

No. 44992-7-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

FRANCISCO G. CASTRO, APPELLANT

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Appeal from the Superior Court of Mason County  
The Honorable Amber L. Finaly, Judge

No. 12-1-00412-9

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**BRIEF OF RESPONDENT**

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A. STATE'S COUNTER-STATEMENTS OF ISSUES  
PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

1. The trial court jury convicted Castro of bail jumping. Castro alleges that the jury's verdict is improper because, he alleges, the State failed to present evidence that Castro was released by court order or admitted to bail and that he knew that he was required to appear in court. *Was the evidence at trial insufficient to sustain the jury's verdict of guilty?*
2. Castro alleges that his trial attorney was ineffective because the attorney failed to call a witness who was critical to Castro's defense. *Did Castro received ineffective assistance of counsel?*
3. Castro alleges that the trial court judge allowed the State to call witnesses for the purpose of impeaching Castro on a collateral matter. *Did the trial court allow impeachment on a collateral matter, and, if so, did the trial court abuse its discretion?*

B. FACTS

For the purposes of consideration of the issues raised by Castro in this appeal, the State accepts Castro's statement of facts, but the State supplements with additional facts where needed to develop the State's arguments, below. RAP 10.3(b).

C. ARGUMENT

1. The trial court jury convicted Castro of bail jumping. Castro alleges that the jury's verdict is improper because, he alleges, the State failed to present evidence that Castro was released by court

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order or admitted to bail and that he knew that he was required to appear in court. *Was the evidence at trial insufficient to sustain the jury's verdict of guilty?*

The elements of the offense of bail jumping are 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, 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.

RCW 9A.76.170(1).

At trial, the State presented as evidence a copy of the information charging Castro with malicious mischief in the first degree in Mason County Superior Court case number 12-1-00412-9, RP 62-63; Ex. 7. The State presented evidence that Castro was present at a court hearing on the matter on October 22, 2012. RP 63; Ex. 8. The State presented evidence that at this hearing, the trial court executed an "Order and Notice Setting Trial Dates, Omnibus and Other Hearings" and that the order was signed by Castro. RP 64; Ex. 9. The order set the omnibus hearing for November 26, 2012, and set the trial date for December 24, 2012. Ex. 9. In words of command, the order stated that "[t]he defendant is required to be present at all hearing(s)." Ex. 9. On the order, above Castro's signature, the following statement appears: "I promise to appear on the

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dates set out above.” Ex. 9. The State presented evidence that Castro failed to appear at the December 24, 2012, pretrial hearing. RP 64-65; Ex. 10.

Sufficiency of evidence claims are reviewed in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *State v. Drum*, 168 Wn.2d 23, 34–35, 225 P.3d 237 (2010). An appellant who challenges the sufficiency of evidence necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from that evidence. *Id.* at 35. Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of “conflicting testimony, credibility of witnesses, and persuasiveness of the evidence.” *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

“The elements of bail jumping are satisfied if the defendant (1) was held for, charged with, or convicted of a particular crime; (2) had

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knowledge of the requirement of a subsequent personal appearance; and (3) failed to appear as required.” *State v. Downing*, 122 Wn. App. 185, 192, 93 P.3d 900 (2004). “[T]he knowledge requirement is met when the State proves that the defendant has been given notice of the required court dates.” *State v. Fredrick*, 123 Wn. App. 347, 353, 97 P.3d 47 (2004) (citing *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004)).

The facts show that Castro was charged with malicious mischief in the first degree (RP 62-63; Ex. 7); that a pretrial hearing was set for December 24, 2012 (Ex. 9); that Castro signed for notice of the hearing (RP 63-64; Ex. 8, 9); and, that he failed to appear at the hearing (RP 64-65; Ex. 10). Thus, each of the elements identified and described by *State v. Downing*, 122 Wn. App. 185, 192, 93 P.3d 900 (2004), are satisfied in the instant case.

