Supreme Court No. 99347-5

Court of Appeals No. 37023-5-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner,

v.

ZACHARY BERGSTROM, Respondent

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

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Comes now, the State of Washington, and requests this Court exercise discretionary review over Division Three of the Court of Appeals' decision in *State v. Bergstrom*, No. 37023-2, ___ Wn. App. ___, 474 P.3d 578 (October 15, 2020) attached hereto as Appendix A.

II. ISSUES PRESENTED FOR REVIEW

1. Is review appropriate under RAP 13.4(b)(2) where the *Bergstrom* decision conflicts with a published decision of another division of the Court of Appeals?
2. Is review appropriate under RAP 13.4(b)(4) where the decision below involves a matter of statutory interpretation and the manner in which Washington trial courts should instruct juries on the elements of bail jumping, both issues of substantial public importance?

III. STATEMENT OF THE CASE

Zachary Bergstrom was convicted of three counts of bail jumping, and one count of escape from community custody. *Bergstrom*, No. 37023-2-III (2020), slip op. at 1. The trial court instructed the jury on the elements of bail jumping with the Washington Pattern Instruction,

WPIC 120.41. *Id*. at 5-6. Relevant here, the defendant was convicted of the three counts of bail jumping as charged. *Id*. at 4.

On appeal, Mr. Bergstrom claimed that the pattern instruction relieved the State of its burden to prove he knowingly failed to appear as required. *Id*. at 6. The Court of Appeals agreed, citing this Court's decision in *State v. Williams*, 162 Wn.2d 177, 183-84, 170 P.3d 30 (2007); it held that the trial court erred (though the error was harmless), directing trial courts to instruct juries with the elements as identified in *Williams* rather than with the pattern instruction. *Bergstrom*, No. 37023-2-III, slip op. at 7-8. Specifically, the majority opinion found that the pattern instruction relieved the State of its burden to prove that Bergstrom "knowingly failed to appear as required," explicitly disagreeing with Division Two's published opinion in *State v. Hart*, 195 Wn. App. 449, 456, 381 P.3d 142 (2016), *review denied*, 187 Wn.2d 1011 (2017), which held that the pattern jury instruction adequately stated the law. *Bergstrom*, No. 37023-2-III, slip op. at 8-9.

Judge Korsmo concurred with the majority opinion to the extent that it affirmed the bail jumping convictions, but disagreed with the majority's disapproval of the pattern instruction or of the *Hart* opinion. *Bergstrom*, No. 37023-2-III (2020), slip op. at 1 (Korsmo, A.C.J., concurring). Judge Korsmo found that *Hart's* approval of the WPIC was based on a

"faithful recitation" of the plain language of the statute. *Id*. Discussing legislative changes enacted in 2001 to the bail jumping statute, Judge Korsmo observed that "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" and the WPIC "properly sets out these commands." *Id*. at 2. Judge Korsmo found that Mr. Bergstrom's reading of the WPIC was strained, and contrary to his contention, the instruction did not "divorc[e] the date of the offense from the knowledge of appearance before the court element." *Id*.

Thereafter, the State moved the Court to reconsider its opinion, arguing that the 2001 legislative changes have superseded the elements of bail jumping as discussed in *William*s, and *State v. Pope*, 100 Wn. App. 624, 627, 999 P.2d 51 (2000), and therefore, the Court of Appeals' reliance on the elements of the crime of bail jumping as set forth in those cases was not appropriate. The Court of Appeals denied the State's motion for reconsideration on December 10, 2020, attached hereto as Appendix B.

IV. REASONS REVIEW SHOULD BE ACCEPTED AND ARGUMENT

Discretionary review is appropriate under RAP 13.4(b)(2) and (4). Review is appropriate under RAP 13.4(b)(2) where the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals.

