SUPREME COURT NO. 99347-5

COA NO. 37023-2-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ZACHARY BERGSTROM,
Petitioner.

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

Spokane County Cause No. 17-1-03794-32

The Honorable Maryann C. Moreno, Judge

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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I. IDENTITY OF REPONDENT, CROSS-PETITIONER

Petitioner Zachary Bergstrom, the appellant below, is there respondent herein and asks the Court to review the decision of Division III of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Zachary Bergstrom seeks cross-review of the Court of Appeals part published opinion entered on October 15, 2020 and Order Denying Motion for Reconsideration filed December 10, 2020. A copy of the opinion and order is attached.

III. ISSUES CROSS-PRESENTED FOR REVIEW

> **ISSUE 1:** Constitutional error requires reversal unless the state can prove harmlessness beyond a reasonable doubt. Does the giving of a to-convict instruction relieving the state of its Due Process burden to prove each element of Bail Jumping beyond a reasonable doubt require reversal of Mr. Bergstrom's convictions for Counts III and IV when the evidence on the relevant issue was far from uncontroverted at trial?
>
> **ISSUE 2:** In order to convict for bail jumping, the state must prove beyond a reasonable doubt that the accused was given notice of a required court date and later failed to appear on that date. Did the state present insufficient evidence to convict Mr. Bergstrom of Count III when the evidence showed only that a tentative hearing date had been set and that he would be advised of "the correct court time" later?

IV. STATEMENT OF THE CASE

Zachary Bergstrom was charged with possession of a controlled substance based on trace amounts of drugs found in a car in which he had

been riding as a passenger. CP 1; RP[1] 102-12. A jury eventually acquitted Mr. Bergstrom of that charge. CP 162.

When Mr. Bergstrom refused to plead guilty to the drug possession charge, however, the state amended the Information to add three counts of bail jumping and one of escape from community custody – all felonies. *See* CP 19-24, 130-31.

The bail jumping charge at Count III was based on an allegation that Mr. Bergstrom had missed a required court hearing on 4/18/18. CP 130-31.

The order the state offered to show that Mr. Bergstrom had been required to appear in court on 4/18/18 set a hearing for that date but also included the following language:

> *** YOUR COURT TIME IS SUBJECT TO CHANGE, PIONEER WILL ASISGN YOU A CASEMANAGER (sic). PIONEER WILL ADVISE YOU OF THE CORRECT COURT TIME. *****
> Ex. 8, p. 2 (emphasis in original).

The state did not present any evidence regarding any "correct court time" that was later communicated to Mr. Bergstrom. *See* RP *generally*.

The to-convict instructions for each of the bail jumping charges listed the elements for the jury as follows:

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[1] All citations to the Verbatim Report of Proceedings refer to the chronologically paginated volume spanning 7/8/19 through 8/9/19.

(1) That on or about [date] the defendant failed to appear before a court;
(2) That the defendant was charged with… a class C felony;
(3) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and
(4) That any of these acts occurred in the State of Washington.

CP 148, 150, 152.

No other instruction informed the jury that the state had to prove that Mr. Bergstrom had been given notice of the hearings he was alleged to have missed (including notice that his attendance was required) or that the state had to prove that he had failed to appear "as required." *See* CP 132-61.

The jury convicted Mr. Bergstrom of each of the three Bail Jumping charges. CP 163-66. Mr. Bergstrom timely appealed. CP 218.

The Court of Appeals issued an opinion, published in part, which reversed one of the Bail Jumping convictions (Count II) but affirmed each of Mr. Bergstrom's other convictions. *See* Appendix.

The Court of Appeals held that the trial court's to-convict instruction for the Bail Jumping charges violated Due Process by failing to require the state to prove each element of the charges. Appendix, pp. 4-9. But the court found that the error was harmless in Mr. Bergstrom's case. Appendix, p. 9.

In the unpublished portion of its opinion, however, the Court of Appeals reversed Mr. Bergstrom's Bail Jumping conviction at Count II on the grounds of ineffective assistance of counsel. Appendix, p. 14-15.

The state filed a Petition for Review, asking this Court to reverse the Court of Appeals' holding related to the to-convict instruction for the Bail Jumping charges. *See* Petition for Review (filed 12/21/2020). The state did not seek review of the ruling reversing Mr. Bergstrom's conviction in Count II.

V. ARGUMENT

A. If this Court grants the state's petition for review, the court should also review Court of Appeals' harmless error ruling and hold that the state cannot prove that the erroneous to-convict instruction for the Bail Jumping charges was harmless beyond a reasonable doubt in Mr. Bergstrom's case.

The Court of Appeals held in the published portion of its decision in Mr. Bergstrom's case that the to-convict instruction for his bail jumping charges violated Due Process because it relieved the state of its burden to prove that he had been given notice of the court hearings that he was alleged to have missed. *See* Appendix, pp. 6-9.

