SUPREME COURT NO. 99370-0

NO. 80238-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM H. DIXON III,

Petitioner.

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

The Honorable Laura M. Riquelme, Judge
The Honorable David Needy, Judge

PETITION FOR REVIEW

DAVID B. KOCH
Attorney for Petitioner

NIELSEN KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. IDENTITY OF PETITIONER

William Dixon, the appellant below, asks this Court to review the Court of Appeals decisions referred to in section B.

B. COURT OF APPEALS DECISION

Dixon requests review of the Court of Appeals decision in State v. Dixon, COA No. 80238-1-I, filed September 28, 2020, and the court's "Order Denying Motion For Reconsideration," filed December 8, 2020. These decisions are attached to this petition as appendices A and B, respectively.

C. ISSUES PRESENTED FOR REVIEW

1. To convict an individual of bail jumping, the State must prove that, having been released from custody with the requirement of a subsequent court appearance, the defendant "knowingly failed to appear as required." The pattern jury instruction for bail jumping, used at petitioner's trial, does not require proof that the defendant was given notice of the specific court date he allegedly missed. Recently, in State v. Bergstrom,[1] Division Three held that the pattern instruction violates due process by dispensing with the State's burden to prove all essential

[1] ___ Wn. App. 2d ___, 474 P.3d 578 (2020).

elements of the crime.[2] Based on Bergstrom, were Dixon's due process rights violated?

2. Is review appropriate under RAP 13.4(b)(2) where the Court of Appeals decision in Dixon's case conflicts with Division Three's published opinion in Bergstrom?

3. Is review particularly appropriate where Division Three's published opinion in Bergstrom conflicts with Division Two's opinion in State v. Hart,[3] on this precise issue?

4. Is Dixon's case particularly suited for review of this issue because the unique facts of his case highlight the deficiency in the current pattern instruction for bail jumping and the resulting prejudice?

5. Was Dixon's due process claim, based on Bergstrom, properly raised in a motion for reconsideration?

D. STATEMENT OF THE CASE

1. Superior Court

The Skagit County Prosecutor's Office charged William Dixon with three crimes: (count 1) Trafficking in Stolen Property in

[2] On December 22, 2020, the State filed a petition for review in Bergstrom. See docket for cause number 99347-5 (set for April 6, 2021 calendar).

[3] 195 Wn. App. 449, 381 P.3d 142 (2016), review denied, 187 Wn.2d 1011, 388 P.3d 480 (2017).

the Second Degree, (count 2) Bail Jumping for a missed court appearance on August 4, 2017, and (count 3) Bail Jumping for a missed court appearance on January 19, 2018. CP 8-9. Dixon pleaded guilty to the Trafficking charge and proceeded to trial on the two Bail Jumping charges. 2RP[4] 3-11.

This petition only concerns the second count of Bail Jumping, charged as count 3, but referred to as "count II" in the jury instructions and verdict forms. 4RP 72; CP 8-9, 35-36, 39-40.

The prosecution called one witness – Skagit County Deputy Clerk Katherine Davies. 4RP 40. Through Davies, the State introduced a copy of the information charging Dixon on June 26, 2017 with Trafficking in Stolen Property (exhibit 1; 4RP 43).

Regarding the second count of Bail Jumping, the State provided a December 1, 2017 order setting conditions of release and scheduling the next hearing for some time in January 2018. Exhibit 5; 4RP 46-49. Davies testified that the order indicated the next hearing was set for January 17, 2018 at 9:00 a.m., although she added that the 17 on the order could be a 19, meaning it was impossible for her to determine whether the next hearing was

scheduled for January 17 or January 19, 2018. 4RP 48-49. The State also provided a clerk's minute sheet indicating Dixon was not present in court on January 19, 2018 (exhibit 6; 4RP 49-50). Davies testified that a bench warrant for Dixon's arrest was issued that day. 4RP 50.

Following Davies testimony, the defense moved to dismiss this second count of bail jumping, arguing – among other things – that the State had failed to establish that Davies had been required to return to court on January 19, 2018, since Davies herself testified that exhibit 5 might have required his return on January 17, 2018. 4RP 64-65. The motion was denied. 4RP 65-66.

The "to convict" instruction for the second count of bail jumping provided:

> To convict the defendant of the crime of bail jumping, as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about January 19, 2018, the defendant failed to appear before a court;
> (2) That the defendant was charged with Trafficking in Stolen Property in the Second Degree, a class C felony;
> (3) That the defendant had been released by court order with knowledge of the requirement of a

[4] This petition refers to the verbatim report of proceedings as follows: 1RP – 2/8/18; 2RP – 3/14/19; 3RP – 3/18/19; 4RP – 12/3/18, 3/18/19 (p.m.), and 7/11/19.

subsequent personal appearance before that court; and

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

CP 36.

