SUPREME COURT NO. 95611-1

NO. 34814-8-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN JACKSON,

Petitioner.

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

The Honorable Rau Lutes, Judge
The Honorable Scott Gallina, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Stephen Jackson asks this Court to grant review of the court of appeals' unpublished decision in State v. Jackson, No. 34814-8-III, filed January 9, 2018 (Appendix A). The court of appeals denied Jackson's motion for reconsideration on February 6, 2018 (Appendix B).

B. ISSUE PRESENTED FOR REVIEW

1. Is this Court's review warranted under RAP 13.4(b)(3) and (b)(4) to determine what standard applies to waiver of a criminal defendant's statutory and rule-based right to counsel?

2. Is this Court's review warranted under RAP 13.4(b)(3) and (b)(4) to determine whether a defendant can challenge the denial of his or her statutory or rule-based right to counsel for the first time on appeal?

3. Is this Court's review warranted under RAP 13.4(b)(2) because of the court of appeals' decision conflicts with State v. Milton, 160 Wn. App. 656, 252 P.3d 380 (2011), which holds an order is void when entered at a hearing where a defendant is denied his or her rule-based right to counsel.

C. STATEMENT OF THE CASE

1. Procedural History

On November 30, 2015, the State charged Stephen Jackson with possession of a controlled substance, third degree possession of stolen

property, and third degree assault. CP 11-13. The trial court held a probable cause and bond hearing that same day, at which Jackson was not represented by counsel. RP 4-5, 9. The court released Jackson on bond pending trial and entered a bond order, specifying conditions of release, including making all court appearances. CP 15-16.

Jackson was arraigned on December 7, 2015, again without counsel present. RP 16-19. Counsel was finally appointed on December 21, 2015. CP 111; RP 29-31. From there, Jackson appeared at hearings for the next several months as the case limped along: continuance (January 4, 2016), trial setting (January 11, 2016), pretrial (February 1, 2016), review status (February 16, 2016), resetting (February 22, 2016), resetting (February 29, 2016), and resetting (May 2, 2016. RP 36, 41, 47, 52, 57, 62, 69-70.

Another resetting hearing was held on May 16, to which Jackson was late. RP 74-75. At that hearing, the parties agreed on July 26 for the trial date. RP 75. The State noted the pretrial hearing would be held on July 11, and Jackson signed a promise to appear at 9:00 a.m. on that date. CP 17. On July 11, Jackson failed to appear for the pretrial hearing. RP 79. Defense counsel noted it had been a long time since Jackson's last court date and counsel had not had a chance to call Jackson. RP 79-80. The trial court granted the State's request for a bench warrant. RP 79-80.

At a bond hearing on July 15, Jackson explained he thought was he was set for trial on July 26 and he did not realize there was another pretrial hearing set for July 11. RP 86-87. He explained, "[m]y attorney hasn't been in contact with me." RP 87. Jackson's attorney confirmed he usually calls Jackson in advance of court hearings, but "I wasn't able to do that [on July 11] because . . . I did not have a phone." RP 91. The court acknowledged the promise to appear was issued back in May, which is "[k]ind of a long time to keep things on the front burner for Mr. Jackson." RP 92. The court further noted Jackson made all "his appearances here since December." RP 92. The court accordingly reinstated Jackson's bond. RP 92; CP 23-24.

The State thereafter amended the information to charge Jackson with bail jumping, alleging he failed to appear on July 11, despite having previously been released by a court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance in court. CP 34; CP 47; RP 153-54. The State ultimately dropped the underlying assault and possession charges based on evidentiary issues, leaving only the bail jumping charge. RP 115, 127; CP 33.

2. Jury Trial: State's Case

McKenzie Kelley, chief deputy clerk of the Asotin County Superior Court in May-July 2015, was the State's sole witness at trial. RP 158. Kelley testified she was familiar with Jackson and his court file. RP 159-60.

She testified class C felony charges were filed against Jackson on November 30, 2015. RP 161; Ex. P-1. Kelley further testified a bond order was entered on November 30, requiring Jackson to make all court appearances. RP 162-63; Ex. P-2. Jackson posted 10 percent of the bond amount and was released from jail pursuant to the bond order. RP 164-65.

