

No. 36134-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II
JAN 11 2007
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STATE OF WASHINGTON,

Respondent,

vs.

Phyllis Bondurant,

Appellant.

Lewis County Superior Court

Cause No. 06-1-00365-3

The Honorable Judge Nelson E. Hunt

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The prosecuting attorney committed misconduct requiring reversal.
2. The Information was deficient as to Count V because it omitted an essential element of Bail Jumping.
3. The trial court's instructions as a whole failed to inform the jury of the essential elements of felony Bail Jumping.
4. The trial court's "to convict" instruction failed to set forth all the essential elements of felony Bail Jumping.
5. The trial court erred by giving Instruction No. 13, which reads as follows:

A person commits the crime of bail jumping when she knowingly fails to appear as required after having been released by court order or admitted to bail with the requirement of a subsequent personal appearance before a court.
Supp. CP.

6. The trial court erred by giving Instruction No. 14, which reads as follows:

To convict the defendant of the crime of Bail Jumping, as charged in Count V, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 2nd day of November, 2006, the defendant knowingly failed to appear before a court;
- (2) That the defendant was charged with Possession of a Controlled Substance;
- (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 on November 02, 2006;
- (4) That the defendant knew of the requirement to subsequently appear before the court on November 02, 2006, during the time the defendant was released or admitted to bail; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.
Supp. CP.

7. The trial court erred by giving Instruction No. 17, which reads as follows:

Possession of a Controlled Substance is a class C felony.
Supp. CP.

8. The trial court erred by giving Instruction No. 18, which reads as follows:

Evidence has been introduced in this case of the defendant having been charged with the crime of Possession of a Controlled Substance, a class C felony and can be considered by you only as proof of element (2) in instruction No. 14. The fact that the defendant has been charged shall not be considered by you for any other purpose.
Supp. CP.

9. The trial court erred by sentencing Ms. Bondurant for felony Bail Jumping without a jury determination of all factors necessary to elevate the crime from a misdemeanor to a felony.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Phyllis Bondurant was charged with two counts of Possession of a Controlled Substance (methamphetamine and marijuana), Use of Drug Paraphernalia, and Bail Jumping. At trial, her testimony contradicted that of the arresting officer. On cross-examination, the prosecuting attorney asked Ms. Bondurant if the officer was “making all this up.” An objection was sustained.

1. Did the prosecuting attorney violate Ms. Bondurant’s constitutional right to a fair trial by asking if the investigating officer was “making all this up?” Assignment of Error No. 1.

2. Did the prosecuting attorney commit misconduct requiring reversal of the convictions by asking if the investigating officer was “making all this up?” Assignment of Error No. 1.

In the Amended Information, the operative language charging Bail Jumping alleged that Ms. Bondurant “knowingly failed to appear as required.” It did not allege that she knew of the requirement that she personally appear in court.

The court’s instructions did not require the jury to find that Ms. Bondurant was held for or charged with a felony, in order to convict her of felony Bail Jumping. The jury’s guilty verdict was a general verdict; it did not specify whether the jury relied on possession of methamphetamine (a felony) or possession of marijuana (a misdemeanor) as the underlying charge establishing the Bail Jumping. Despite this, the trial judge entered judgment for felony Bail Jumping, and sentenced Ms. Bondurant accordingly.

3. Was the Information deficient because it failed to allege an essential element of Bail Jumping? Assignment of Error No. 2.

4. Did the trial court’s instructions relieve the prosecution of its burden to prove every essential element of felony Bail Jumping? Assignments of Error Nos. 3-8.

5. Did the trial court’s “to convict” instruction omit an essential element of felony Bail Jumping? Assignments of Error Nos. 3-8.

6. Did the trial court err by entering judgment for felony Bail Jumping without a jury determination of every fact necessary to elevate the crime from a misdemeanor to a felony? Assignment of Error No. 9.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Phyllis Bondurant was charged by Information with two counts of Possession of a Controlled Substance.¹ CP 17-19. Count 2 was for marijuana (less than 40 grams); Count 1 was for methamphetamine. CP 17.