Even so, the court affirmed Mr. Bergstrom's bail jumping convictions for Counts III and IV[2], holding that the error was harmless

[2] This Court reversed Mr. Bergstrom's bail jumping conviction in Count II on other grounds. *See* Appendix, pp. 13-14.

because those convictions were "supported by uncontroverted evidence." Opinion, p. 9.

If this Court grants the state's Petition for Review regarding the constitutionality of the to-convict instruction for the Bail Jumping charges, the Court should also grant cross-review of the Court of Appeals' holding regarding harmless error. The harmless error inquiry poses a significant question of constitutional law under RAP 13.4(b)(3) because it is necessary to give meaningful effect to the protection of Due Process. The issue is also of substantial public interest under RAP 13.4(b)(4) because future courts and litigants will require guidance regarding harmless error in order to properly apply any ruling by this Court regarding the issue raised in the state's petition. This Court should grant review pursuant to RAP 13.4(b)(3) and (4).

Constitutional error -- such as that in the to-convict instructions in Mr. Bergstrom's case -- is presumed to be prejudicial. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). The state bears the burden of proving harmlessness beyond a reasonable doubt. *Id.*

An error is only harmless if it is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." *State v.*

Havens, 171 Wn. App. 220, 224, 286 P.3d 722 (2012) (*quoting State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)).

Failure to instruct the jury regarding a necessary element of an offense is not harmless error unless the court is able to conclude that the erroneous instruction "in no way affected the outcome of the case." *State v. Smith*, 131 Wn.2d 258, 264, 930 P.2d 917 (1997).

As outlined below, the evidence regarding whether Mr. Bergstrom had received notice of the court hearings underlying Counts III and IV was not uncontroverted. Indeed, under the evidence presented at trial, a reasonable jury could have harbored a reasonable doubt as to whether he had been provided notice of the hearings he was charged with missing. But the jury's to-convict instructions for those counts required conviction *even if* the state failed to prove that Mr. Bergstrom had received notice. *See* Opinion, pp. 6-9.

Accordingly, the error was not "trivial, formal, or merely academic." *Havens*, 171 Wn. App. at 224. The state cannot prove that the erroneous instruction "in no way affected the outcome" of Mr. Bergstrom's case. *Smith*, 131 Wn.2d at 264.

The state introduced a scheduling order setting a hearing date for 5/4/18.[3] Ex. 7. About a month later, before the 5/4/18 hearing had taken place, Mr. Bergstrom was released from custody in order to observe the drug court program. *See* Ex. 8. His release order set two dates for Mr. Bergstrom to observe drug court and also provided in all capital letters that:

> YOUR COURT TIME IS SUBJECT TO CHANGE, PIONEER WILL ASSIGN YOU A CASEMANAGER (sic). PIONEER WILL ADVISE YOU OF THE CORRECT COURT TIME. Ex. 8, p. 2.

The order does not clarify whether the "correct court time" refers to the dates that Mr. Bergstrom was supposed to observe drug court or to his next hearing date in criminal court. *See* Ex. 8. The state did not present any evidence of anyone from Pioneer ever informing Mr. Bergstrom of his "correct court time." *See* RP *generally*.

The release order provisionally sets one of Mr. Bergstrom's drug court observation dates for 4/18/18. Ex. 8, p. 2. The fact that Mr.

---

[3] Mr. Bergstrom's purported signature appeared on each order, but no witness who claimed to have seen him actually sign the documents testified at trial. *See* RP *generally*. No authenticated signature of Mr. Bergstrom was offered for the jury to compare to the signature on the exhibits. *See* RP *generally*. Nor did the state offer clerk's minutes or any other evidence establishing that Mr. Bergstrom had been present at the hearings when the orders were entered. Indeed, it was not clear whether the orders had even been signed in open court or *ex parte*. *See* RP *generally*.

Bergstrom missed that date forms the basis for his charge in Count III. *See* CP 130-31.

Mr. Bergstrom was later removed from the drug court docket and his case was returned to the normal criminal docket. *See* RP 244-45. Mr. Bergstrom testified that, after that happened, he was never made aware of when his next hearing date would be. RP 244. The state did not present any evidence controverting that testimony. *See* RP *generally*. Still, his failure to appear for the subsequent hearing on 5/4/18 forms the basis for his conviction in Count IV.

1. The instructional error was not harmless beyond a reasonable doubt as to Count IV because the state's evidence demonstrates (at most) that the court's orders were ambiguous regarding whether Mr. Bergstrom was required to attend the 5/4/18 hearing after he was released to observe the drug court program.