Kelley explained Jackson's case was called for a resetting hearing on May 16, 2016. RP 166. Kelley's minutes reflected Jackson was in court that day and the bond order was still in effect. RP 166-68. July 11 was selected for the pretrial hearing and July 26 for trial. RP 166. She explained Jackson signed a promise to appear on July 11. RP 167-68; Ex. P-3. Kelley testified Jackson did not appear on July 11 for the pretrial hearing, so a "bench warrant was issued with a no bond hold." RP 168.

3. Jury Trial: Defense Case

Jackson explained that on May 16, he just "heard a bunch of dates," and only the date of trial, July 26, stood out to him. RP 192. He did not remember the July 11 date and did not realize there would be another pretrial hearing. RP 192-93. Jackson recalled the May 16 hearing lasted "[m]aybe about two minutes, three at the most, if that -- if that," consistent with Kelley's agreement that resetting hearings occur very quickly and there are usually around 50 cases on the docket for a resetting day. RP 170-74, 194.

Jackson acknowledged he missed court on July 11, but explained was not aware he was supposed to be in court that day. RP 194-95, 198. Jackson discovered the missed court date on July 14 when he reported to his probation officer. RP 195-97. When an officer arrived at his probation office, Jackson explained, "I didn't know what was going on." RP 197. He was "very surprised" and "baffled" because "I just knew that I had to go to court on the 26th for trial." RP 198-99. In closing argument, defense counsel emphasized Jackson appeared for his court dates for over half a year before missing a single pretrial hearing. RP 247.

4. Verdict and Exceptional Sentence Downward

The jury found Jackson guilty as charged. RP 260-61; CP 57. The trial court sentenced Jackson to an exception sentence downward of 30 months. RP 286; CP 62. The court emphasized the overwhelming sense "was that Mr. Jackson was lackadaisical." RP 281. The court explained:

> This is not a gentleman who skipped town, went on a crime spree across six states, and finally got corralled somewhere in the Badlands of South Dakota. This is an individual who missed a court date and, by all accounts, has a very difficult time keeping times and dates straight for court . . . .

RP 283. The court believed this showed Jackson's actions were not malicious or based on "some kind of wrongful mindset." RP 283. The court noted Jackson was arrested on the bench warrant "while he was observing the

terms of [his] supervision." RP 283. The court therefore could not justify "punish[ing] so harshly someone who is lackadaisical." RP 281.

5. Appellate Arguments and Decision

The State appealed the exceptional sentence downward. The court of appeals upheld the sentence: "In its oral ruling, the trial court explained Mr. Jackson's offense conduct was atypical of bail jumping, in that he did not purposefully miss his court date. Instead, he was merely lackadaisical." Appendix A, 5. The court concluded there were "sufficient offense-specific facts to justify an exceptional sentence downward." Appendix A, 5. The court held, however, that the trial court's written findings and conclusions did not adequately state this fact-specific basis, so remanded for entry of new written findings and conclusions. Appendix A, 6.

Jackson cross-appealed his conviction. He argued he did not make a knowing and intelligent waiver of his rule-based right to counsel at the initial bond hearing, which resulted in the bond order that was later used to prove bail jumping. Br. of Appellant, 9-20. Based on Milton, Jackson argued the bond order was void, given the deprivation of his right to counsel, and the State therefore failed to present sufficient evidence of bail jumping, requiring dismissal. Br. of Appellant, 18-20.

In considering Jackson's argument, the court of appeals believed "[t]he logical relationship between Mr. Jackson's assignment of error and

requested remedy is questionable." Appendix A, 7. The court ultimately refused to consider Jackson's argument, holding "[t]he record here does not indicate any constitutional error." Appendix A, 7. The court reasoned:

> During his bail hearing, Mr. Jackson was advised of the right to counsel and he indicated he wished to proceed pro se. Mr. Jackson has not established that, at this preliminary stage of the proceedings, his waiver was invalid. Accordingly, there is no apparent error and we decline review of Mr. Jackson's legal challenge.

Appendix A, at 7-8. Jackson moved to reconsider, pointing out the court of appeals overlooked Milton. Motion to Reconsider, 1-3. The court denied Jackson's motion. Appendix B.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHAT STANDARD APPLIES TO WAIVER OF A RULE-BASED RIGHT TO COUNSEL AND WHETHER THE COURT OF APPEALS' DECISION CONFLICTS WITH MILTON.

