62957-3

62957-3

NO. 62957-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CYNTHIA NELSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. Here, the primary officer identified Nelson in court and the State admitted twelve court documents, four of which were signed by Nelson acknowledging that she was required to appear at future court dates, including the hearings set for February 1, 2008 and May 9, 2008 that Nelson failed to appear for. Is there substantial evidence in the record to support Nelson's Bail Jumping convictions?

2. To be constitutionally sufficient, all essential elements of the crime must be included in the charging document. When a charging document is challenged for the first time on appeal, it must be construed liberally. One element of Bail Jumping is that the defendant was held for, charged with or convicted of a particular crime. Identifying the particular underlying crime can be accomplished by stating the class or specific crime name in the charging document. In the instant case, the amended information alleged that Nelson had been charged with a class C felony. Does

the amended information adequately inform Nelson of the potential penalty for the crime of Bail Jumping?

3. A "to convict" instruction must contain all elements of the charged crime. Omission of an essential element is not reversible error where the State is not relieved of its burden of proving each element. Jury instructions are sufficient when, read as a whole, they accurately state the law, do not mislead the jury, and permit each party to argue its theory of the case. The instructions given to Nelson's jury stated that to convict her of Bail Jumping, it must find that she had been charged with a class C felony. A separate instruction informed the jury that the specific crime she had been charged with, Possession of Methamphetamine, was a class C felony. Nelson did not object to any of the Bail Jumping instructions. Are the "to convict" instructions constitutionally sufficient? If not, is Nelson entitled to seek relief for the first time on appeal where the record demonstrates that the alleged error was not manifest, but harmless?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Cynthia Nelson by amended information with Violation of the Uniform Controlled Substances Act—Possession of Methamphetamine, and two counts of Bail Jumping. CP 4-5. The jury acquitted Nelson of the drug offense but convicted Nelson of the two Bail Jumping charges. CP 10-12. The court imposed a standard range sentence of nine months' Electronic Home Detention on each count to be served concurrently. CP 50-56; 4RP 12-13. [1]

2. SUBSTANTIVE FACTS

a. Possession Of Methamphetamine.

Cynthia Nelson was arraigned on the original information, which charged her with a Violation of the Uniform Controlled Substances Act—Possession of Methamphetamine, on October 1, 2007. CP 1-3, 58; Ex. 16, 17. At that hearing, Nelson signed a case scheduling order acknowledging that she had received notice of the next court date. CP 58; Ex. 17. At Nelson's fourth court

[1] The Verbatim Report of Proceedings consists of four volumes. The State has adopted the following reference system: 1RP (09/16/08), 2RP (09/17/08), 3RP (09/22/08), 4RP (01/09/09).

hearing on November 26, 2007, the court set an omnibus hearing for February 1, 2008 and a trial date of February 20, 2008. CP 59; Ex. 18. Nelson signed the order indicating that she had received notice of the upcoming court dates. CP 59; Ex. 18. Nelson failed to appear for court on February 1, 2008 and bench warrant was issued. CP 60, 62; Ex. 19, 20. The court also struck the February 20th trial date. CP 62; Ex. 21.

Nelson appeared before the court on February 11, 2008, at which time the court quashed the bench warrant and set a case scheduling hearing for March 3, 2008. CP 63-64; Ex. 22, 23. Nelson also signed an order acknowledging that she had received notice of the next hearing date. CP 63; Ex. 22.

On March 3, 2008, the court set an omnibus hearing for May 9, 2008 and a trial date of May 27, 2008. CP 65; Ex. 24. Nelson signed an order indicating that she had received notice of these dates. CP 65; Ex. 24. Nelson failed to appear in court on May 9, 2008 and the court issued a bench warrant. CP 67; Ex. 26. The court also struck the May 27th trial date. CP 66; Ex. 25. Nelson appeared before the court on June 20, 2008 at which time the court quashed the warrant and set a new case scheduling hearing. CP 68; Ex. 27.

In the early morning hours of May 3, 2007, Black Diamond Police Officer Tim MacDonald stopped a car with expired license plates. 1RP 58-59, 62, 79. Officer MacDonald spoke with both occupants of the car. 1RP 59-60. The driver, George Lake, had a suspended license and an outstanding felony warrant, so Officer MacDonald arrested him. 1RP 59, 62, 79.