Prior to trial, Ms. Bondurant missed a court date. The Information was amended to add Bail Jumping:

...in that the defendant on or about November 02, 2006, in Lewis County, Washington, then and there, having been charged with POSSESSION OF A CONTROLLED SUBSTANCE, a class C felony, ASSAULT IN THE FOURTH DEGREE – DOMESTIC VIOLENCE, a Gross Misdemeanor, and POSSESSION OF MARIJUANA – LESS THAN 40 GRAMS and UNLAWFUL USE OF DRUG PARAPHERNALIA, Misdemeanors, and having been released by court order and having been admitted to bail with a requirement of a subsequent appearance before the Lewis County Superior Court, did knowingly fail to appear as required contrary to the peace and dignity of the State of Washington. CP 18-19.

At trial, the court gave an instruction defining Bail Jumping without reference to the underlying offense:

A person commits the crime of bail jumping when she knowingly fails to appear as required after having been released by court order or admitted to bail with the requirement of a subsequent personal appearance before a court.

¹ Additional charges included Assault in the Fourth Degree - Domestic Violence and Use of Drug Paraphernalia. CP 17-19.

Instruction No. 13, Supp. CP.

The trial court's "to convict" instruction on Bail Jumping read as follows:

To convict the defendant of the crime of Bail Jumping, as charged in Count V, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 2nd day of November, 2006, the defendant knowingly failed to appear before a court;
- (2) That the defendant was charged with Possession of a Controlled Substance;
- (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 on November 02, 2006;
- (4) That the defendant knew of the requirement to subsequently appear before the court on November 02, 2006, during the time the defendant was released or admitted to bail; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. 14, Supp. CP.

The court's instructions informed the jury that Possession of a Controlled Substance is a class C felony without differentiating between the marijuana charge and the methamphetamine charge. Instructions Nos. 17 and 18, Supp. CP. None of the remaining instructions required the jury to find that Ms. Bondurant was held for or charged with a felony, in order to convict her of felony Bail Jumping. Supp. CP.

Ms. Bondurant testified at trial. RP 110-136. She told the jury that she had asked the arresting officer to get her pill container from inside her home so that she could have her medication at the jail. RP 121-122. She testified that the pill container he retrieved was next to hers, but was not her pill container. RP 132, 136.

According to the arresting officer, Ms. Bondurant said the pill container was hers. RP 27, 47. During the state's cross-examination of Ms. Bondurant, the prosecutor asked about the contradiction between her testimony and the officer's: "So Deputy Spahn is just making all this up?" RP 133. An objection was sustained. RP 133.

The jury convicted Ms. Bondurant of Possession of Methamphetamine, Unlawful Use of Drug Paraphernalia, and Bail Jumping.² The verdict was a general verdict. Verdict Form, Supp. CP. The court sentenced her for felony Bail Jumping, and this timely appeal followed. CP 4-12, 3.

² The charge of Assault IV, Domestic Violence, was dismissed prior to trial. Ms. Bondurant was acquitted of Possession of Marijuana. CP 13-19, 4.

ARGUMENT

I. THE PROSECUTING ATTORNEY COMMITTED MISCONDUCT REQUIRING REVERSAL OF MS. BONDURANT'S CONVICTIONS.

A prosecutor has a duty to act impartially and in the interest of justice. *State v. Rivers*, 96 Wn.App. 672 at 675, 981 P.2d 16 (1999). It is “flagrant misconduct” to ask one witness whether another witness is lying. *State v. Boehning*, 127 Wn.App. 511, 525, 111 P.3d 899 (2005). Cross examination intended to compel a defendant to call police witnesses liars is prosecutorial misconduct which invades the province of the jury, and which may prompt a juror to conclude that “ ‘an acquittal would reflect adversely upon the honesty and good faith of the police witnesses.’ ” *State v. Suarez-Bravo*, 72 Wn.App. 359 at 366, 864 P.2d 426 (1994), quoting *State v. Casteneda-Perez*, 61 Wn. App. 354 at 362, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991).

In this case, when Ms. Bondurant denied ownership of the pill container admitted into evidence, the prosecutor asked about the discrepancy between her testimony and the deputy's. The prosecutor concluded by asking the following question: “So Deputy Spahn is just making all this up then?” RP 133.

Although an objection was sustained, the damage had already been done. The prosecutor's question implied that Ms. Bondurant was lying,

improperly called attention to the discrepancy, and was intended to force her to call the officer a liar. It violated the rule set forth in *Boehning, supra*. Because Ms. Bondurant's credibility was critical to her case, the misconduct prejudiced her. *Boehning, supra*. Accordingly, the convictions must be reversed and the case remanded for a new trial. *Boehning, supra*.