1. Jackson had a statutory and rule-based right to counsel at the bond hearing.

Under both the federal and state constitutions, the accused is entitled to the assistance of counsel at all critical stages of criminal proceedings. U.S. CONST. amend. VI; CONST. art. I, § 22; Missouri v. Frye, 566 U.S. 133, 140, 132 S. Ct. 1399, 1405, 182 L. Ed. 2d 379 (2012); State v. Heddrick, 166 Wn.2d 898, 909-10, 215 P.3d 201 (2009). The bond order hearing was likely not a critical stage of the proceedings under the case law.

However, Jackson had a statutory and rule-based right to counsel. The Washington criminal rules confer an early right to counsel. CrR 3.1(b)(1) provides "[t]he right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest." The rule further specifies "[a] lawyer shall be provided at every stage of the proceedings." CrR 3.1(b)(2).

The Washington Constitution provides "[a]ll persons charged with crime shall be bailable by sufficient sureties," with few exceptions. CONST. art. 1, § 20. Chapter 10.21 RCW details the procedures trial courts must follow in making bail determinations under article I, section 20. RCW 10.21.010; Laws of 2010, ch. 254, § 1. A judicial officer must hold a bail hearing "immediately upon the defendant's first appearance," unless good cause is shown. RCW 10.21.060 (2).

At the bail hearing, the accused "has the right to be represented by counsel, and, if financially unable to obtain representation, to have counsel appointed." RCW 10.21.060(3). In addition, the accused "must be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise." Id.

Thus, RCW 10.21.060(3) and CrR 3.1(b) both provide the right to counsel at bond hearings. The trial court correctly noted at the November 30, 2015 bond hearing that Jackson had "a right to an attorney today to help you establish conditions of release." RP 9. The question then becomes whether Jackson validly waived that right to counsel.

2. Jackson did not make a knowing, intelligent, and voluntary waiver of his right to counsel.

A valid and effective waiver of the constitutional right to counsel must unequivocally demonstrate that the accused knowingly, intelligently, and voluntarily waived the assistance of counsel. Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001). The validity of a waiver is measured by the accused's understanding at the time he waives his right to counsel. United States v. Mohawk, 20 F.3d 1480, 1484 (9th Cir. 1994).

Washington courts have yet to decide whether the rule-based right to counsel requires a knowing and voluntary waiver, warranting this Court's review under RAP 13.4(b)(3), as an issue of due process, and RAP 13.4(b)(4), as an issue of substantial public interest that should be determined by this Court.

Child dependency and sexually violent predator proceedings provide a useful analogy. Parents have a statutory right to counsel in dependency

and termination proceedings. RCW 13.34.090(2). Based on this statutory right, Washington courts hold that waiver of the right to counsel in dependency and termination proceedings "must be expressed on the record and knowingly and voluntarily made." In re Welfare of G.E., 116 Wn. App. 326, 333, 65 P.3d 1219 (2003).

Individuals subject to sexually violent predator commitment proceedings likewise have a statutory right to counsel. RCW 71.09.050(1); State v. Ransleben, 135 Wn. App. 535, 540, 144 P.3d 397 (2006). As in dependency proceedings, the individual must make a knowing, intelligent, and unequivocal waiver of that right. In re Det. of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999).

These analogous cases make clear that when an individual is conferred a statutory right to counsel, then waiver of that right must meet the constitutional waiver standard: unequivocal, knowing, intelligent, and voluntary. Jackson's waiver of counsel at the November 30 bond hearing did not meet that standard.

There is no specific formula for determining a waiver's validity. Silva, 108 Wn. App. at 539. However, "the preferred method is a court's colloquy with the accused on the record detailing at a minimum the seriousness of the charge, the possible maximum penalty involved, and the existence of technical, procedural rules governing the presentation of the

accused's defense." Id. In other words, the accused "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Faretta, 422 U.S. at 835 (quoting Adams v. United States, 317 U.S. 269, 279, 63 S. Ct. 236, 87 L. Ed. 268 (1942)).