When Officer MacDonald spoke to the female passenger, she identified herself as Cynthia M. Nelson, with a birth date of December 21, 1961. 1RP 59-62. Before allowing Nelson to leave the scene, he took her picture. 1PR 62-63, 70, 85; Ex. 2. Officer MacDonald also identified the female defendant in court as the Cynthia Nelson who was the passenger in the car that morning and that was depicted in the photograph. 1RP 58, 85; Ex. 2.

During his search of the car, Officer MacDonald found a backpack that was on the floorboard where Nelson had been sitting. 1RP 63. Inside the backpack, Officer MacDonald found two containers with methamphetamine and drug paraphernalia, along with makeup, women's deodorant, a pink razor and a hairbrush. 1RP 63-64, 68-69, 71, 83. At Officer MacDonald's request, a second officer located Nelson a short distance away and brought her back to the scene. 2RP 24-25, 27-28.

Regarding the Bail Jumping charges, the State called Laurie Bell, who was a supervisor in the King County Clerk's Office at the Regional Justice Center. 2RP 4-5. Bell stated that she supervised 34 employees, including the courtroom clerks. 2RP 5. Bell also supervised the case processing and data entry or docketing sections. 2RP 5.

Bell testified regarding certified copies of 12 court documents filed in the instant case, which were admitted as exhibits 16-27. 2RP 7-23. The first document was the original Information. Ex. 16. Bell testified that an Information was a document that is filed by the Prosecutor's office that informs a defendant of the charges against him or her. 2RP 7. Exhibit 16 showed that Nelson had been charged with a Violation of the Uniform Controlled Substances Act; specifically, that Nelson possessed methamphetamine on or about May 3, 2007. Four of the other court documents admitted as exhibits were certified copies of orders setting future hearing dates, all of which were signed by Nelson. Ex. 17, 18, 22, 24.

The second paragraph of each order stated in pertinent part:

> You must be present [at the next hearing] or a warrant will be issued for your arrest and your failure to appear may result in additional criminal charges.

Ex. 17, 18, 22, 24; CP 58-59, 63, 65; 2RP 10, 17. Three of the four scheduling orders were also signed by Nelson's trial attorney.[2] Ex. 18, 22, 24.

Bell next explained to the jury that courtroom clerks create minute entries while a hearing is occurring in order to record what happened at that particular hearing. 2RP 13-14. Bell stated that the clerk's minute entry from February 1, 2008 (exhibit 19) documented that a motion for a bench warrant without bail was granted in Nelson's case as indicated by her name and cause number appearing on the minute entry along with the clerk's notations. 2RP 15; CP 62; Ex. 19.

Finally, Bell told the jury that each of the bench warrants and orders striking the trial date in this case showed that Nelson failed to appear for an omnibus hearing: once on February 1, 2008 and once on May 9, 2008. 2RP 14-15, 21-22; Ex. 20, 21, 25, 26.

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[2] The initial Notice of Case Setting form that is completed at arraignment does not have a signature line for defense counsel. Ex. 17; CP 58.

C. ARGUMENT

1. NELSON'S BAIL JUMPING CONVICTIONS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

Nelson asserts that the State did not establish beyond a reasonable doubt that she was the person who signed the orders setting future court dates and then knowingly failed to appear on those dates. This argument should be rejected because there is substantial evidence in the record establishing the defendant's identity as Cynthia Nelson, including an in-court identification by the officer, a photograph taken on the day that Nelson identified herself to Officer MacDonald, and six consistent and legible signatures contained in the court documents admitted as exhibits.

The State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Inherent in this burden is the requirement that the State prove that the defendant is the person who committed the offense. State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable

doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

"A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." Id. at 201. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

A person is guilty of bail jumping if he or she fails to appear 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. RCW 9A.76.170(1). Where, as here, proving criminal liability depends on proving that the defendant is the person to whom the court documents pertain, the State must produce evidence independent of the court records to establish that the person named in the court documents is the defendant in the present case. State v. Hunter, 29 Wn. App. 218, 221-22, 627 P.2d

1339 (1981); State v. Brezillac, 19 Wn. App. 11, 12, 573 P.2d 1343 (1978).

Relying on State v. Huber, 129 Wn. App. 499, 119 P.3d 388 (2005), Nelson argues that her convictions must be reversed because the State did not prove that the Cynthia Nelson present in court was the same person who signed the notices of hearing dates in court and then failed to appear. Huber is distinguishable.