Mr. Bergstrom was convicted in Count IV for missing a hearing on 5/4/18. But the state's evidence does not make clear whether he was given notice that he was required to attend that hearing. Even if the evidence demonstrates that Mr. Bergstrom received the scheduling order setting that hearing, things changed afterwards. *See* Ex. 8. Before the hearing had been held Mr. Bergstrom was informed that his "court time" was "subject to change" and that he would be informed of his true court date at a later time. Ex. 8, p. 2.

A reasonable jury could have concluded either: (a) that the court's orders did not require Mr. Bergstrom to attend the 5/4/18 hearing after his release to attend the drug court program and instead anticipated that a new court date would be set by his Pioneer case manager; (b) that the state had not proved beyond a reasonable doubt that Mr. Bergstrom knew that that 5/4/18 hearing was required because the orders (taken together) are ambiguous on the matter; or (c) that the state failed to prove that Mr. Bergstrom had received a copy of the order scheduling the 5/4/18 hearing because his purported signature was never authenticated and no witness who was present when the order was entered testified at trial.

But the jury's to-convict instruction for the bail jumping charge at Count IV required conviction even if the state failed to prove beyond a reasonable doubt that Mr. Bergstrom was, in fact, given notice that he was required to appear in court on 5/4/18 even after he had been released to observe drug court. *See* Opinion, pp. 7-9.

The evidence that Mr. Bergstrom was given notice of the hearing underlying his conviction in Count IV was not uncontroverted. The state cannot prove that the instructional error -- which deprived Mr. Bergstrom of his constitutional right to require the state to prove each element of the offense– was harmless beyond a reasonable doubt. Accordingly, the error

was not "trivial, formal, or merely academic." *Havens*, 171 Wn. App. at 224; *Smith*, 131 Wn.2d at 264.

This Court should grant review and hold that the constitutionally deficient to-convict instruction for Bail Jumping requires reversal of Mr. Bergstrom's conviction for Count IV because the state cannot prove that it was harmless beyond a reasonable doubt. *Id.*

2. The instructional error was not harmless beyond a reasonable doubt as to Count III because the state's evidence demonstrates only that Mr. Bergstrom's drug court observation date was *provisionally* set for 4/18/18.

Mr. Bergstrom was convicted in Count III for missing a drug court observation date on 4/18/18. *See* Ex. 8. But he was only ever given provisional notice that he was required to attend drug court on that date. Ex. 8, p. 2. He was also told that his "court time" was "subject to change" and that he would be informed of his true court date at a later time. Ex. 8, p. 2.

Again, a reasonable jury could have concluded either (a) that the court's orders did not require Mr. Bergstrom to attend the 4/18/18 hearing and instead anticipated that a new court date would be set by his Pioneer case manager; (b) that the state had not proved beyond a reasonable doubt that Mr. Bergstrom knew that that 4/18/18 hearing was required because the release order is ambiguous on the matter; or (c) that the state failed to

prove that Mr. Bergstrom had received a copy of the order scheduling the 4/18/18 hearing because his purported signature was never authenticated and no witness who was present when the order was entered testified at trial.

But the jury's to-convict instruction for the bail jumping charge in Count III required conviction even if he was never given notice that he was, in fact, required to appear in drug court on that date. *See* Opinion, pp. 7-9. This instruction rendered any reasonable doubt as to whether he had received notice inapposite to conviction for the charge, in the eyes of the jury.

The evidence that Mr. Bergstrom was given notice of the hearing underlying his conviction in Count III was not uncontroverted at trial. The error of giving a to-conviction instruction that deprived Mr. Bergstrom's Due Process right to require proof beyond a reasonable doubt of each element of the charge was not "trivial, formal, or merely academic." *Havens*, 171 Wn. App. at 224; *Smith*, 131 Wn.2d at 264.

This Court should grant review and hold that the constitutionally deficient to-convict instruction for Bail Jumping requires reversal of Mr. Bergstrom's conviction for Count IV because the state cannot prove that it was harmless beyond a reasonable doubt. *Havens*, 171 Wn. App. at 224; *Smith*, 131 Wn.2d at 264.

B. This Court should accept review and hold that the state presented insufficient evidence to convict Mr. Bergstrom of the Bail Jumping charge in Count III. No rational jury could have found beyond a reasonable doubt that Mr. Bergstrom was required to appear in court on 4/18/18 – as required to convict him of Count III -- because the state's evidence on the issue was equivocal, at best.

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 each element of 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).

The bail jumping statute requires the state to prove beyond a reasonable doubt that:

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

RCW 9A.76.170(1).