Here, the published-in-part *Bergstrom* decision conflicts with Division Two's published decision in *Hart*, as discussed below. Review is also appropriate under RAP 13.4(b)(4). Under that rule, review is appropriate where the issue presented is one of substantial public importance. The Court of Appeals' interpretation of statutory language relied on caselaw that has since been superseded by statute; therefore, *Bergstrom*'s disapproval of the WPIC, patterned on the current version of the statute, and its command that trial courts instruct juries with elements that have been superseded by statute is in error. Thus, there is a two-fold substantial public interest justifying review by this Court: (1) it involves a matter of statutory interpretation and (2) it involves the proper language that Washington's trial courts should use in instructing its juries on charges such as this.

1. *Bergstrom* conflicts with Division Two's Decision in *State v. Hart*.

In *Hart*, the defendant was charged with bail jumping, and as in this case, his jury was instructed on the elements of that crime with WPIC 120.41. On appeal, Hart alleged that the WPIC relieved the State of its burden to prove the element that he had failed to appear at a hearing "as required." *Hart*, 195 Wn. App. at 456. Division Two rejected this argument, finding that the WPIC mirrors the statute, and properly "required the State to prove beyond a reasonable doubt that Hart 'had been released by the court

or admitted to bail with knowledge of the *requirement* of a subsequent personal appearance before that court.'" *Id*. (emphasis in original)

Expressly rejecting this opinion, *Bergstrom* has now held that the WPIC does, indeed, lower the State's burden of proof, as the WPIC allegedly allows a defendant to be convicted of bail jumping if they had knowledge of "any" subsequent court appearance, not necessarily the court appearance at which the defendant ultimately failed to appear. *Bergstrom,* No. 37023-2-III, slip op. at 1. As Judge Korsmo noted in his concurrence, this interpretation of the statute is strained and leads to absurd results, and should be reversed. *Id.* at 1 (Korsmo, J. concurring); *see e.g., State v. McDougal*, 120 Wn.2d 334, 841 P.2d 1232 (1992) ("In resorting to statutory interpretation, this Court first looks to the plain meaning of the words used in a statute…Statutes should be construed to effect their purpose. Unlikely, absurd or strained consequences resulting from a literal reading should be avoided" (internal footnotes omitted)).

Interestingly, both *Hart* and *Bergstrom* relied on this Court's opinion in *Williams*, 162 Wn.2d 177, which, as discussed in greater detail below, recited the element of bail jumping based not on the 2001 version of the statute, under which those defendants were charged, but on a prior version of the statute. *Hart*, 195 Wn. App. at 456; *Bergstrom*, No. 37023-2-III, slip op. at 8. Despite both Divisions' discussion of the

same case, and analysis of generally the same issue, the Court of Appeals has produced two opinions reaching opposite results, leaving trial courts in the difficult position of determining which opinion to follow in instructing juries on the elements of bail jumping. Review is appropriate for this reason alone. RAP 13.4(b)(2).

2. *Bergstrom* presents this Court with a matter of substantial public importance.

This Court is the final authority on matters of Washington State statutory construction, in the absence of any federal constitutional issues. *See e.g., In re Peterson*, 138 Wn.2d 70, 80, 980 P.2d 1204 (1999). Statutory interpretation is an issue of substantial public importance, as required by RAP 13.4(b)(4), especially where, as here, the Court of Appeals is divided on the meaning of a statute. Here, as mentioned above, both *Hart* and *Bergstrom* mention this Court's holding in *Williams*, yet the courts have reached opposite conclusions considering that case and the plain language of the current version of RCW 9A.76.170.

a. History of RCW 9A.76.170 defining bail jumping.