In Huber, the State charged the defendant with the Violation of a Protection Order and Witness Tampering. 129 Wn. App. at 500. Huber later failed to appear for a subsequent hearing and a bench warrant was issued. Id. The Bail Jumping charge was tried separately from the original counts. Id. The State did not call any witnesses in its case-in-chief, but introduced certified copies of four court documents: an information that charged Huber with Violation of a Protection Order and Witness Tampering; a court order requiring Huber to appear in court on July 10, 2003; the clerk's minutes from that date showing that Huber was not present in court on July 10, 2003; and a bench warrant for Huber's arrest. Id. at 500-01. Huber did not present any evidence. Id. at 501. The jury convicted Huber of Bail Jumping. Id.

The Huber court found that the evidence presented was insufficient to identify the Huber at trial as the same Huber who had jumped bail because the State could not prove identity by simply showing that the names on the relevant documents matched the name of the defendant. Id. at 502-04. Rather, the State must show, "by evidence independent of the record, that the person named therein is the defendant in the present action." Id. at 502 (internal quotations omitted); State v. Brezillac, 19 Wn. App. 11, 12, 573 P.2d 1343 (1978); Hunter, 29 Wn. App. at 221.

Here, unlike Huber, the State's primary witness on the drug charge, Officer MacDonald, identified Nelson in court and confirmed that she was the person depicted in the photograph he took at the scene on May 3, 2007—the same date that the State later alleged Nelson possessed methamphetamine. 1RP 59-61, 70; CP 1-3; Ex. 2, 16. The State also admitted as exhibits, in conjunction with Bell's testimony, certified copies of six court orders that had signature lines for the defendant. Ex. 17, 18, 22-24, 27. Nelson's legible signature is above each signature line. Ex. 17, 18, 22-24, 27; 2RP 7-23. Four of the six orders provided notice to Nelson of future hearing dates and informed her that her failure to appear could result in additional criminal charges. Ex. 17, 18,

22, 24. Nelson's signature on each of the four scheduling orders was an acknowledgement that she had received notice of each of the subsequent court dates. Ex. 17, 18, 22, 24.

In addition, the State admitted a clerk's minute entry from February 1, 2008 under the same cause number that was on the information, containing Nelson's name, the nature of the underlying offense charged ("VUCSA"), and a notation that the motion for a no bail warrant was granted. Ex. 16, 19. When considered in combination with the bench warrant and the order striking trial date entered on the same day, it is apparent that the warrant was issued due to Nelson's failure to appear for an omnibus hearing related to the underlying drug charge. Ex. 19-21. Similarly, the bench warrant issued on May 9, 2008, along with the order striking the trial date signed on the same day, established that Nelson failed to appear for an omnibus hearing on that date as well. Ex. 25, 26.

In further contrast to Huber, the Bail Jumping charges in the instant case were consolidated under the same cause number and tried to a jury along with the underlying drug charge. CP 4-5; 1RP 29, 57-88; 2RP 4-42. A solid connection to one count, which is tied to other counts, can constitute independent evidence that all counts relate to the same person. See Brezillac, 19 Wn. App.

13-15 (solid evidence establishing identity as to three counts, which were tied to three other counts under the same cause number, constituted independent evidence that all counts pertained to the same person). Thus, a rational trier of fact could logically conclude that the identity of the person alleged to have committed Bail Jumping was identical to the identity of the person facing the drug charge.

The evidence presented, when viewed in a light most favorable to the State, sufficiently supports Nelson's Bail Jumping convictions. These convictions should be affirmed.

2. THE AMENDED INFORMATION ADEQUATELY NOTIFIED NELSON OF ALL THE ELEMENTS OF THE BAIL JUMPING CHARGE.

Nelson asserts, for the first time on appeal, that her Bail Jumping convictions should be reversed because the amended information erroneously lacked an essential element of the crime: the name of the underlying offense. This argument is without merit. When liberally construed, an information charging Bail Jumping sufficiently informed a defendant of all the essential elements, including the potential penalty involved, if it identified the class of the underlying crime.

a. Relevant Facts.