Absent a colloquy, the record must reflect the accused was "fully apprised of these factors and other risks associated with self-representation." Silva, 108 Wn. App. at 540. "[O]nly rarely will adequate information exist on the record, in the absence of a colloquy, to show the required awareness of the risks of self-representation." City of Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984). Courts "indulge in every reasonable presumption against waiver." Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977).

Jackson appeared at the initial November 30, 2015 probable cause and bond hearing via teleconference from the Asotin County Jail. RP 5. He did not have an attorney present and none had yet been appointed. RP 3; CP 111. The trial court immediately found probable cause for the alleged crimes and the prosecutor began discussing the bond amount and conditions of release. RP 5-7.

Only after several pages of discussion did the court tell Jackson, "you have the right to remain silent." RP 8. The court then informed Jackson:

> Do you wish to be represented by an attorney? The right to an attorney is two-fold. You have a right to an attorney to defend you on the charges and you have a right to an attorney today to help you establish conditions of release.

RP 9. Jackson responded, "No, sir. Can I -- well, I -- I don't really need any attorney right now." RP 9. The court said, "Okay," and proceeded to discuss the bond order with Jackson. RP 9. The court set Jackson's bond at $15,000 and entered a bond order the same day. RP 10-12; Ex. P-2.

The record shows the trial court did not engage in any colloquy on the record with Jackson. The court informed Jackson only that he had the right to have an attorney help him establish conditions of release. RP 9. The court did not inform Jackson of the risks of proceeding without an attorney, the minimum seriousness of the charge, or the ramifications of entering a bond order or later failing to appear for court. Nor did the court inform Jackson of the procedural rights he was guaranteed in RCW 10.21.060(3), including the opportunity to testify, present witnesses, and "present information by proffer or otherwise." Briefly informing Jackson he had the right to counsel falls far short of the colloquy contemplated by Faretta.

Absent an adequate colloquy, the record must reflect Jackson was fully apprised of the procedural rules governing his defense and the risks associated with self-representation, measured "at the time of his decision." Mohawk, 20 F.3d at 1484. Again, the record fails to reflect any such

understanding. At the point he waived counsel, Jackson knew only that he had the right to remain silent and the right to an attorney. Nowhere in the record prior to his waiver were his procedural rights stated or explained. At no time was he informed that his failure to appear following entry of a bond order could result in a bail jumping charge. Under the circumstances, "I don't really need an attorney right now," was not a knowing, intelligent, and voluntary waiver of the right to counsel.

Furthermore, a defendant's experience with the criminal system or skill as a litigator does not make an otherwise invalid waiver valid. Silva provides a useful analogy. There, the record demonstrated Silva understood the nature and gravity of the charges against him, and was aware of the risks of self-representation. Silva, 108 Wn. App. at 540. He displayed "exceptional skill" during his numerous pretrial motions, including "persuasively written briefs, skillful examination of witnesses, and articulate argument." Id. at 541. Often, Silva obtain the relief he requested. Id.

Nevertheless, the court explained, "even the most skillful of defendants cannot make an intelligent choice without knowledge of all facts material to the decision." Id. Silva was never advised of the maximum possible penalties for the charged crimes. Id. The court held "[a]bsent this critical information, Silva could not make a knowledgeable waiver of his

constitutional right to counsel." Id. Without reviewing prejudice, the court reversed Silva's convictions because his waiver was invalid. Id. at 542.

After waiving his right to counsel, Jackson articulated several reasons why the court should release him on bond. RP 9-10. He successfully advocated on his own behalf, with the court dropping the bond amount from the State's requested $25,000 to $15,000. RP 5, 10-11. Silva demonstrates, however, that Jackson's success at the bond hearing does not make the waiver of his right to counsel valid. The fact remains that he was never informed of the risks of proceeding without representation, the risks of entering a bond order, or the procedural rights guaranteed to him at the bond hearing. Absent this critical information, Jackson could not make a knowing and intelligent waiver of his right to counsel.

3. Deprivation of the statutory and rule-based right to counsel should not be insulated from appellate review.

The court of appeals refused to consider the denial Jackson's statutory and rule-based right to counsel "because this issue has not been preserved." Appendix A, 7. This conclusion ultimately allows trial courts to deny a defendant his or her rule-based right to counsel, then that individual is precluded from challenging the trial court's clearly erroneous decision on appeal because he or she failed to object. Deprivation of the rule-based right

to counsel is entirely insulated from appellate review. Such a result also warrants this Court's review under RAP 13.4(b)(3) and (b)(4).

