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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether there was sufficient evidence presented to prove the charge of bail jumping beyond a reasonable doubt.

2. Whether his counsel was ineffective for failing to properly present a defense theory that the State had not proven the identity of the defendant.

B. STATEMENT OF THE CASE.

The State accepts Chambers' statement of the case.

C. ARGUMENT.

1. The State produced sufficient evidence at trial to allow a rational trier of fact to find that Chambers was the person who failed to appear for a hearing and that he knowingly failed to do so.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, 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).

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the

prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Chambers asserts that the State failed to prove he was the person who signed the order on August 8, 2007, requiring his appearance at a September 26, 2007, status conference. CP 7. The State was not required to prove he signed it, of course, but rather that he was the person ordered to appear and that he knew of the order. The elements of the crime, as set forth in Jury Instruction No. 15, are:

To convict the defendant of the crime of bail jumping as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 26th day of September, 2007, the defendant knowingly failed to appear before a court;
 - (2) That the defendant was charged with three counts of Possessing Stolen Property in the Second Degree;
 - (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.
- 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.

[CP 39]. The State had to prove only that Chambers knowingly failed to appear before the court on September 26, 2007. His real

argument, of course, is that the State failed to prove that the David Chambers sitting in the courtroom during the trial was the David Chambers who was ordered, but failed, to appear on September 26, 2007. In support of that argument he cites to State v. Huber, 129 Wn. App. 499, 119 P.3d 388 (2005).

In Huber, the defendant was charged with violating a protection order and tampering with a witness. He was released, ordered to appear on July 10, 2004, and he failed to appear as ordered. A bench warrant was issued and a charge of bail jumping was added. At trial, the State introduced certified copies of the information charging him with the first two crimes, an order requiring his appearance in court on July 10, 2004, the clerk's minutes showing that he had failed to appear on that date, and the bench warrant. There was no testimony that those documents related to the same person sitting in the courtroom. Huber did not testify or present any evidence, and his attorney did not even make an opening statement. The attorney did argue to the jury, and, following the jury's departure to deliberate, made a motion to dismiss, based on the lack of evidence making the connection. Both the trial court and the jury ruled against him; on appeal, however, he was more successful and his conviction was reversed.

This division of the Court of Appeals held that the State must show, “independent of the record,” that the person named in those documents is the defendant. Id., at 390.

The facts of this case are significantly different, and despite Chambers’ assertion to the contrary, the State did establish that the person sitting at the defense table with his attorney was the same David Chambers who was the subject of the court order to appear on September 26, 2007.

“It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense.” . . . Identity involves a question of fact for the jury and any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment, in carrying on his everyday affairs, of the identity of a person should be received and evaluated.

State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974) (cite omitted).

In Hill, the defendant was charged with possession of narcotics. At trial, there was no specific in-court identification; however, he was present in the courtroom at all times. There were many references to “the defendant” and to “Jimmy Hill.”

The arresting officer testified that it was “the defendant” whom he observed at the scene of the arrest, that he had ordered “the defendant” to halt,

and that it was “the location where the defendant was finally stopped that the Kleenex was found.” The jury verdict was in the form: “We, the Jury . . . , find the defendant [Jimmy Hill] Guilty

Id., at 560. The Supreme Court found this sufficient to establish Hill’s identity as the person who committed the crime. Id.

In Chambers’ case, much the same sort of identification occurred. It is true that no witness pointed at the defendant and said, “That’s the man.” However, Deputy Prosecuting Attorney Don Smith testified that he was familiar with the defendant [12/17/07 RP 33], that the order of trial continuance dated August 8, 2007 was signed by the defendant as well as his attorney and Smith [12/17/07 RP 37], that the defendant did not appear on September 26, 2007—“I was in court and he wasn’t” [12/17/07 RP 38], and the defendant’s name had been called by the judge on September 26, 2007, before a warrant was ordered [12/17/07 RP]

Chambers, unlike Huber, took the stand and testified. He said that he took the paperwork he received on August 8th and gave it to his mother. [12/17/07 RP 45] He received a piece of paper that said he had to come back to court, but he did not come to court on September 26th. [12/17/07 RP 55-56].

A defendant has the right to remain silent, but if he chooses to give up that right and testify, the jury may consider his testimony as it would any witness's. A reasonable trier of fact would be justified in thinking that by taking the stand but not denying that he was the person to whom the court order was addressed, Chambers was admitting that he was that person. "Each party is entitled to the benefit of all the evidence, whether or not that party introduced it." WPIC 1.02, CP 23. As in Hill, the testimony of Smith and Chambers provided sufficient evidence "which would convince or tend to convince a person of ordinary judgment", Hill, supra, at 560, that the David Chambers sitting in the courtroom was the same David Chambers who was ordered to appear on September 26 and who did not.

In State v. Hunter, 29 Wn. App. 218, 627 P.2d 1339 (1981), the defendant was charged with first degree escape, and one piece of the evidence was the judgment and sentences resulting from the convictions for which he was incarcerated. A probation officer testified that Hunter had been in a work release facility after transfer from a state prison, at least until his work release was revoked, and the court found that sufficient to establish a prima facie case that the person on trial was the same person named in the judgment

and sentences. Once that was accomplished, the “burden was on defendant to come forward with evidence casting doubt on the identity of the person named in the documents.” Id., at 222, citing to State v. Brezillac, 19 Wn. App. 11, 573 P.2d 1343 (1978). Here the State produced sufficient evidence to put on Chambers some burden of challenging his identity as the person who failed to appear.

The State presented sufficient evidence that Chambers knowingly failed to appear. Although he maintained that his mother managed his life, the definition of knowledge as contained in Jury Instruction No. 16 [CP 40], allows a reasonable trier of fact to find that Chambers knew he was to be in court and knowingly failed to appear.

2. Chambers’ counsel was not ineffective, nor was he prejudiced by her representation.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel’s performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel’s performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d

668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

As in Hill, it is apparent from the record that “[n]either the prosecution nor the defense considered the matter of identification of particular importance.” Hill, *supra*, at 560. Defense counsel

clearly did not challenge the identification, or lack of same, because she and everybody else knew that Chambers was the person named in the order to appear as well as the bench warrant. Had counsel objected to Smith's assertion that Chambers signed the order of continuance, the State would merely have produced the finger-pointing, in-court identification, and the jury would quite likely have wondered why she was grasping at straws. Counsel's questions and arguments were directed to the theory that despite having been in court and signed the order, Chambers was unaware of the date he was to be in court—his mother took care of his appointments, so he didn't bother to read the document, and he doesn't hear so well—and therefore he did not knowingly fail to appear. [12/17/07 RP 45-46, 12/18/07 RP 103] A choice of strategy cannot support a finding of ineffective assistance of counsel.

If counsel's performance was not deficient, the court does not reach the second prong of the test, which is prejudice to the defendant. In any event, even had counsel acted during trial as he now urges, the State would have had the opportunity to correct the omission and Chambers would still have been convicted.

Chambers did not receive ineffective assistance of counsel.

D. CONCLUSION.

The State proved every element of the bail jumping charge beyond a reasonable doubt, as well as establishing Chambers' identity as the person who committed the crime. His counsel was not ineffective. The State respectfully requests that this court affirm his conviction.

Respectfully submitted this 22d of September, 2008.



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