The state charged Mr. Bergstrom in Count III with missing a required court hearing on 4/18/18. In support of that charge, the state presented an order releasing Mr. Bergstrom for drug court observation, which tentatively required him to go to drug court on that date. Ex. 8, p. 2. But the order also informed Mr. Bergstrom that:

> *** YOUR COURT TIME IS SUBJECT TO CHANGE, PIONEER WILL ASSIGN YOU A CASEMANAGER. PIONEER WILL ADVISE YOU OF THE CORRECT COURT TIME. ***** Ex. 8, p. 2 (emphasis in original).

The state did not present any evidence regarding any "correct court time" that was later communicated to Mr. Bergstrom. *See* RP *generally*. Accordingly, the evidence that Mr. Bergstrom was required to appear in court on 4/18/18 – or that he was aware of any such requirement if it did exist – was equivocal at best and does not constitute proof beyond a reasonable doubt.

In order to support a conviction for bail jumping, the state is required to prove beyond a reasonable doubt that the accused was given notice of a required court date, which s/he is alleged to have missed. *State v. Cardwell*, 155 Wn. App. 41, 47, 226 P.3d 243 (2010), *review granted, cause remanded on other grounds*, 172 Wn.2d 1003, 257 P.3d 1114 (2011). An element has not been proved beyond a reasonable doubt if the state presents only equivocal evidence. *State v. Vasquez*, 178 Wn.2d 1, 14, 309 P.3d 318 (2013).

Here, the state presented evidence that a hearing was tentatively set for 4/18/18, but that Mr. Bergstrom was also told that the hearing was subject to change and that the "correct court time" would be communicated to him later. Ex. 8, p. 2. That information was emphasized

by being printed in all capital letters with asterisks on either side. There is no evidence regarding any "correct court time" that was later communicated to Mr. Bergstrom. *See* RP *generally*. It is possible that the hearing remained set for 4/18/18, but it is also possible under the state's evidence that Mr. Bergstrom was later given a different time and date.

In short, it is not clear from the state's evidence whether Mr. Bergstrom was required to appear on 4/18/18 or not. It is also not clear whether it was ever confirmed to Mr. Bergstrom that the hearing would, in fact, take place on 4/18/18 if that was the case. The state's evidence is equivocal, at best, and does not constitute proof beyond a reasonable doubt that Mr. Bergstrom was required to appear in court on 4/18/18, as required to convict him of Count III. *Vasquez*, 178 Wn.2d at 14.

No rational jury could have found beyond a reasonable doubt that Mr. Bergstrom was required to appear in court or had been given notice of such a requirement if one existed.

The Court of appeals should have reversed Mr. Bergstrom's conviction for Count III. *Chouinard,* 169 Wn. App. at 899. But the Court of Appeals neglected to meaningfully consider Mr. Bergstrom's insufficient evidence argument regarding Count III. *See* Appendix, pp. 12-13. Instead, the court simply held that all three Bail Jumping convictions were supported by sufficient evidence because a rational jury could have

found that Mr. Bergstrom had signed the orders setting the relevant hearing dates. Appendix, pp. 12-13.

This Court should grant review because Mr. Bergstrom's insufficient evidence challenge to Count III has yet to be meaningfully considered on review by any court. Additionally, the issue poses a significant question of constitutional law that is of substantial public interest because it goes to the heart of what is required of the state under the beyond-a-reasonable-doubt standard. This Court should grant review of Mr. Bergstrom's cross-petition under RAP 13.4(b)(3) and (4).

VI. CONCLUSION

The issues here are significant under the State and federal Constitutions. Furthermore, because they could impact nearly all Bail Jumping cases, they are of substantial public interest. If The Supreme Court grants the state's Petition for Review, the court should also accept review of the issues outlines above, pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted January 19, 2021.

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

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Answer/Petition for Review, postage pre-paid, to:

Zachary Bergstrom/DOC#398577
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

and I sent an electronic copy to

Spokane County Prosecuting Attorney
SCPAappeals@spokanecounty.org

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Supreme Court.

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

Signed at Seattle, Washington on January 19, 2021.

_____
Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

APPENDIX:

Renee S. Townsley
Clerk/Administrator

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October 15, 2020

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CASE # 370232
State of Washington v. Zachary P. Bergstrom
SPOKANE COUNTY SUPERIOR COURT No. 171037941

Counsel:

Enclosed please find a copy of the opinion filed by the Court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or, if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:pb
Enc.

c: **E-mail** Hon. Maryann Moreno
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FILED
OCTOBER 15, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 37023-2-III
	)	
Respondent,	)	
	)	
v.	)	OPINION PUBLISHED
	)	IN PART
ZACHARY P. BERGSTROM,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — Zachary Bergstrom appeals his convictions for three counts of bail jumping and one count of escape from community custody. The argument he raises that we deem worthy of publishing is whether he was denied his due process right of having the jury instructed on every element of the three bail jumping charges. We hold that the pattern instruction given by the trial court failed to instruct the jury on every element of bail jumping, but the error was harmless beyond a reasonable doubt. In so holding, we decline to follow *State v. Hart*, 195 Wn. App. 449, 381 P.3d 142 (2016). In the unpublished portion of this opinion, we reverse Bergstrom's conviction on the January 12, 2018 bail jumping count due to ineffective assistance of counsel. We otherwise affirm.