In 2001, the legislature redefined the crime of bail jumping when it added an affirmative defense.[1] Laws of 2001, ch. 264, § 3. The relevant

[1] And, as the *Bergstrom* concurrence points out, to eliminate the "I forgot" defense. *Bergstrom*, No. 37023-2-III (2020), slip op. at 2 n.2 (Korsmo, A.C.J., concurring).

portion of the amended statute in effect when Mr. Bergstrom committed the crime read:

> Any person having been released by court order or admitted to bail ***with knowledge of the requirement of a subsequent personal appearance before any court of this state***, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

Former RCW 9A.76.170 (2001), Laws of 2001, ch. 264, § 3 (emphasis added). However, the predecessor statute, discussed in both *Pope* and *Williams* provided:

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

Former RCW 9A.76.170 (1976), Laws of 1975, ch. 260, § 9A.76.170 (emphasis added). Thus, in the 1976 statute, "knowingly" modified "fails to appear as required." Former RCW 9A.76.170 (1976), Laws of 1975, ch. 260, § 9A.76.170. Unlike its predecessor statute, however, "knowledge" in the 2001 version of the statute modified "the requirement of a subsequent personal appearance" element. Former RCW 9A.76.170 (2001), Laws of 2001, ch. 264, § 3.

Based on the 1976 language, Division Two of the Court of Appeals held in *Pope*:

> [T]he elements of bail[] jumping are met if 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.

100 Wn. App. at 627. It appears this Court adopted that passage verbatim, without analysis, in 2007, when it decided *Williams*:

> Bail jumping is defined in RCW 9A.76.170. "[T]he elements of bail jumping are met if 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."

162 Wn.2d at 183-84 (quoting *Pope*, 100 Wn. App. at 627). The question presented to and addressed by the *Williams* court analyzed whether the penalty subsection of RCW 9A.76.170, a completely different subsection, made the underlying crime behind the charge an essential element of bail jumping, and resolved a divisional split by ruling it did not. *Williams*, 162 Wn.2d. at 185. *Williams* did not analyze the current language of the statute for the elements as defined in former RCW 9A.76.170 (2001), Laws of 2001, chapter 264, section 3, but simply relied on *Pope*, 100 Wn. App. at 627.

b. WPIC 120.41 accurately reflects the elements required by the 2001 statute; however, Bergstrom*'s interpretation of RCW 9A.76.170 requires Washington trial courts to instruct juries with a necessary element that no longer exists and which omits an element required by the current statute.*

Consistent with the 2001 statutory language, WPIC 120.41, rejected by the *Bergstrom* decision, provides:

> A person commits the crime of bail jumping when he or she [fails to appear] [or] [fails to surrender] as required after having been released by court order or admitted to bail **with knowledge of the requirement [of a subsequent personal appearance before a court]** [or] [to report to a correctional facility for service of sentence.]

WPIC 120.41 (emphasis added).

"It is the job of the legislature to define crimes." *State v. Pinkham*, 2 Wn. App. 2d 411, 414, 409 P.3d 1103, *review denied*, 190 Wn.2d 1027 (2018) (citing *State v. Feilin*, 70 Wash. 65, 70, 126 P. 75 (1912)). The legislature has the power to overrule decisions of the judicial branch, and properly exerts that power by amending a statute and applying the amendment prospectively. *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004).

Simply put, Division Three's reliance on *Williams* and *Pope* has led to its misinterpretation of RCW 9A.76.170, which, in turn has resulted in the court's erroneous holding that Washington trial courts must instruct juries with the former statutory elements found in *Williams*, as opposed to

those found in the 2001 version of the statute. The *Williams* and *Pope* decisions hold no precedential value as applied to Mr. Bergstrom's case because the version of the statute they interpreted is no longer in effect and was not in effect when Mr. Bergstrom committed his crime.[2] The *Williams*

[2] The most recent version of the statute was adopted this year. *See* RCW 9A.76.170 (2020). It provides:

> (1) A person is guilty of bail jumping if he or she:
>
> (a) Is released by court order or admitted to bail, has received written notice of the requirement of a subsequent personal appearance for trial before any court of this state, and fails to appear for trial as required; or
>
> (b)(i) Is held for, charged with, or convicted of a violent offense or sex offense, as those terms are defined in RCW 9.94A.030, is released by court order or admitted to bail, has received written notice of the requirement of a subsequent personal appearance before any court of this state or of the requirement to report to a correctional facility for service of sentence, and fails to appear or fails to surrender for service of sentence as required; and
>
> (ii)(A) Within thirty days of the issuance of a warrant for failure to appear or surrender, does not make a motion with the court to quash the warrant, and if a motion is made under this subsection, he or she does not appear before the court with respect to the motion; or
>
> (B) Has had a prior warrant issued based on a prior incident of failure to appear or surrender for the present cause for which he or she is being held or charged or has been convicted.
>
> (2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances by negligently disregarding the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

court did not analyze the significant statutory changes between the 1976 and 2001 versions of the statute because that issue was not the question before the Court.