During closing arguments, defense counsel argued that the State had failed to prove element 3 (knowledge of the requirement of a subsequent court appearance), since Dixon may have been told his next court date was January 17 (rather than January 19). See 4RP 88-91.

The jury convicted Dixon. 4RP 94; CP 39-40.

2. Court of Appeals

On appeal, Dixon argued there was insufficient evidence that he was provided notice to return to court on January 19, 2018, meaning the State had failed to prove element (3), which required Dixon's knowledge that he return to court on that particular date. See Brief of Appellant, at 6-7. Specifically, Dixon contended that the December 1, 2017 order setting conditions of his release required his appearance on January 17, 2018, rather than January 19, 2018. Thus, the State's evidence that Dixon had knowledge of a January 19, 2018 appearance failed. Brief of Appellant, at 6.

The Court of Appeals did not agree:

> Dixon next challenges the sufficiency of the evidence that he had knowledge of the subsequent personal appearance requirement. Dixon points again to the December 1, 2017 order. He asserts that because of unclear handwriting, it is uncertain whether he was required to appear on January 17, 2018 or January 19, 2018. Furthermore, he avers that because the signature line for the defendant is blank, there is no evidence that he received the document.
>
> These arguments are not persuasive. They speak only to the weight of the evidence presented to the jury, not to its constitutional sufficiency. "'Credibility determinations are for the trier of fact and cannot be reviewed on appeal.'" State v. Bajardi, 3 Wn. App. 2d 726, 733, 418 P.3d 164 (2018) (quoting State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). Similarly, the weight to be assigned to admissible evidence is solely within the province of the jury. State v. Rattana Keo Phuong, 174 Wn. App 494, 534-35, 299 P.3d. 37 (2013); State v. Gerber, 28 Wn. App. 214, 216, 622 P.2d 888 (1981). The jury was thus free to determine—by examining the exhibit—that the order set forth an understandable listing of the date of the next hearing.

Dixon, Slip op., at 5-6 (appendix A).

Approximately two weeks later, on October 15, 2020, Division Three filed its published opinion in Bergstrom, holding that a bail jumping "to convict" instruction – modeled on the pattern jury instruction and failing to require proof that the defendant was required to return to court on a particular date – is manifest constitutional error that violates due process. Bergstrom, 474 P.3d at 580-582. Division

Three held that, to comply with the statutory elements and due process, the date of the required appearance must be included in the element of the "to convict" instruction requiring that the defendant knowingly failed to appear. Id. at 582 n.1. In so doing, Division Three explicitly rejected Division Two's contrary decision in State v. Hart. Id. at 581.

The following day, on October 16, Dixon filed a timely motion for reconsideration. Citing Bergstrom, he noted the "to convict" instruction in his case was similar to the instructions in Bergstrom and argued a violation of due process. Motion, at 3-5. Dixon also noted that manifest constitutional error is properly raised in the Court of Appeals for the first time in a motion for reconsideration. Motion, at 5 (citing Conner v. Universal Utilities, 105 Wn.2d 168, 171, 712 P.2d 849 (1986) (due process violation properly considered under RAP 2.5(a) even where raised for first time in motion for reconsideration)).

The State filed an answer, agreeing that Dixon could properly raise his due process claim for the first time in his motion for reconsideration. Answer, at 2. But the State argued that Bergstrom was wrongly decided and urged Division One to follow Division Two's decision in Hart. Answer, at 3-7.

On December 8, citing Hart, Division One denied Dixon's motion for reconsideration. See Order Denying Motion For Reconsideration (appendix B).

Dixon now seeks this Court's review.

E. ARGUMENT

REVIEW IS APPROPRIATE UNDER RAP 13.4(b)(2) BECAUSE DIVISION ONE'S DECISION IN DIXON'S CASE CONFLICTS WITH DIVISION THREE'S DECISION IN BERGSTROM.

Under Division Two's published opinion in Hart, to prove bail jumping, due process does not require evidence the defendant had knowledge he was supposed to appear in court on a particular date. The pattern instruction is sufficient.

Under Division Three's published opinion in Bergstrom, to prove bail jumping, due process requires evidence the defendant had knowledge he was supposed to appear in court on a particular date. The pattern instruction is insufficient and its use is manifest constitutional error.