On the first day of trial, the State amended the information to add two counts of Bail Jumping.[3] CP 4-5; 1RP 29. The language used to charge Nelson in counts two and three was identical except for the date. Count two stated:

> And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse CYNTHIA MARIE NELSON of the crime of **Bail Jumping**, based on a series of acts connected together with another crime charged herein, committed as follows:
>
> That the defendant CYNTHIA MARIE NELSON, in King County, Washington, on or about May 9, 2008, being charged with a Class C felony and with knowledge of the requirement of a subsequent personal appearance before the court, did fail to appear;
>
> Contrary to RCW 9A.76.170, and against the peace and dignity of the State of Washington.

CP 4-5 (emphasis in original). Count three alleged an offense date of February 1, 2008. CP 5. Nelson did not object to the amendment. 1RP 29.

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[3] Nelson's counsel did not object to the amendment of the information adding the two Bail Jumping counts when the State made the motion on the morning of the first day of trial. 1RP 29. After the noon recess, Nelson's counsel moved to sever the Bail Jumping counts on the grounds that he was a potential witness for the defense. 1RP 34-41 (pages 39-41 were sealed by the court). The court denied Nelson's motion to sever. 1RP 44.

b. When Liberally Construed, The Amended Information Adequately Informed Nelson Of All The Essential Elements Of The Bail Jumping Charges, Including The Potential Penalty.

A defendant must be informed of the nature and cause of the accusation against him. U.S. Const. amend. VI; Const. art. I, sec. 22. To be constitutionally adequate, a charging document must include all essential elements of the alleged crime and must sufficiently identify the crime charged. State v. Tandecki, 153 Wn.2d 842, 846, 109 P.3d 398 (2005); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). "An element is essential if its 'specification is necessary to establish the very illegality of the behavior.'" State v. Yates, 161 Wn.2d 714, 757, 168 P.3d 359 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). The objective of the "essential elements" rule is to give notice to an accused of the nature of the crime so that the accused can prepare an adequate defense. State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991).

A challenge to the sufficiency of the charging document is reviewed de novo. State v. Williams, 162 Wn.2d 177, 170 P.3d 30 (2007). When an information is challenged post-conviction, it must be construed liberally. State v. Miller, 156 Wn.2d 23, 27, 123 P.3d

827 (2005). The two-part test is: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" Kjorsvik, 117 Wn.2d at 105-06. "Words in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied." Kjorsvik, 117 Wn.2d at 109. Thus, the court "need only determine if the necessary facts appear *in any form* in the charging document." Williams, 162 Wn.2d at 185 (emphasis in original).

The Bail Jumping statute states in pertinent part:

> (1) 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.
>
> * * *
>
> (3) Bail jumping is:
>
> (a) A class A felony if the person was held for, charged with, or convicted of murder in the first degree;

> (b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in the first degree;
>
> (c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony;
>
> (d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

RCW 9A.76.170.

A plain reading of the statute shows that section (1) defines the statutory elements of the crime for the purpose of determining guilt, without reference to section (3), which defines the penalty classes of Bail Jumping according to the class of the underlying offense. State v. Gonzalez-Lopez, 132 Wn. App. 622, 629, 132 P.3d 1128 (2006). Additionally, because the penalty for a Bail Jumping conviction is determined by the class of the underlying offense, Washington courts have held that the identification of the underlying offense in the information is an essential non-statutory element of Bail Jumping. Williams, 162 Wn.2d at 184, 191-92; Gonzalez-Lopez, 132 Wn. App. at 633 (citing State v. Pope, 100 Wn. App. 624, 999 P.2d 51 (2000)). Hence, the elements of Bail Jumping in Washington are that the defendant: "(1) was held for, charged with, or convicted of *a particular crime*; (2) was

released by court order or admitted to bail with the requirement of a subsequent personal appearance; and, (3) knowingly failed to appear as required." Williams, 162 Wn.2d 183-84 (italics in original) (quoting Pope, 100 Wn. App. at 627). Pleading either the specific name of the underlying charge *or* the class of the underlying offense (i.e., the "particular crime") in the charging document is sufficient to apprise the defendant of the Bail Jumping penalty classification. See Gonzalez-Lopez, 132 Wn. App. at 633; Williams, 184-85, 191-92.