Pro se litigants are held to the same standard as lawyers only *after* a valid waiver of their right to counsel. State v. Bebb, 108 Wn.2d 515, 524-26, 740 P.2d 829 (1987). There is no way to know whether Jackson understood "the existence of technical procedural rules," which is one of the minimum requirements for a knowing and intelligent waiver of the right to counsel. State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). Without a valid waiver of his right to counsel, Jackson cannot be held to the same standard as an attorney, who would be expected to object to a clearly erroneous, harmful ruling. Jackson therefore should not be faulted for failing to object to the denial of his right to counsel at the bail hearing.

Analogous case law further demonstrates Jackson's failure to object should not preclude him from raising the issue on appeal. For instance, individuals subject to civil commitment under chapter 71.05 RCW have a statutory right to counsel at multiple stages of the commitment process. In re Det. of T.A.H.-L., 123 Wn. App. 172, 179, 97 P.3d 767 (2004). "The due process protection of the right to counsel articulated in chapter 71.05 RCW is meaningless unless it is read as the right to effective counsel." Id. The same is true of the statutory right to counsel in sexually violent predator commitment proceedings, chapter 71.09 RCW: "The right to counsel is

meaningless unless it includes the right to effective counsel." Ransleben, 135 Wn. App. at 540.

In both contexts, involuntarily committed individuals can raise ineffective assistance of counsel claims for the first time on appeal, even though the right to counsel is only a statutory one. In re Det. of Moore, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009) (applying Strickland standard in chapter 71.09 RCW case); T.A.H.-L., 123 Wn. App. at 179-81 (applying Strickland standard in chapter 71.05 RCW case); see also In re Dependency of A.J., 189 Wn. App. 381, 402-04, 357 P.3d 68 (2015) (holding reversal of a dependency order was justified based on violations of the mother's statutory procedural rights, challenged for the first time on appeal).

Thus, due process of law requires a promised statutory right to be meaningful. In the contexts discussed above, the statutory right to counsel means the right to *effective* counsel, and so the constitutional standard applies. Due process likewise necessitates that the constitutional standard apply to the denial of the statutory right to counsel. See Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985) ("[A] party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all."). The statutorily guaranteed right to counsel at an initial bail hearing is meaningless if a defendant can waive that right without knowingly and voluntarily doing so.

4. Under *Milton*, the deprivation of counsel renders the bond order void, requiring dismissal of Jackson's conviction.

Given the denial of Jackson's statutory and rule-based right to counsel, Milton should control the outcome in this case. CrR 3.1(b)(2) guarantees criminal defendants the right to counsel "at every stage of the proceedings," including restitution hearings. Milton, 160 Wn. App. at 659. In Milton, the trial court held a restitution hearing and entered restitution orders without Milton's attorney present. Id. at 658. Milton had waived his right to be present and so did not object at the hearing, but challenged the deprivation of counsel on appeal. Id. The State argued the court of appeals should not reverse unless Milton demonstrated prejudice. Id. at 659. The court refused the State's invitation to apply the harmless error standard. Id. Instead, the court vacated the restitution orders, without any consideration of prejudice, because Milton was denied his rule-based right to counsel at the restitution hearing. Id.

Milton stands for multiple propositions. First, denial of the statutory or rule-based right to counsel is reviewable for the first time on appeal, contrary to the court of appeals' decision in Jackson's case. Second, courts do not apply the harmless error standard when a defendant is denied the right to counsel. And, third, an order entered at a hearing where a defendant is denied his or her right to counsel is void. Neither the State nor the court of

appeals addressed Milton. The conflict between the result in Milton and the result in Jackson's case warrants this Court's review under RAP 13.4(b)(2).

Release pursuant to a court order or admitted to bail with knowledge of a subsequent personal appearance is an essential element of bail jumping. RCW 9A.76.170(1); State v. Williams, 162 Wn.2d 177, 183-84, 170 P.3d 30 (2007). The trial court entered a bond order following the November 30 hearing at which Jackson was denied counsel. CP 15-16. The State then used this bond order to prove the essential element of bail jumping that Jackson had been "released by court order or admitted to bail." Ex. P-2; RP 163-64, 240-41; CP 53 (to-convict instruction).