FACTS

The State originally charged Zachary Bergstrom with one count of possession of a controlled substance. At Bergstrom's September 22, 2017 initial court appearance, the trial court set bail at $2,500, advised Bergstrom he was required to appear at all court dates, and set Bergstrom's arraignment for October 4, 2017. After his arraignment, Bergstrom secured a $2,500 surety bond and was released from jail.

Three failures to appear (bail jumping)

On November 3, 2017, the trial court entered a scheduling order, setting a pretrial conference for January 12, 2018, at 10:30 a.m. Bergstrom and his attorney signed the order, acknowledging their approval of the date and time. Bergstrom failed to appear at the pretrial conference. The trial court later issued a bench warrant for Bergstrom's arrest.

On February 28, 2018, the trial court entered a second scheduling order setting a pretrial conference for May 4, 2018. Bergstrom and his attorney signed the order, acknowledging their approval of the date and time.

On April 5, 2018, the trial court entered an order releasing Bergstrom on April 10 for a drug evaluation. The order also required Bergstrom to appear for drug court on April 11 at 3:00 p.m. and again on April 18 at 3:00 p.m. Bergstrom and his attorney

signed the order. Bergstrom failed to appear for drug court on April 18, and the drug court entered an order authorizing a bench warrant. Bergstrom also failed to appear for his May 4, 2018 pretrial conference. The trial court later issued a bench warrant.

Escape from community custody

While out of custody, Bergstrom was under community supervision and was required to regularly report in person to Officer Jeremy Wilson. Officer Wilson directed Bergstrom to report in person to him on April 17, 2018, and gave Bergstrom a card with the appointment date and time on the back. Bergstrom failed to report on that date, or any other dates, until he was arrested on other charges.

Trial

The State amended the original possession charge by adding three counts of bail jumping and one count of escape from community custody. At trial, the State called two deputy court clerks to substantiate the bail jumping charges. Through them, the State offered several certified court records to buttress their testimony that Bergstrom failed to appear in court as ordered on January 12, 2018, April 18, 2018, and May 4, 2018. The State also called Officer Wilson, who substantiated the escape from community custody charge.

Bergstrom testified on his own behalf. He did not deny he knew of the court dates he missed nor did he claim it was someone else's signature on the certified court records. Instead, he testified he failed to appear at the January 12, 2018 hearing because he was in a hospital at the time. According to Bergstrom, he contacted his bonding company while in the hospital and, a day or two later, he went to the bonding company with papers showing he had been in the hospital. Bergstrom testified that despite these papers, the bonding company surrendered him to the jail.

After both sides presented their cases, the trial court instructed the jury. Bergstrom did not object to any of the court's instructions. The jury returned a verdict of not guilty on the charge of possession of a controlled substance and guilty on all other charges. The trial court entered its judgment and sentence, and Bergstrom timely appealed.

ANALYSIS

A. DUE PROCESS CHALLENGE TO BAIL JUMPING TO-CONVICT INSTRUCTIONS

Bergstrom argues the trial court's three bail jumping to-convict instructions violated his right to due process because the instructions relieved the State of its burden to prove each element of the charges. We agree, but conclude the error was harmless beyond a reasonable doubt.

To understand Bergstrom's argument, we must compare the elements of bail jumping with the trial court's bail jumping to-convict instructions.

To convict a defendant of bail jumping, the State must prove beyond a reasonable doubt 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); RCW 9A.76.170(1).

Compare those elements with the three bail jumping to-convict instructions given by the trial court:

> (1) That on or about January 12, 2018, the defendant failed to appear before a court;
> (2) That the defendant was charged with possession of a controlled substance, a crime under RCW 69.50.4013(1), a class C felony;
> (3) That the defendant had been admitted to bail with the knowledge of the requirement of a subsequent personal appearance before that court; and
> (4) That any of these acts occurred in the State of Washington.

CP at 148 (Instruction 14).

> (1) That on or about April 18, 2018, the defendant failed to appear before a court;
> (2) That the defendant was charged with possession of a controlled substance, a crime under RCW 69.50.4013(1), a class C felony;
> (3) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and

> (4) That any of these acts occurred in the State of Washington.

CP at 150 (Instruction 16).

> (1) That on or about May 04, 2018, the defendant failed to appear before a court;
> (2) That the defendant was charged with Possession of a Controlled Substance, a crime under RCW 69.50.4013(1), a class C felony;
> (3) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and
> (4) That any of these acts occurred in the State of Washington.