However, to prove the allegation of bail jumping, the State was required at trial to prove that Castro was “released by court order or admitted to bail” when he subsequently failed to appear as alleged in the information. RCW 9A.76.170(1). The State did not directly address this element in its proof, but the command and promise language of the order setting the hearing provides circumstantial evidence that Castro was

released by court order pending his appearance at the subsequent hearing. Because circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence, the evidence in this case was sufficient to sustain the jury's verdict on this charge. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

2. Castro alleges that his trial attorney was ineffective because the attorney failed to call a witness who was critical to Castro's defense. *Did Castro received ineffective assistance of counsel?*

By an order dated October 22, 2012, the trial court ordered Castro to appear for a pretrial hearing at 9:00 a.m. on December 24, 2012. Ex. 9. Castro promised to appear as ordered. Ex. 9. On appeal, Castro contends that his trial counsel was ineffective because his counsel did not call as a witness a court clerk by the name of "Vicki," who could have testified that Castro had appeared on an unknown date at an unknown to time and received information about how to quash his warrant. Br. of Appellant at 8-9. At trial, defense counsel provided a summary of the witness's testimony, as follows:

She doesn't remember which day he came in, which is the problem as far as calling her as a witness. She can't say what day he day he came in and was told that. But that is what the clerk's officer

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directs individuals to do; they come in -- it's a business practice, essentially, of theirs. They don't answer legal questions, they say get in touch with your attorney or come back tomorrow to quash the warrant or to deal with it.

RP 70.

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260, 1268 -1269 (2011). To demonstrate prejudice, Castro must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). Castro has not made the required showings.

First, he cannot show that his counsel's performance was deficient. Castro was required to appear for a pretrial hearing at 9:00 a.m. on December 24, 2012. Ex. 9. An assertion of fact that Castro may have appeared at some unknown time on an uncertain date and received information about quashing a warrant is not relevant. Relevant evidence is

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evidence that has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. “Evidence which is not relevant is not admissible.” ER 402.

Second, Castro cannot show that had his attorney called “Vicki” as a witness, the result of the trial would probably have been different. The proffered witness could not corroborate or otherwise testify that Castro was present in court at 9:00 a.m. on December 24, 2012, as required by the court order and as Castro promised when he signed the court order. Ex. 9. The most that can be inferred from this witness’s testimony is that Castro appeared late for court, after his attorney was no longer present and a warrant had been ordered, and that he then appeared in the clerk’s office and received information about quashing the warrant.

These alleged facts might provide mitigation at sentencing, but they do not constitute a defense to the allegation that Castro failed to appear at 9:00 a.m. on December 24, 2012. Therefore, this witness’s testimony would have had no bearing on the trial. Because Castro cannot show that there is a reasonable probability that this witness’s testimony would have changed the result of the trial, Castro’s trial counsel was not

ineffective by not calling the witness to testify. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

3. Castro alleges that the trial court judge allowed the State to call witnesses for the purpose of impeaching Castro on a collateral matter. *Did the trial court allow impeachment on a collateral matter, and, if so, did the trial court abuse its discretion?*

Castro's former wife, Jennifer Fox, who was the victim of the malicious mischief crime charged against Castro, testified at trial that she and Castro had separated in July of 2012 and that he came to her house early in the morning when the crime was committed. RP 29-31. Ms. Fox testified that she was in bed and heard Castro outside and that she then heard her car splash into the lake. RP 31-32. The inference of this testimony was that Ms. Fox was estranged from Castro and that and that Castro showed up at her home uninvited and maliciously put her car into a lake.

Castro testified that Ms. Fox had called him to dinner the night before her car ended up in the lake. RP 78. Although he had earlier testified that he was living "at Les Schwab" at the time, Castro later testified that "the night before that happened" Ms. Fox was with him at

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“his house.” RP 79, 83. Castro testified that while Ms. Fox was at his house they had “dinner and sex and... a little fun with the kids.” RP 84. This testimony inferentially contradicted the testimony given by Ms. Fox, and it therefore inferentially attacked her credibility.

Castro contends that his testimony on this point was collateral to the principle issue of whether he knowingly and maliciously put Ms. Fox’s car into the lake and that, therefore, the trial court erred by allowing the State to rebut his testimony on this point. Br. of Appellant at 10-12.