State v. Spiers, which Nelson does not address, is controlling. 119 Wn. App. 85, 79 P.3d 30 (2003). In Spiers, the defendant was initially charged with 12 crimes. Id. at 88. When Spiers failed to appear for a hearing in another case, the State added a 13th count, charging Bail Jumping. Id. Count 13 of the fourth amended information alleged that Spiers, with knowledge of the requirement of a subsequent personal appearance, failed to appear as required after having been "held for, charged with, or convicted of a class "B" or "C" felony." Id. at 90. Spiers did not object to the amendment and the jury found him guilty. Id. at 88-89. The Spiers court, after liberally construing the amended information, held that it informed Spiers of "all the elements of Bail

Jumping, including the penalty that he faced." Id. at 91 (cited with approval in Williams, 162 Wn.2d at 185).

Here, the wording of counts two and three of the amended information alleged that Nelson, "on or about [a date certain], being charged with a Class C felony and with knowledge of the requirement of a subsequent personal appearance before the court, did fail to appear." CP 4-5. The charging language here is nearly identical to the language upheld in Spiers and cited with approval in Williams. As in Spiers, Nelson's potential penalty for a class C felony Bail Jumping conviction would be the same regardless of which class C crime the State proved she had been charged with. RCW 9A.76.170(3); Spiers, 119 Wn. App. at 91; Williams, 162 Wn.2d at 191. Moreover, Nelson does not allege an inability to prepare a defense or otherwise identify an actual prejudice. The amended information is constitutionally sufficient when liberally construed because it informed Nelson of all the essential elements of Bail Jumping, including the potential penalty. Nelson's Bail Jumping convictions should be affirmed.

c. Nelson Waived Her Challenge To The Information Because She Did Not Request A Bill Of Particulars.

When a charging document is challenged on appeal, the reviewing court distinguishes between a charging document that fails to allege the essential elements of the crime and a charging document that is merely unclear as to the acts upon which the crime is charged. Leach, 113 Wn.2d at 686; State v. Holt, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985). When the information contains all elements of the charged crime but is vague, a defendant cannot seek relief on appeal unless he or she requested a bill of particulars at trial. Leach, 113 Wn.2d at 687.

Here, Nelson's true complaint is not that an element was missing but that the charging language was vague because it identified the underlying crime by its class rather than its specific name. But the amended information traced the statutory language for the crime of Bail Jumping, and there are no additional implied elements. RCW 9A.76.170(1); see Williams, 162 Wn.2d at 187-88, 191-92. If Nelson felt that the amended information was unclear as to which specific class C felony the State alleged as the underlying offense to Bail Jumping, she should have filed a bill of particulars as to those charges. Because she did not, Nelson has waived her

claim. Leach, 113 Wn.2d at 687; State v. Winings, 126 Wn. App. 75, 85-86, 107 P.3d 141 (2005).

3. THE "TO CONVICT" INSTRUCTIONS WERE CONSTITUTIONALLY SUFFICIENT BECAUSE EACH INCLUDED ALL THE ELEMENTS OF THE CHARGED CRIMES.

Nelson argues, for the first time on appeal, that her convictions must be reversed because the "to convict" instructions for the Bail Jumping counts omitted an essential element of the crime: the name of the underlying offense. Nelson's argument should be rejected for three reasons.

First, Nelson has waived this claim because she has failed to demonstrate that the alleged error, while constitutional in nature, was manifest as required by RAP 2.5(a). Second, the "to convict" instructions did not omit an essential element of the crime, as each identified the particular underlying crime that Nelson had been charged with by its class. A separate instruction told the jury that Possession of Methamphetamine is a class C felony. Third, any alleged error was harmless because this element is supported by uncontroverted evidence.

a. Relevant Facts.

The State proposed a full set of jury instructions at the beginning of trial. CP 73-98. Regarding the Bail Jumping counts, the State proposed "to convict" instructions based on WPIC[4] 120.41. CP 92-93. The "to convict" instructions were identical except for the date. CP 92-93. The proposed instruction for count two stated that, in order to convict Nelson of this count, the following elements must have been proven beyond a reasonable doubt:

> (1) That on or about the 9th of May 2008, the defendant knowingly failed to appear before a court;
>
> (2) That the defendant was charged with a Class C felony;
>
> (3) That the defendant had been released by court order or admitted to bail with the requirement of a subsequent personal appearance before that court; and
>
> (4) That the acts occurred in the State of Washington.