CP at 152 (Instruction 18).

The three instructions were patterned from *11A Washington Practice: Pattern Jury Instructions: Criminal* 120.41, at 570 (4th ed. 2016).

Bergstrom argues the bail jumping to-convict instructions relieved the State of its burden of proving he knowingly failed to appear as required. He contends the instructions allowed him to be convicted even if he was not given notice of the specific court dates he allegedly missed. The State argues that we should refuse to review this unpreserved claim of error. We disagree.

Unpreserved claims of manifest error involving a constitutional right are reviewable. RAP 2.5(a)(3). Bergstrom raises such a claim. First, Bergstrom's claim actually involves a constitutional right. A trial court's failure to instruct the jury as to

every element of the crime charged violates due process. *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995).

Second, the claimed error is manifest. An error is manifest if there is actual prejudice—meaning a plausible showing by the appellant that the asserted error had practical and identifiable consequences at trial. *State v. Irby*, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015). To determine whether this standard is met, "the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error." *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009). "If the trial court could not have foreseen the potential error or the record on appeal does not contain sufficient facts to review the claim, the alleged error is not manifest." *State v. Davis*, 175 Wn.2d 287, 344, 290 P.3d 43 (2012). Here, if the to-convict instructions given did not require the State to prove that Bergstrom knowingly failed to appear as required, the trial court reasonably should have known the instructions were erroneous and could have corrected the error by giving appropriate to-convict instructions.

A review of the bail jumping to-convict instructions makes it apparent the instructions did not require the State to prove that Bergstrom knowingly failed to appear as required. The first element in the to-convict instruction required the State to prove that

Bergstrom failed to appear on the dates alleged in the particular counts. But no element in the to-convict instruction required the State to prove Bergstrom *knew* he was required to appear on the dates alleged in the particular counts. The knowledge element in RCW 9A.76.170(1) requires the State to prove that the defendant was given notice of the required court dates. *Williams*, 162 Wn.2d at 184; *see also State v. Fredrick*, 123 Wn. App. 347, 353, 97 P.3d 47 (2004); *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004).

The State urges us to follow *Hart*, 195 Wn. App. 449. There, Division Two of this court held that an instruction similar to the one given here correctly stated the law. Division Two concluded that the third part of the instruction, "'knowledge *of the requirement* of *a* subsequent personal appearance before the court,'" was sufficient. *Id.* at 456 (second emphasis added). We disagree. *A* subsequent court appearance means "any" subsequent court appearance. That is, a defendant could receive notice to appear on May 10—*a* subsequent court appearance. If the defendant failed to appear on May 17, a date he did not know he had to appear, he could nevertheless be convicted because he received notice to appear on May 10.

Because the to-convict instructions did not require the State to prove an element of bail jumping—that Bergstrom knowingly failed to appear as required—we conclude the trial court violated Bergstrom's right to due process.[1]

However, jury instructions that omit an element of the crime charged are subject to harmless error analysis. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). An instruction that omits an element is harmless error if, beyond a reasonable doubt, the error did not contribute to the verdict. *Id.* For instance, if the omitted element is supported by uncontroverted evidence, the error is harmless. *Id.*

Here, the uncontroverted evidence established that Bergstrom received notice he was required to attend court on January 12, 2018, April 18, 2018, and May 4, 2018. We conclude the trial court's instructional errors were harmless beyond a reasonable doubt.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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[1] Our concurring colleague says this reading is strained. But it is what the instructions literally say. Trial courts, rather than resorting to the pattern instruction that the jury may misunderstand, should instruct the jury using the elements as set forth in *Williams*, 162 Wn.2d at 183-84. Trial courts should add the charged date after the third *Williams* element and include the jurisdictional element as the fourth element.

B. UNCHARGED ALTERNATIVE MEANS

Bergstrom claims the trial court violated his constitutional right to notice of charges against him by instructing the jury on an alternative means of committing escape from community custody, which was not charged in the information.[2]

The Washington Constitution guarantees a defendant the right to be given notice of the charges against him. WASH. CONST. art. I, § 22. To that end, when a statute provides multiple alternate means of committing a specific crime, the defendant has the right to have notice of the means of committing the offense the State is accusing him of. *In re Pers. Restraint of Brockie*, 178 Wn.2d 532, 536, 309 P.3d 498 (2013). We conclude Bergstrom waived this argument by failing to object below.

An appellate court may refuse to review any claim of error that was not raised in the trial court. RAP 2.5(a). This rule encourages parties to make timely objections, gives

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[2] RCW 72.09.310 provides in relevant part:

> An inmate in community custody who willfully discontinues making himself or herself available to the department for supervision *by making his or her whereabouts unknown* or *by failing to maintain contact with the department as directed by the community corrections officer* shall be deemed an escapee and fugitive from justice . . . .