II. THE INFORMATION WAS DEFICIENT AS TO COUNT V BECAUSE IT FAILED TO ALLEGE ALL ESSENTIAL ELEMENTS OF BAIL JUMPING.

A criminal defendant has a constitutional right to be fully informed of the charge he or she is facing. This right stems from the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution, as well as Article I, Section 3 and Article I, Section 22 (amend. 10) of the Washington State Constitution.

A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93 at 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Kjorsvik*, at 105. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Kjorsvik*, at 105-106. If the Information is deficient, no prejudice need be shown, and the case

must be dismissed without prejudice. *State v. Franks*, 105 Wn.App. 950, 22 P.3d 269 (2001).

The crime of Bail Jumping is defined in RCW 9A.76.170(1), which reads (in relevant part) as follows: “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... who fails to appear... as required is guilty of bail jumping.” The statute thus requires an allegation and proof that the accused had “knowledge of the requirement of a subsequent personal appearance...” RCW 9A.76.170(1). The statute does not actually require proof that an accused “knowingly” failed to appear. An allegation of knowledge cannot be transferred from one element to another. *See, e.g., State v. Simon*, 120 Wn.2d 196, 840 P.2d 172 (1992) (allegation that defendant “did knowingly advance and profit” by compelling victim to engage in prostitution was not sufficient to allege that the defendant knew the victim was less than 18 years old).

The Amended Information in this case alleged that Ms. Bondurant “did knowingly fail to appear as required...” CP 18-19. It did not allege that she had “knowledge of the requirement of a subsequent personal appearance,” as required by the statute. The phrase “knowingly fail to appear as required” does not convey the same meaning as “with

knowledge of a subsequent personal appearance... [fail] to appear.” RCW 9A.76.170(1). The difference in meaning was adequately conveyed in the court’s “to convict” instruction: paragraph (1) required proof that Ms. Bondurant “knowingly failed to appear....” while paragraph (4) required proof that she “knew of the requirement to subsequently appear before the court.” The Amended Information did not achieve this clarity.

For example, Ms. Bondurant knew that she didn’t go to court on November 1, November 3, and November 4, 2006; thus she knowingly failed to appear on all those dates. But this knowledge (that she didn’t go to court on any of those days) does not equate with knowledge that she was required to personally appear in court on a particular date. In fact, she wasn’t required to appear on November 1, 3, or 4, but still knowingly failed to appear on those days. As this example illustrates, the word “knowingly” in the phrase “knowingly fails to appear as required” cannot be stretched to include knowledge of every pertinent fact, such as knowledge of the requirement of subsequent personal appearance. *See, e.g., State v. Simon*, 120 Wn.2d 196, 840 P.2d 172 (1992).

The Amended Information failed to allege that Ms. Bondurant had knowledge of the requirement of subsequent personal appearance in court. CP 18-19. Because of this, the conviction must be reversed and Count V dismissed without prejudice. *Kjorsvik, supra*.

III. MS. BONDURANT'S FELONY BAIL JUMPING CONVICTION MUST BE VACATED BECAUSE THE JURY DID NOT DETERMINE ALL FACTS NECESSARY TO ELEVATE THE CRIME TO A FELONY.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358 at 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jury instructions, when taken as a whole, must properly inform the jury of the applicable law. *State v. Douglas*, 128 Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67; 941 P.2d 661 (1997). The failure to instruct on all the elements of an offense is a constitutional error that may be raised for the first time on appeal. *State v. Mills*, 154 Wn.2d 1 at 6, 109 P.3d 415 (2005). The error is presumed to be prejudicial. *State v. Kiehl*, 128 Wn. App. 88 at 91, 113 P.3d 528 (2005). Reversal is required unless the prosecution can establish that the error was harmless beyond a reasonable doubt. *State v. Jones*, 106 Wn. App. 40 at 45, 21 P.3d 1172 (2001). See *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002); *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999); *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed. 2d 439, (1987).