The State also proposed two definitional instructions regarding the Bail Jumping counts: WPIC 120.40, which defined the crime of Bail Jumping; and WPIC 2.09, which instructed the jury that Possession of Methamphetamine is a class C felony. CP 94. The trial court

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[4] Washington Pattern Jury Instruction—Criminal.

accepted the State's proposed instructions pertaining to the Bail Jumping counts as written, and incorporated them into the court's instructions to the jury. CP 13, 28-31. Nelson did not object to either of the "to convict" instructions as to counts two and three, nor to the corresponding definitional instructions. 3RP 12-13.

In her initial closing argument, the prosecutor discussed the evidence that supported convictions on the Bail Jumping counts, specifically noting that one of the court's instructions stated that Possession of Methamphetamine was a class C felony. 3RP 20, 22. The majority of her argument, however, was focused on the first and third elements of knowingly failing to appear after receiving notice of the subsequent hearings. 3RP 20-22.

Nelson's attorney argued that the State had not proven the Bail Jumping counts beyond a reasonable doubt because the State had not established that the signatures on the court documents admitted as exhibits were Nelson's: "If you can't tie the signature to Ms. Nelson, [then] you have no evidence before you showing you that Ms. Nelson knowingly failed to appear." 3RP 29-30.

In rebuttal, the prosecutor again emphasized that the evidence presented showed that Nelson twice failed to appear after

receiving notice of her next required court appearances. 3RP 33-34.

b. Nelson's Claimed Error Is Not Manifest And May Not Be Raised For The First Time On Appeal.

Generally, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). A claim of error may be raised for the first time on appeal only if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). The exception under RAP 2.5(a)(3) is "a narrow one, affording review only of 'certain constitutional questions.'" State v. Boss, 144 Wn. App. 878, 891, 184 P.3d 1264 (2008) (quoting State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988)). To obtain review, the defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. McFarland, 127 Wn.2d at 333. "Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case." Boss, 144 Wn. App. at 891 (quoting State v. WWJ Corp., 138 Wn.2d 595, 603, 980

P.2d 1257 (1999) (internal quotations omitted)). It is this showing of actual prejudice that makes the error "manifest," allowing appellate review. McFarland, 127 Wn.2d at 333; Scott, 110 Wn.2d at 688.

For example, in State v. Boss, the defendant was convicted by a jury of Custodial Interference in the First Degree. 144 Wn. App. at 881. Boss claimed, for the first time on appeal at oral argument, that the "to convict" instruction omitted the implied element of knowledge, thereby relieving the State of its burden of proving every element of the offense. Id. at 890. This Court held that, although the alleged error was of constitutional magnitude, it was not manifest because Boss failed to make a plausible showing that the claimed error "had practical and identifiable consequences in her trial." Id. at 894. This Court further found that Boss could not establish actual prejudice because the overwhelming evidence at trial showed that Boss had the requisite knowledge she claimed was an implied element of the offense, and that the question of her knowledge was never a focus of the trial. Id.

Here, similar to Boss, the alleged error is of constitutional magnitude, but is not manifest because Nelson cannot establish actual prejudice. At trial, the State presented uncontested

evidence, in the form of Bell's testimony and the certified copies of 12 court documents, that Nelson had been charged with Possession of Methamphetamine and that she knowingly failed to appear for two omnibus hearings while the drug charge was pending, after being informed that she was required to appear. 2RP 7-22; Ex. 16-27.

In closing, Nelson's attorney did not contend, or even suggest, that the State had not proven that Nelson had been charged with Possession of Methamphetamine or a class C felony. 3RP 23-30. Instead, he argued that the State had not presented any evidence to prove that the signatures on the court documents were Nelson's and therefore, the State had not established beyond a reasonable doubt that Nelson had knowingly failed to appear. 3RP 29-30. Thus, as in Boss, Nelson did not contest the evidence presented as to this element of the offense and the question of what Nelson had been charged with as the underlying offense was never a focus of the trial.

Additionally, the court instructed the jurors that in order to convict Nelson of Bail Jumping in counts two and three, one of the elements that they must find beyond a reasonable doubt was that Nelson had been charged with a class C felony (instructions 13

and 14). CP 29-30. A separate instruction (instruction 15) correctly defined Possession of Methamphetamine as a class C felony. CP 31. Thus, to convict Nelson of Bail Jumping, the jury would necessarily have to find that Nelson had been charged with Possession of Methamphetamine because no other crime was defined as a class C felony and no evidence was presented regarding any other crimes. CP 29-31; 1RP 57-87; 2RP 4-42. Moreover, Nelson's trial strategy and argument for acquittal at trial would not have been any different if the "to convict" instruction listed "Possession of Methamphetamine" instead of "a Class C felony" because the exact same evidence would have been admitted, eliciting the exact same argument from the defense.