(Emphasis added.) Here, the State charged Bergstrom with escape from community custody by alleging he "willfully discontinue[d] making himself . . . available to the department for supervision by making his . . . whereabouts unknown." CP at 131. But the trial court instructed the jury a person is guilty of escape if he "fail[ed] to maintain contact with the department as directed by the community corrections officer." CP at 156.

the trial judge an opportunity to address an issue before it becomes an error on appeal, and promotes the important policies of economy and finality. *O'Hara*, 167 Wn.2d at 98.

As noted above, some unpreserved claims of error may be reviewed, such as a claim of "manifest error affecting a constitutional right." RAP 2.5(a)(3). "Manifest," within the meaning of this rule, requires a showing of actual prejudice. *O'Hara*, 167 Wn.2d at 99. To demonstrate actual prejudice, the appellant must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. *Id.* In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. *Id.* In addition, the appellant must establish the error was reasonably obvious to the trial court, given what it knew at the time. *Id.* at 100; *State v. Kalebaugh*, 183 Wn.2d 578, 588, 355 P.3d 253 (2015) (Gonzalez, J., concurring).

Here, Bergstrom fails to argue that this claim is one of manifest error. We do not think it is. Both parties disagree whether escape from community custody is an alternative means crime and acknowledge the question has yet to be answered in our appellate courts. We decline to review the claim of error because the error, if any, certainly was not reasonably obvious to the trial court.

C. INSUFFICIENT EVIDENCE

Bergstrom contends the evidence was insufficient to sustain the convictions on the three counts of bail jumping. He argues his signature on the court records, showing he had personal knowledge of the hearing dates, was unauthenticated and should not have been admitted. He argues that because this was the only evidence he had personal knowledge, the evidence was insufficient. We disagree.

When reviewing a challenge to sufficiency of the evidence, this court looks at whether, in the light most favorable to the State, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences must be drawn in favor of the State and interpreted strongly against the defendant. *Id.* Necessarily, an allegation of insufficient evidence admits the truth of the State's evidence and all inferences that can be drawn from said evidence. *Id.*

Certified court records are admissible. RCW 5.44.010.[3] Here, the pertinent certified court records bore signatures above the line labeled defendant's signature and above the line labeled attorney for defendant. A rational trier of fact could have found

[3] Former RCW 5.44.010 (1997) provides: "The records and proceedings of any court of the United States, or any state or territory, shall be admissible in evidence in all cases in this state when duly certified . . . ."

that the defendant actually signed these records and, thus, had notice of the court dates. First, Bergstrom did not deny these documents bore his signature. Second, if an imposter signed the documents, defense counsel would not have also signed them. We conclude substantial evidence supports Bergstrom's three bail jumping convictions.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Bergstrom contends his defense counsel was ineffective for not objecting to the certified court records and for not proposing an affirmative defense to bail jumping. We disagree in part.

This court reviews claims of ineffective assistance of counsel de novo. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). For claims of ineffective assistance, a defendant must show both deficient performance from defense counsel and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To show defense counsel's performance was deficient, the defendant must show it fell below the objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). To show prejudice, the defendant must show there is a reasonable probability counsel's deficient performance affected the outcome of the proceedings. *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). A reasonable probability "'is a probability sufficient to undermine confidence in the outcome.'"

State v. Crawford, 159 Wn.2d 86, 100, 147 P.3d 1288 (2006) (quoting *Strickland*, 466 U.S. at 694).

Defense counsel did not perform deficiently by failing to object to the certified court records. As noted above, these documents were admissible.

But we do agree that defense counsel performed deficiently by failing to offer a jury instruction on the affirmative defense to bail jumping. RCW 9A.76.170(2) provides defendants with an affirmative defense to bail jumping in the event "uncontrollable circumstances prevented the person from appearing or surrendering . . . [and] the person appeared or surrendered as soon as such circumstances ceased to exist." Here, Bergstrom testified he was in the hospital on January 12, 2018, and he stayed with a friend after he was discharged because he still was very ill. He testified he met with the bond company a day or two after being discharged to show documentary proof he was in the hospital, and the bonding company surrendered him to the jail. This testimony, if believed, warranted an instruction on the affirmative defense.

Counsel's deficient performance was prejudicial. His failure to request an instruction on the available defense undermines our confidence in the verdict on this count of bail jumping. First, the State did not offer any evidence to dispute Bergstrom's claim he was in the hospital on January 12, 2018. Second, the jury presumably found

Bergstrom credible because it found him not guilty on the original charge of possession of a controlled substance. We, therefore, reverse Bergstrom's conviction on this bail jumping count.