A “to convict” instruction must contain all the elements of the crime, because it serves as a “yardstick” by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22 at 31, 93 P.3d 133 (2004). The jury has the right to regard the “to convict” instruction as a complete statement of the law. *State v. Smith*, 131 Wn.2d 258 at 263, 930 P.2d 917 (1997) (“*Smith I*”). The adequacy of a “to convict” instruction is reviewed *de novo*. *State v. Deryke*, 149 Wn.2d 906 at 910, 73 P.3d 1000 (2003).

The Sixth Amendment to the U.S. Constitution guarantees a criminal defendant the right to a trial by jury. U.S. Const. Amend. VI. Under *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), any fact which increases the penalty for a crime must be found by a jury by proof beyond a reasonable doubt. *Blakely* error is subject to harmless error analysis under the strict constitutional standard for harmless error. *Washington v. Recuenco*, ___ U.S. ___, 126 S. Ct. 2546 at 2553, 165 L. Ed. 2d 466 (2006).

Bail Jumping is a class C felony if the accused was held for, charged with, or convicted of a class B or class C felony; it is a misdemeanor if the accused was held for, charged with, or convicted of a gross misdemeanor or misdemeanor. RCW 9A.76.170(3). Thus in order to convict Ms. Bondurant of felony Bail Jumping, the prosecution was

required to allege and prove that she was held for or charged with a felony; otherwise, she could be convicted only of misdemeanor Bail Jumping. *Blakely, supra*.

The Amended Information alleged that Ms. Bondurant was charged with a class C felony, a gross misdemeanor,³ and two misdemeanors. CP 18-19. At trial, the prosecution presented evidence that Ms. Bondurant was charged with two counts of possession, one of which (the marijuana charge) was a misdemeanor. Exhibit 8, Supp. CP. The court's instruction defining Bail Jumping made no reference to the charge underlying the Bail Jumping, and did not inform the jury of the requirement that Ms. Bondurant be held for or charged with a felony. Instruction No. 13, Supp. CP. The court's "to convict" instruction required proof that Ms. Bondurant "was charged with Possession of a Controlled Substance," but did not require the jury to find that Ms. Bondurant was charged with felony possession. Instead, it permitted conviction based on Ms. Bondurant's marijuana charge.⁴ Instruction No. 14, Supp. CP. This is also reflected in Instruction No. 18, which advised

³ The assault charge was dismissed prior to trial.

⁴ The court incorrectly instructed the jury that Possession of a Controlled Substance "is a class C felony." Instruction Nos. 17 and 18.

the jury that “Evidence... of the defendant having been charged with the crime of Possession of a Controlled Substance, a class C felony... can be considered by you only as proof of element (2) in Instruction No. 14... [and not] for any other purpose.” Instruction No. 18, Supp. CP. The jury returned a general verdict as to Count V. Supp. CP.

If the jury convicted Ms. Bondurant of Bail Jumping based on her marijuana charge, then she should have been sentenced only for misdemeanor Bail Jumping under *Blakely*. Because the general verdict does not indicate whether or not the jury relied on Ms. Bondurant’s marijuana charge for the Bail Jumping conviction, Count V must be reversed and remanded to the trial court for entry of a conviction for misdemeanor Bail Jumping. *Blakely, supra*.

In the alternative, since the court’s instructions (including the “to convict” instruction) failed to require proof of an essential element-- that Ms. Bondurant was held for or charged with a class C felony-- Count V must be reversed and remanded for a new trial. *Jones, supra*.

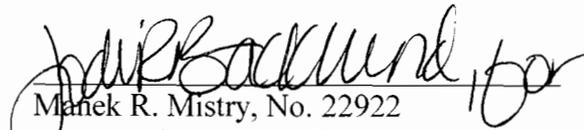
CONCLUSION

Because the prosecutor committed misconduct, Ms. Bondurant’s convictions must be reversed and her case remanded for a new trial. Furthermore, her conviction for Bail Jumping must be reversed and that count dismissed without prejudice. If the charge is not dismissed, the

court must vacate the conviction for felony Bail Jumping and remand the case for entry of a conviction for misdemeanor Bail Jumping. In the alternative, the Bail Jumping conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on August 22, 2007.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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and to:

Lewis County Prosecuting Attorney
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on August 22, 2007.

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

Signed at Olympia, Washington on August 22, 2007.


Jodi R. Backlund, No. 22917
Attorney for the Appellant

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BY 
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DIVISION II