In Dixon's case, Division One denied his motion for reconsideration based on Hart. This conflict among divisions of the Court of Appeals makes review appropriate under RAP 13.4(b)(2).

Moreover, Dixon's case is the perfect vehicle for that review because it highlights the constitutional danger of permitting conviction without requiring proof the defendant was provided notice of the specific date allegedly missed. At Dixon's trial, the requirements of the December 1, 2017 order were very much in dispute – both as to whether Dixon signed that order and to whether it required that he appear on January 17, 2018 or, instead, January 19, 2018. Yet, under element (3) of the "to convict" instruction, jurors were not required to resolve these matters. So long as Dixon had been released and then provided notice that he was required to appear *at any time in the future*, he could be convicted of this crime.

This Court should resolve the conflict among divisions and find that Bergstrom is correctly decided.

Lastly, under this Court's decision in Conner v. Universal Utilities, 105 Wn.2d at 171, Dixon properly raised his due process challenge in his motion for reconsideration based on the new decision in Bergstrom. The State agrees. See Answer To Motion For Reconsideration, at 2 ("the State agrees with Dixon that this issue can be raised for the first time in this motion for reconsideration"). When denying Dixon's motion for reconsideration, the Court of Appeals did not state otherwise. But the language used in the order is somewhat

opaque: “Based on the authority of State v. Hart, 195 Wn. App. 449, 381 P.3d 142 (2016), and because all issues properly raised on appeal were correctly decided, the appellant’s motion to reconsider is denied.” To the extent this language represents a refusal to consider the due process claim on its merits, it is inconsistent with Conner and would warrant review under RAP 13.4(b)(1).

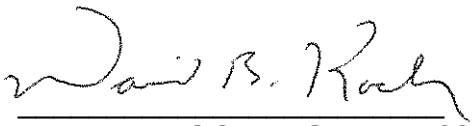
F. CONCLUSION

Dixon respectfully asks this Court to grant his petition and reverse the Court of Appeals.

DATED this 30th day of December, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC



DAVID B. KOCH, WSBA No. 23789
Office ID No. 91051
Attorneys for Petitioner

APPENDIX A

FILED
9/28/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WILLIAM H. DIXON III, Appellant.	DIVISION ONE No. 80238-1-I UNPUBLISHED OPINION

DWYER, J. — William H. Dixon III appeals from the judgment entered on a jury's verdict finding him guilty of two counts of bail jumping. He contends that the jury's verdict on the second count of bail jumping was not supported by a constitutionally sufficient quantum of evidence. Specifically, he avers that there was insufficient evidence adduced to establish that he was released from custody with knowledge of the requirement that he subsequently personally appear before the court. We disagree. A certified copy of a court order tended to prove that he was released with such knowledge. The jury was entitled to draw the inference that he was not in custody on the day of the missed hearing as a result of the entry of that order. Accordingly, we affirm.

I

In June 2017, William H. Dixon III was charged with one count of trafficking in stolen property. He pleaded guilty to the charge in March 2019. During the nearly two-year period in which the trafficking charge was pending,

Dixon missed court appearances on August 4, 2017, and January 19, 2018. In response, the State charged him with two counts of bail jumping.

At trial, to prove the first count of bail jumping, the State introduced (1) the information charging Dixon, (2) an order releasing Dixon on July 31, 2017 and requiring him to return on August 4, 2017, and (3) a clerk's minute sheet from August 4, 2017 indicating that Dixon had failed to appear in court on that date.

To prove the second count of bail jumping, the State introduced two additional pieces of evidence. First, an order dated December 1, 2017 setting future court dates and conditions of Dixon's release from custody, and requiring Dixon to return to court on January 19, 2018. Second, a clerk's minute sheet from January 19, 2018, indicating that, once again, Dixon had not appeared for the hearing. The order dated December 1, 2017 was titled "Order Setting Dates and Conditions of Release." However, preprinted boxes on the form order located next to language for setting bail and releasing a defendant on personal recognizance, respectively, were not checked. Elsewhere, the order required that Dixon reside at a specific address, remain in Washington, and have no contact with a certain boat dealer. The dates handwritten on the order established the next hearings on the matter. There was no signature on the line marked "defendant." However, a signature and a bar number appeared on the line marked "attorney for defendant." Subsequent to the entry of the order, Dixon was released from custody.

Dixon was convicted of both counts. He appeals from the judgment entered on the second count.

II

Dixon claims that insufficient evidence supports his conviction for bail jumping by missing the January 19 court date. Because a rational trier of fact could have found that all of the elements of bail jumping had been proved beyond a reasonable doubt, we disagree.