The penalty classification for Nelson's Bail Jumping convictions would also have been the same because the court, for sentencing purposes, would have determined that Possession of Methamphetamine was a class C felony as a matter of law, and thus, Nelson's Bail Jumping convictions would also be class C felonies. See RCW 9A.76.170(3). Since Nelson cannot show actual prejudice by making a plausible showing that the claimed error had any practical and identifiable consequences in her trial, her claim is not manifest and she is not entitled to relief on appeal.

c. The "To Convict" Instructions Contained Every Element Of The Crime Charged.

The State bears the burden of proving every element of the crime charged beyond a reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A "to convict" instruction must contain all elements of the charged offense because it is the "yardstick" by which the jury measures the evidence to determine guilt or innocence. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003); Gonzalez-Lopez, 132 Wn. App. at 637. A "to convict" instruction need not, however, contain all pertinent law such as "*definitions of terms*, duties of the jury to disregard statements that are not evidence, and so forth." State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009) (emphasis in original) (quoting State v. Mills, 154 Wn.2d 1, 7-8, 109 P.3d 415 (2005)). A challenged jury instruction is reviewed de novo, with the reviewing court evaluating it in the context of the instructions as a whole. Pirtle, 127 Wn.2d at 656.

Omission of an essential element of the crime charged does not result in automatic reversible error if the State has not been relieved of its burden of proving each element beyond a reasonable

doubt. State v. Brown, 147 Wn.2d 330, 339-40, 58 P.3d 889 (2002). However, a reviewing court may not rely on other instructions to supply the elements missing from the "to convict" instruction. DeRyke, 149 Wn.2d at 910. Jury instructions are sufficient when, read as a whole, they accurately state the law, do not mislead the jury, and permit each party to argue its theory of the case. State v. Teal, 152 Wn.2d 333, 339, 96 P.3d 974 (2004); State v. Douglas, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005).

As discussed above, the essential elements of Bail Jumping are that the defendant: "(1) was held for, charged with, or convicted of *a particular crime*; (2) was released by court order or admitted to bail with the requirement of a subsequent personal appearance; and, (3) knowingly failed to appear as required." Williams, 162 Wn.2d at 183-84 (italics in original) (quoting Pope, 100 Wn. App. at 627) (emphasis added). The underlying offense ("a particular crime") is an essential element merely because it "establishes the penalty that may be imposed following a [B]ail [J]umping conviction." Williams, 162 Wn.2d at 192.

Although the class of the underlying offense is not an essential element,[5] it is the class and not the specific crime that determines the penalty that may be imposed upon conviction, with the sole exception of when the underlying offense is Murder in the First Degree. RCW 9A.76.170(3). The determination of the classification for sentencing purposes of both the underlying offense and the Bail Jumping conviction is a question of law for the judge. Williams, 162 Wn.2d at 187, 191.

Here, Nelson argues that the "to convict" instructions were deficient because they required only that the jury find that Nelson had been charged with a class C felony, rather than the specific crime of Possession of a Controlled Substance. Nelson relies on State v. Pope[6] and State v. Williams[7] to support her argument; however, both cases are distinguishable.

In Pope (a consolidation of State v. Pope and State v. Kaija), the jury was instructed that to find Kaija guilty of Bail Jumping, it must find that the defendant had been "released by court order or admitted to bail with the requirement of a subsequent personal

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[5] Williams, 162 Wn.2d at 188, 192; Gonzalez-Lopez, 132 Wn. App. at 633, 638.

[6] 100 Wn. App. 624.

[7] 162 Wn.2d 177.

appearance before that court regarding a felony matter." 100 Wn. App. at 629. The trial court did not provide any further definition of the phrase "a felony matter." Id. at 627-30. The Pope court reversed Kaija's conviction because the jury was not instructed as to the "particular crime" that he had been convicted of. Id. at 630-31.