A witness cannot be impeached upon matters that are collateral to the principal issues being tried. *State v. Oswald*, 62 Wn.2d 118, 120, 381 P.2d 617 (1963). In determining whether evidence is collateral, the test is whether it could be offered for any purpose other than attacking the credibility of the witness. *State v. Hubbard*, 103 Wn.2d 570, 576, 693 P.2d 718 (1985); *Oswald*, 62 Wn.2d at 212; *State v. Rosborough*, 62 Wn. App. 341, 349, 814 P.2d 679 (1991); see also 5A Karl B. Tegland, Washington Practice: Evidence sec. 607.21, at 343 (4th ed.1999).

On the facts of this case, Castro opened the door to the rebuttal testimony because he provided testimony that cast Ms. Fox’s credibility in a false light. When a defendant has “‘opened the door’ to a particular

subject, the State may pursue the subject to clarify a false impression.” *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009), quoting *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). However, “the prosecution may not impeach a witness, or contradict prior testimony, on collateral matters.” *Fisher* at 750, citing *State v. Oswald*, 62 Wn.2d 118, 120, 381 P.2d 617 (1963). The test of whether evidence is collateral is whether it could be offered for any other purpose than to attack the credibility of the witness. *Oswald* at 212.

“Where the credibility of the complaining witness is crucial, her possible motive to lie is not a collateral issue.” *State v. Lubers*, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996). While Castro’s testimony did not suggest a motive for Ms. Fox to lie, it did nevertheless suggest that she was deceptive or untruthful in her testimony, and it follows from *Lubers* that any attack against the credibility of a complaining witness is not a collateral issue. *Id.*

Still more, to prove malicious mischief, the State was required to prove that Castro “knowingly and maliciously” put Ms. Fox’s car into the lake. RCW 9A.48.080. Castro’s testimony that he and Ms. Fox were romantically involved before her car ended up in the lake created the false

impression that directly negated the element of maliciousness. Thus, the State's evidence offered to rebut Castro's assertions was directly related to the element of maliciousness.

Finally, even if the rebuttal evidence was improperly admitted, the error was harmless. "[W]here collateral evidence is improperly admitted, the error is only prejudicial if it 'affects or presumptively affects the final results of a trial[.]'" *State v. Allen*, 50 Wn. App. 412, 423, 749 P.2d 702 (1988), quoting *State v. Haga*, 8 Wn. App. 481, 492, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973). As in *Allen*, if the evidence here was improperly admitted, the most that it did was to rebut Castro's credibility on "a quite neutral matter." *Allen* at 423. Ms. Fox's credibility was crucial. *State v. Lubers*, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996). But whether or not she and Castro were romantically involved in the hours leading up to the crime was, indeed, "a quite neutral matter." *Allen* at 423. Thus, if admission of the rebuttal testimony was error, it was harmless error. *Id.*

E. CONCLUSION

The trial court order setting the hearing at which Castro subsequently failed to appear contained language of command that ordered Castro to appear at the hearing, and the order contained Castro's promise to appear as ordered. By implication the order released Castro based upon the court's command that he attend future court hearings as stated in the order. This order served as circumstantial evidence that was sufficient to sustain the jury's verdict on appeal.

Castro has not shown that the court clerk who was not called by his attorney to testify at trial would have been relevant to his defense, and Castro has not shown that there is a reasonable probability that the result of the trial would have been different had the clerk been called to testify. Therefore, Castro's trial counsel was not ineffective for not calling the witness to testify.

Because Castro put the complaining witness's credibility at issue by offering testimony that created a false impression in regard to her credibility, rebuttal testimony that rehabilitated the complaining witness's credibility was not evidence on a collateral matter. Finally, even if it were

error to admit the rebuttal testimony, the error was harmless because it did not affect the verdict.

For these reasons, the State asks the Court deny Castro's appeal and sustain the jury's verdict of guilty.

DATED: January 3, 2014.

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# MASON COUNTY PROSECUTOR

## January 03, 2014 - 4:37 PM

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