Remand for resentencing.

Lawrence-Berrey, J.

I CONCUR:

Siddoway, J.

KORSMO, A.C.J. (concurring) — Although I agree with the result of the majority opinion, I do not agree with its reasoning concerning the bail jump instruction or with its criticism of *State v. Hart*, 195 Wn. App. 449, 381 P.3d 142 (2016).[1] The pattern elements instruction for bail jumping correctly reflects the statute, even if the elements are stated in a different order, and *Hart* faithfully does so. There is no problem here, but merely a disagreement about the placement of the "knowledge" modifier.

Hart is the simplest point, so I will start there. The majority criticizes *Hart* for stating one of the elements as "knowledge *of the requirement* of *a* subsequent personal appearance." Majority at 8 (quoting *Hart*, 195 Wn. App. at 456 (second emphasis added). That quote is a faithful recitation of the opening line of RCW 9A.76.170(1): "Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent court appearance . . . ." If the majority has a problem with that line, it should take it up with the legislature. Division Two of this court did not err.

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[1] I also note that appellant's alternative means argument on the escape from community custody charge is without merit. The majority prudently finds that the issue is not manifest error, but I would go further. RCW 72.09.310 establishes a single crime of escape by one who "willfully discontinues making himself or herself available to the department for supervision." It then defines that offense as including both those who never report to the department and those who begin and then fail to maintain contact. Appellant's argument simply repeats the discredited approach of treating the definitions of a crime as overriding the legislature's description of the offense. There is only one means of committing escape from community custody. *See State v. Barboza-Cortes*, 194 Wn.2d 639, 451 P.3d 707 (2019); *State v. Sandholm*, 184 Wn.2d 726, 364 P.3d 87 (2015).

Prior to the amendment in 2001, the bail jumping statute had required proof that one "knowingly fails to appear as required." Former 9A.76.170(1) (1983). The amendment changed the knowledge requirement to specify instead proof of "knowledge of the requirement of a subsequent appearance before any court of this state . . . ." LAWS OF 2001, ch. 264, § 3. In other words, the amendment changed the element to reflect proof of knowledge of the need to appear instead of establishing the mindset behind the failure to appear.[2]

The pattern instruction properly sets out these commands, as illustrated by the relevant elements of the instruction used in this case:

> (1) That on or about January 12, 2018, the defendant failed to appear before a court;
>
> . . . .
>
> (2) That the defendant had been admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court;

Clerk's Papers at 148 (Instruction 14).

Mr. Bergstrom contends that the instruction was deficient in divorcing the date of the offense from the knowledge of appearance before the court element, arguing that he could be convicted of a crime just because he knew that he had some court appearance on some future day. His reading is strained. In context, the instruction properly told the jury

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[2] As explained in an earlier Division Two opinion, the change eliminated the "I forgot" defense. *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004).

that defendant committed the crime on January 12, 2018, when he failed to appear in court with knowledge of the requirement to appear. The third element perhaps could be clarified, maybe by again inserting the violation date, or by restating the element as "knowledge of the requirement to appear before the court." While such changes would eliminate Mr. Bergstrom's argument, they are not necessary.

The pattern instruction sufficiently conveys the elements of the offense in the statutory language. It is correct. Accordingly, I join in the judgment of the court.

Korsmo, A.C.J.

Renee S. Townsley
Clerk/Administrator

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CASE # 370232
State of Washington v. Zachary P. Bergstrom
SPOKANE COUNTY SUPERIOR COURT No. 171037941

Counsel:

Enclosed is a copy of the order deciding the appellant's motion for reconsideration of this court's opinion that was filed on October 15, 2020.

A party may seek discretionary review by the Washington Supreme Court of a Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a petition for review in this Court within 30 days after the attached order on reconsideration is filed. RAP 13.4(a). Please file the petition electronically through the Court's e-filing portal. The petition for review will then be forwarded to the Supreme Court. The petition must be received in this court on or before the date it is due. RAP 18.5(c).

If the party opposing the petition for review wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service on the party of the petition. RAP 13.4(d). The address of the Washington Supreme Court is Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:pb
Enc.

FILED
DECEMBER 10, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 37023-2-III**
	)	
Respondent,	)	
	)	**ORDER DENYING**
v.	)	**APPELLANT'S**
	)	**MOTION FOR**
ZACHARY P. BERGSTROM,	)	**RECONSIDERATION**
	)	
Appellant.	)	

The court has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of October 15, 2020, is denied.

PANEL: Judges Lawrence-Berrey, Siddoway, Korsmo

FOR THE COURT:

REBECCA PENNELL
CHIEF JUDGE

LAW OFFICE OF SKYLAR BRETT

January 19, 2021 - 6:22 PM

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