Typically the denial of counsel will result in a new trial. See, e.g., Acrey, 103 Wn.2d at 212; Silva, 108 Wn. App. at 542. Here, however, the harm resulting from the denial of counsel cannot be undone, because the State must show Jackson was released pursuant to a court order or admitted to bail *prior* to his failure to appear. Like Milton, the November 30 bond order was entered following a hearing at which Jackson was denied the right to counsel. The bond order is therefore void and must be vacated.

Without evidence of the essential element that Jackson was released by a court order or admitted to bail, the State cannot prove bail jumping. See, e.g., State v. Le, No. 72166-6-I, 2015 WL 7300787, at *2 (Nov. 16, 2015) (unpublished opinion reversing Le's bail jumping conviction for

insufficient evidence where the State did not show Le had been released by court order). The proper remedy is dismissal of Jackson's conviction. State v. Hickman, 135 Wn.2d 97, 103-05, 954 P.2d 900 (1998).

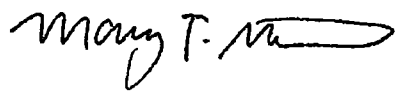
E. CONCLUSION

For the aforementioned reasons, Jackson respectfully asks this Court to grant review under RAP 13.4(b)2), (b)(3), and (b)(4).

DATED this 8th day of March, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix A

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CASE # 348148
State of Washington v. Stephen R. Jackson
ASOTIN COUNTY SUPERIOR COURT No. 151001894

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 an original and two copies of the motion (unless filed electronically). 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

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FILED
JANUARY 9, 2018
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, Appellant/ Cross Respondent, v. STEPHEN R. JACKSON, Respondent/ Cross Appellant.	))))))))))	No. 34814-8-III UNPUBLISHED OPINION

PENNELL, J. — The parties cross appeal Stephen Jackson's conviction and sentence for bail jumping. We affirm Mr. Jackson's conviction, but the sentence cannot be affirmed on the current record. Although the trial court identified a permissible basis for an exceptional sentence downward in its oral ruling, the written findings of fact and conclusions of law are insufficient. Mr. Jackson's case is therefore remanded for further proceedings.

FACTS

After being arrested on multiple felony charges, Stephen Jackson appeared in superior court for a probable cause and bond hearing. He was not represented by counsel. The court advised Mr. Jackson he had the right to remain silent and asked if he wanted to be represented by an attorney. The court told Mr. Jackson, "[t]he right to an attorney is two-fold. You have a right to an attorney to defend you on the charges and you have a right to an attorney today to help you establish conditions of release." Report of Proceedings (RP) (Nov. 30, 2015) at 9. Mr. Jackson responded, "[n]o, sir. Can I—well, I—I don't really need an attorney right now." *Id.* Mr. Jackson went on to argue on his case and the court entered a bond order with specific conditions of release. Mr. Jackson posted bond, was released from custody, and subsequently received appointed counsel.

Over the next several months, Mr. Jackson appeared for various court hearings. Mr. Jackson was tardy for court appearances scheduled for May 2 and May 16, 2016. At the May 16 hearing, Mr. Jackson signed a promise to appear, advising him of a July 11 pretrial hearing date. Trial was scheduled for July 26.

Mr. Jackson failed to appear on July 11. A warrant was issued and Mr. Jackson was arrested three days later when he reported for an appointment with his probation officer. At a subsequent bond hearing, the court gave Mr. Jackson another chance and

released him from custody under the condition that he not be late to any more court appearances. Mr. Jackson failed to meet this expectation. He was arrested after appearing late for a subsequent court hearing and remained in custody through the conclusion of his court proceedings.

The State amended Mr. Jackson's charges to include a count of bail jumping, based on the missed court date on July 11. The other charges were later dismissed and Mr. Jackson proceeded to a jury trial.

The State presented its trial evidence through a deputy court clerk. Mr. Jackson testified in his defense. He explained that on May 16 he "heard a bunch of dates" and only his trial date, July 26, stood out to him. RP (Oct. 6, 2016) at 192. Mr. Jackson did not remember the July 11 pretrial date and did not realize there would be another pretrial hearing. He explained he "probably didn't read" his written promise to appear. *Id.* at 201. Mr. Jackson admitted he made a mistake and explained that he was truly surprised when he was arrested as he did not realize he had missed court.