As Judge Korsmo's concurring opinion in *Bergstrom* acknowledges, the word, "knowledge" in the 2001 statute plainly modifies the requirement of a personal subsequent appearance before the court, and not the failure to appear. *Bergstrom*, No. 37023-2-III (2020), slip op. at 2 (Korsmo, A.C.J. concurring); *Compare* former RCW 9A.76.170 (2001), Laws of 2001, ch. 264, § 3, *with* former RCW 9A.76.170 (1976), Laws of 1975, ch. 260, § 9A.76.170; WPIC 120.41; *see also State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004) ("Based on a plain reading of the current version of RCW 9A.76.170, we expressly hold that the State must prove only that Carver was given notice of his court date – not that he had knowledge of this date every day thereafter – and that 'I forgot' is not a defense to the crime of bail jumping").

Thus, *Bergstrom's* directive that trial courts comply with this Court's discussion of a *former* version of the statute which attached the knowledge requirement to a different element of the crime conflicts with

the legislature's power to amend statutes, define the elements of a crime, and to abrogate or supersede judicial branch interpretations of the law. It would also require the State to prove an element of a crime that no longer exists, while relieving the State of its burden to prove the elements of the crime that the legislature's amendment adopted.

Additionally, the 2020 legislative amendments to RCW 9A.76.170, which overhaul the bail jumping statute, do not moot the Court of Appeals' misinterpretation of the statute. Unresolved bail jumping cases with offense dates prior to June 11, 2020, would be affected both by *Bergstrom's* rejection of the pattern jury instruction and also by the divisional split *Bergstrom* has created. Review is appropriate as a matter of substantial public importance to clarify whether the WPIC properly recites the elements of bail jumping as required by the 2001 version of RCW 9A.76.170, or whether Washington trial courts must use the elements set forth in *Williams*.

V. CONCLUSION

The State respectfully requests this Court grant review of the decision below. *Bergstrom* presents this Court with an opportunity to resolve a conflict in the published opinions of the Court of Appeals,

RAP 13.4(b)(2), as well as a matter of substantial public importance, RAP 13.4(b)(4).

Respectfully submitted this 21 day of December 2020.

LAWRENCE H. HASKELL
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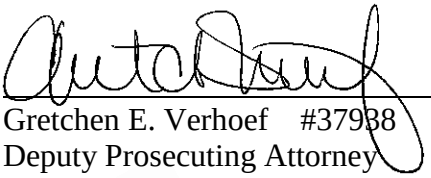

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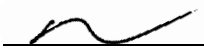

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APPENDIX A

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.

---

[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.

APPENDIX B

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.	)	**STATE'S MOTION**
	)	**FOR RECONSIDERATION**
ZACHARY P. BERGSTROM,	)	
	)	
Appellant.	)	

The court has considered State'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 and Korsmo

FOR THE COURT:

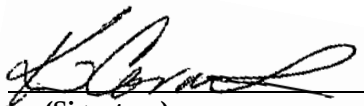
REBECCA PENNELL
CHIEF JUDGE

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ZACHARY BERGSTROM, Appellant.	Supreme Court No. _____ Court of Appeals No. 37023-2-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on December 21, 2020, I e-mailed a copy of the Petition for Review in this matter, pursuant to the parties' agreement, to:

Skylar Brett
skylarbrettlawoffice@gmail.com

12/21/2020 **(Date)** Spokane, WA **(Place)**  **(Signature)**

SPOKANE COUNTY PROSECUTOR

December 21, 2020 - 2:12 PM

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