In contrast to Pope, Nelson's jury had to find that she had been "charged with a class C felony," which was more specifically defined in a separate instruction as Possession of Methamphetamine. CP 28-31. Thus, Nelson's jury was required to find that she had been charged with the class C felony of Possession of Methamphetamine before it could convict her on the Bail Jumping counts. CP 28-31.

In Williams, the "to convict" instruction informed the jury that in order to convict Williams it must find beyond a reasonable doubt that he "was charged with Possession of a Controlled Substance." 162 Wn.2d at 187. Williams argued on appeal that the penalty classification of the underlying offense was an essential element of Bail Jumping and that the "to convict" instruction was defective since it did not include the penalty classification for Possession of a Controlled Substance. Id. at 182. The Williams court held that the

penalty classification of the underlying offense is not an essential element of Bail Jumping and therefore, does not have to be included in the "to convict" instruction. Id. at 188. Thus, "a simple identification of the underlying charge is sufficient." Id.

Nelson asserts that this language from Williams requires that a "to convict" instruction for Bail Jumping include the specific name of the crime. Nelson reads Williams too narrowly. A "simple identification" of the underlying crime in the "to convict" instruction includes identifying the crime by its class where, as here, the court also instructs the jury that the specific offense for which the defendant was charged, held, or convicted is within the identified penalty classification as a matter of law.

As discussed above, Nelson's jury was instructed, as a matter of law, that Possession of Methamphetamine is a class C felony, and that in order to convict Nelson of Bail Jumping, the jury must find that Nelson had been charged with a class C felony. CP 28-31. Thus, the "to convict" instructions contained all the elements of the crime of Bail Jumping and did not relieve the State of its burden of proving every element beyond a reasonable doubt. Nelson's Bail Jumping convictions should be affirmed.

d. Any Error In The "To Convict" Instructions Was Harmless.

In the alternative, even if the Court finds that the "to convict" instruction omitted an essential element of the crime and that Nelson's claim of error is manifest, Nelson's convictions should still be affirmed because the error was harmless. As discussed above, the "to convict" instruction must contain every element of the offense; however, an erroneous "to convict" instruction may be subject to harmless error analysis. DeRyke, 149 Wn.2d at 910; State v. Carter, 154 Wn.2d 71, 81, 109 P.3d 823 (2005); Brown, 147 Wn.2d at 339, 341. When an element is omitted from a jury instruction, the error is harmless if that element is supported by uncontroverted evidence. Brown, 147 Wn.2d at 341 (citing Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (to hold the error harmless, the court must "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error").

Here, the second element of each Bail Jumping count, as stated in the "to convict" instructions, was that Nelson had been charged with "a Class C felony." CP 29-30. A separate instruction informed the jury that Possession of Methamphetamine was a

class C felony. CP 31. The uncontroverted evidence at trial established that Nelson had been charged with Possessing a Controlled Substance; specifically, methamphetamine. 2RP 7-9, 22; Ex. 16, 19. No evidence was presented as to any other controlled substances and no instruction was given as to any other class C felonies. 1RP 57-87; 2RP 30-42; CP 13-34. Thus, to convict Nelson of two counts of Bail Jumping, the jury necessarily had to find beyond a reasonable doubt that Nelson had been charged with a class C felony and that the particular class C felony Nelson had been charged with was Possession of Methamphetamine. CP 29-31.

Moreover, even if the second element of the "to convict" instructions listed "Possession of Methamphetamine" as the underlying offense, as Nelson claims it should have, the jury would have convicted Nelson of Bail Jumping. The evidence was uncontroverted that Nelson had been charged by information with Possession of Methamphetamine, released by the court with the requirement of a subsequent personal appearance, and then knowingly failed to appear for two court dates. 2RP 7-9, 22; Ex. 16, 18, 19, 20, 24, 25, 26. Then the court, instead of the jury, would have determined the penalty classification for the bail jumping

convictions based on the underlying crime of Possession of Methamphetamine, which is a class C felony. See Williams, 162 Wn.2d at 191.

Because the evidence proving that Nelson had been charged with Possession of Methamphetamine was uncontroverted at trial, the record establishes, beyond a reasonable doubt, that the jury verdict would have been the same absent the claimed error. Therefore, the error was harmless and Nelson's convictions must be affirmed.

D. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Nelson's two bail jumping convictions.

DATED this 9th day of October, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. CYNTHIA NELSON, Cause No. 62957-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name Wynne Brame
Done in Seattle, Washington

10/9/09
Date

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