Forgetfulness is not a defense to bail jumping and the jury was instructed accordingly. A guilty verdict ensued. Mr. Jackson's sentencing hearing was scheduled for the day after the jury's verdict.

After hearing from the parties at sentencing, the court announced its intent to impose an exceptional sentence downward. The judge noted he had been struggling with Mr. Jackson's case and that it had kept him up the previous night. While recognizing Mr. Jackson's conduct was "less than stellar," RP (Oct. 7, 2016) at 282, the court found the standard range excessive. The court reasoned Mr. Jackson was simply "lackadaisical" in forgetting his court dates and therefore the purposes of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, would not be served by imposing a sentence in the range of 51-60 months. *Id.* at 281-85. In its written findings of fact and conclusions of law, the court specifically reasoned that its downward departure was justified by analyzing the seven policy factors of the SRA. Clerk's Papers at 107-09.

The State appeals Mr. Jackson's sentence and Mr. Jackson appeals his conviction.

ANALYSIS

State's appeal: the exceptional sentence downward[1]

The SRA permits trial courts to depart from standard sentencing ranges in appropriate circumstances. A below range sentence may be imposed if the trial court finds the defendant's offense conduct involved substantial and compelling mitigating

[1] Although the State's opening brief is not fully compliant with the Rules of Appellate Procedure, it is sufficiently clear to permit review on the merits as contemplated by RAP 1.2(a).

circumstances. RCW 9.94A.535; *State v. Akin*, 77 Wn. App. 575, 584, 892 P.2d 774 (1995). To qualify for a departure, a mitigating circumstance must be atypical for the defendant's class of conviction. Factors already taken into account by the legislature in adopting the SRA (RCW 9.94A.010) are not atypical and cannot justify a sentence outside the standard range. *State v. Powers*, 78 Wn. App. 264, 270, 896 P.2d 754 (1995). When faced with an appeal of an exceptional sentence, we review the legal sufficiency of a trial court's departure decision de novo. RCW 9.94A.585(4)(a); *State v. Law*, 154 Wn.2d 85, 93-94, 110 P.3d 717 (2005).

The State claims the trial court completely failed to identify a legal basis for an exceptional sentence downward. We disagree. In its oral ruling, the trial court explained Mr. Jackson's offense conduct was atypical of bail jumping, in that he did not purposefully miss his court date. Instead, he was merely lackadaisical. In addition, the harms caused by Mr. Jackson's crime were less egregious than in most bail jumping cases because Mr. Jackson never fled the jurisdiction, and he made himself readily available to the court when he reported to probation. While not every trial judge might find Mr. Jackson's circumstances compelling, the court here was presented with sufficient offense-specific facts to justify an exceptional sentence downward. *See, e.g.*, *Akin*, 77 Wn. App. at 585-86 (defendant's voluntary surrender justified an exceptional sentence downward

for escape).[2]

Although the trial court's oral ruling identified a valid basis for an exceptional sentence downward, the written findings and conclusions were insufficient. Unlike the oral ruling, the written order did not include a discussion of the unique crime related mitigating circumstances applicable to Mr. Jackson's case. Instead, the written findings and conclusions focused on the legislative purposes behind the SRA and why the court's selected sentence comported with those purposes. Although it was not inappropriate for the trial court to discuss the SRA's purposes in explaining its selected sentence, *Powers*, 78 Wn. App. at 270, the findings and conclusions needed to focus on the mitigating circumstance that caused Mr. Jackson's case to fall outside the heartland of typical SRA bail jumping cases. RCW 9.94A.535.[3] Because the court's written disposition lacks this essential component, remand is warranted. *See State v. Friedlund*, 182 Wn.2d 388, 341 P.3d 280 (2015).

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[2] In its briefing, the State does not clarify whether it is challenging the trial court's factual findings as well as its legal conclusions. In any event, the court's findings regarding the reasons for Mr. Jackson's failure to appear are supported by the record and are not clearly erroneous. RCW 9.94A.585(4)(a); *Law*, 154 Wn.2d at 93.