The due process clauses of the federal and state constitutions require that the government prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (citing U.S. CONST. amend. XIV, § 1); State v. Johnson, 188 Wn.2d 742, 750, 399 P.3d 507 (2017) (citing WASH. CONST. art. I, § 3). After a verdict, the relevant question when reviewing a challenge to the sufficiency of the evidence is "whether, 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).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).

The elements of bail jumping are set forth in former RCW 9A.76.170(1) (2001),[1] which provides:

> 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 . . . is guilty of bail jumping.

Thus, to prove that Dixon was guilty of bail jumping, the State was required to establish (1) that he was held for, charged with, or convicted of a particular crime, (2) that he was released by court order or admitted to bail with the requirement of a subsequent personal appearance, and (3) that he knowingly failed to appear as required. State v. Williams, 162 Wn.2d 177, 183-84, 170 P.3d 30 (2007).

Dixon challenges the sufficiency of the proof on two elements. First, he claims that there was insufficient evidence adduced that he was released from custody with the obligation to appear for a subsequent hearing. In this regard, Dixon relies on the checkboxes left blank on the order setting dates and conditions of release. Neither the box next to the language setting bail nor the box next to the words "The defendant shall be released upon personal recognizance" was marked. This, he contends, means that the case against him was not proved.

To the contrary, a complete reading of the order and a consideration of the circumstances surrounding its entry, viewed in the light most favorable to the State, supports the verdict. The order is, in part, entitled "Order Setting . . .

[1] In 2020, the legislature amended RCW 9A.76.170. We cite to the version of the statute that Dixon was charged with violating.

Conditions of Release." It mandates that Dixon live at a certain address, forbids Dixon from having contact with a certain boat dealer, and requires that Dixon remain in the state of Washington. These conditions would be nonsensical if the order was designed to keep Dixon in custody, as opposed to releasing him from custody. Furthermore, Dixon did not appear at the hearing. A rational trier of fact could infer that a person in custody would be brought to such a hearing. A rational trier of fact could thus infer, from the wording of the order and the surrounding circumstances, that Dixon was released after entry of the order. Thus, sufficient evidence supports the jury's determination that Dixon was released by court order.

Dixon next challenges the sufficiency of the evidence that he had knowledge of the subsequent personal appearance requirement. Dixon points again to the December 1, 2017 order. He asserts that because of unclear handwriting, it is uncertain whether he was required to appear on January 17, 2018 or January 19, 2018. Furthermore, he avers that because the signature line for the defendant is blank, there is no evidence that he received the document.

These arguments are not persuasive. They speak only to the weight of the evidence presented to the jury, not to its constitutional sufficiency. "'Credibility determinations are for the trier of fact and cannot be reviewed on appeal.'" State v. Bajardi, 3 Wn. App. 2d 726, 733, 418 P.3d 164 (2018) (quoting State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). Similarly, the weight to be assigned to admissible evidence is solely within the province of the

jury. State v. Rattana Keo Phuong, 174 Wn. App 494, 534-35, 299 P.3d. 37 (2013); State v. Gerber, 28 Wn. App. 214, 216, 622 P.2d 888 (1981). The jury was thus free to determine—by examining the exhibit—that the order set forth an understandable listing of the date of the next hearing.

In addition, a rational finder of fact could find plausible the State's explanations for the blank line—the likelihood that Dixon signed the line below, intended for the defense attorney's signature, given the signature's resemblance to Dixon's signature on other exhibits. Because a rational finder of fact could determine that Dixon had knowledge that he was required to appear for court on January 19, sufficient evidence supports the verdict.

Affirmed.

Dwyer, J.

We concur:

Andrus, A.C.J. Leach, J.

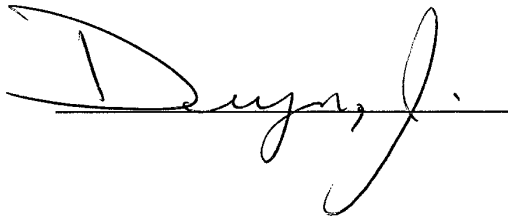
APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WILLIAM H. DIXON III, Appellant.	DIVISION ONE No. 80238-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Based on the authority of State v. Hart, 195 Wn. App. 449, 381 P.3d 142 (2016), and because all issues properly raised on appeal were correctly decided, the appellant's motion to reconsider is denied.

FOR THE COURT:



NIELSEN KOCH P.L.L.C.

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