[3] Contrary to the State's assertions, the majority of the trial court's SRA discussion was not inappropriate. We do not read the court's opinion as disagreeing with the legislative choices contained in the SRA. Instead, the trial court simply pointed out that the purposes of the SRA did not warrant a standard range sentence under the unique circumstances of Mr. Jackson's case.

Mr. Jackson's appeal: waiver of right to counsel at bond hearing

Mr. Jackson argues he did not validly waive the right to counsel at his probable cause and bond hearing and, as a result, the bond order that formed a basis for his conviction was invalid. The logical relationship between Mr. Jackson's assignment of error and requested remedy is questionable. But in any event, we deny relief because this issue has not been preserved for appellate review.

A constitutional[4] challenge can be raised for the first time on appeal if it is "manifest" as contemplated by RAP 2.5(a)(3). To make a showing of manifest error, an appellant must demonstrate that an alleged error "is truly of constitutional dimension." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

The record here does not indicate any constitutional error. While a defendant has a constitutional right to counsel at all critical stages of a criminal prosecution, this right may be waived. There is no specific test for a valid waiver. *Iowa v. Tovar*, 541 U.S. 77, 87-88, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004). Instead, we look at "a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Id.* at 88. During

[4] Mr. Jackson argues the denial of counsel violated court rules as well as the Constitution. However, because this issue has not been preserved, we consider only the constitutional challenge.

his bail hearing, Mr. Jackson was advised of the right to counsel and he indicated he wished to proceed pro se. Mr. Jackson has not established that, at this preliminary stage of the proceedings, his waiver was invalid. Accordingly, there is no apparent error and we decline review of Mr. Jackson's legal challenge.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

In his statement of additional grounds for review (SAG), Mr. Jackson makes several legal challenges to his conviction. None warrant relief. The trial court's to-convict instruction accurately set forth the elements required by statute, RCW 9A.76.170. Defense witnesses were properly excluded as irrelevant. *See State v. Carver*, 122 Wn. App. 300, 305-06, 93 P.3d 947 (2004). And the example used by the prosecutor to explain circumstantial evidence during closing argument fell within the scope of permissible advocacy. *See State v. Dhaliwal*, 150 Wn.2d 559, 577-81, 79 P.3d 432 (2003).

As to Mr. Jackson's remaining claims, the arguments raised relate to facts and materials outside the record. The proper avenue for bringing those claims is a personal restraint petition, not a direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

CONCLUSION

Mr. Jackson's conviction is affirmed. The sentence is reversed and this matter is remanded for either resentencing or the entry of adequate findings of fact and conclusions of law, consistent with this opinion. Mr. Jackson's motion to extend time for filing his report as to continued indigency is granted. As there is no substantially prevailing party on review, no action is necessary on Mr. Jackson's motion to deny appellate costs.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Fearing, C.J.

Korsmo, J.

Appendix B

Renee S. Townsley
Clerk/Administrator

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CASE # 348148
State of Washington v. Stephen R. Jackson
ASOTIN COUNTY SUPERIOR COURT No. 151001894

Counsel:

Enclosed is a copy of the Order Denying Motion for Reconsideration of this court's January 9, 2018, opinion.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file an original and one copy (unless filed electronically) of a Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed. RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition 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.

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment

FILED
FEBRUARY 6, 2018
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

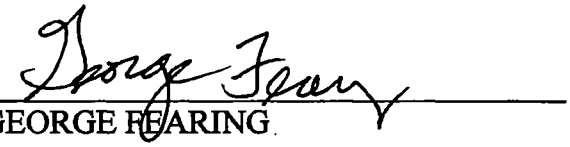
STATE OF WASHINGTON, Appellant/ Cross Respondent, v. STEPHEN R. JACKSON, Respondent/ Cross Appellant.	)	No. 34814-8-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered respondent/cross appellant Stephen R. Jackson's motion for reconsideration of our January 9, 2018, opinion, and the record and file herein.

IT IS ORDERED that the appellant's motion for reconsideration is denied.

PANEL: Judges Pennell, Korsmo and Fearing

FOR THE COURT:



GEORGE FEARING
Chief Judge

NIELSEN, BROMAN & KOCH P.L.L.C.

March 08, 2018 - 2:33 PM

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