

NO. 46516-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN FESSEL,

Appellant.

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

The Honorable Suzan L. Clark, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to sustain appellant's convictions for bail jumping.

2. The trial court erred when it denied appellant's motion to arrest judgment where the State failed to present sufficient evidence to sustain appellant's convictions for bail jumping.

3. Prosecutorial misconduct deprived appellant a fair trial.

Issues Pertaining to Assignments of Error

1. Appellant was charged with two counts of bail jumping. Where no evidence shows that appellant was released by court order, an essential element of the crime of bail jumping per the law of the case, was the State's evidence insufficient to support appellant's two convictions for bail jumping?

2. Did the trial court err in denying appellant's motion to arrest judgment where the State failed to show appellant was released by court order?

3. Appellant received an affirmative defense instruction of uncontrollable circumstances as to the second charged incident of bail jumping. During closing argument, the prosecutor encouraged jurors to reject the affirmative defense, telling them it required something more than just appellant's testimony. Defense counsel's timely objection was

overruled. Should appellant's convictions be reversed because the prosecutor misstated the law when she encouraged jurors to reject the affirmative defense, telling them it required something more than appellant's testimony?

B. STATEMENT OF THE CASE

1. Procedural History

The Clark County prosecutor charged appellant Justin Fessel with two counts of bail jumping for incidents that occurred on March 12 and March 21, 2013. CP 10, 16-17.

A jury found Fessel guilty. CP 38-39; RP 180-81. Fessel was sentenced jointly on the bail jumping charges and several separate felony cases.¹ CP 49-64; RP² 211-13. Fessel was sentenced to 60 months imprisonment on each bailing jump conviction to be served consecutively to the other felony convictions, for a total of 144 months imprisonment. CP 49-64; RP 226. Fessel timely appeals. CP 65-84.

2. Trial Testimony

Fessel pled guilty to possession of a controlled substance in February 2013. RP 69-70. Sentencing was scheduled to occur on March

¹ The separate felony cases included vehicular assault and hit and run. RP 197-99.

² This brief refers to the verbatim report of proceedings as follows: RP – January 8, 2014, June 6, 2014, June 11, 2014, and June 13, 2014.

12, 2013. RP 70-71. Fessel did not appear at the scheduled sentencing. RP 62-63, 101, 106, 110, 121, 132; Exs. 1-2. Based on Fessel's absence, the State charged him with bail jumping. CP 10, 16-17.

Fessel appeared in court on March 13, 2013. RP 102, 127; Exs. 3-4. Fessel explained to the trial court that a car accident on March 12 prevented his appearance in court that day. RP 147-48. A scheduling order entered that day set sentencing for March 21, 2013. RP 103-04, 133; Ex. 4. Fessel did not appear at sentencing on March 21, 2013. RP 63-66, 104, 133. Based on his absence, the State charged him with a second count of bail jumping. CP 16-17.

At trial, Fessel acknowledged he was not present for sentencing on March 12 or March 21, 2013. RP 121, 132-33. Fessel testified that he was on his way to court on March 12 when he was involved in a car accident. RP 122-24. Fessel's car tire was damaged in the accident and he had to wait for a passerby to help him because he did not have the proper wrench to get his tire off. RP 124-25. Fessel explained he exchanged contact information with the other driver but did not call the police because he was in a hurry. RP 125. The other driver's car was not damaged. RP 132.

Fessel headed straight to court after changing his car tire. He arrived at court around 2:30 p.m. and met Fessel in the lobby. RP 126-27.

Fessel showed Riback cell phone photographs of the damage to his car. RP 109, 128. Fessel explained he still had the cell phone but no longer had access to the photographs. RP 128-30.

Fessel never filed an insurance claim or police report regarding the accident. Fessel explained the other driver gave him false information so he was unable to get his car fixed. RP 131. Fessel also did not have a valid license at the time of the accident was therefore afraid to file a police report. RP 134.

Riback explained the procedure for appearing on the trial court's docket. Riback said counsel appeared in court with a client at a designated time and waited until the case was called. RP 105-06. On March 12, 2013, Fessel was scheduled to appear on an afternoon docket. Riback explained some dockets were "very short" and others "obnoxiously" long. RP 106.

Based on this evidence, defense counsel requested and received an 'uncontrollable circumstances' instruction as to the March 12, 2013 bail jumping charge. RP 140, 145; CP 35 (instruction 10).

3. Motion to Arrest Judgment

Before sentencing Fessel moved to arrest judgment under CrR 7.4(a)(3)³, arguing the State failed to present sufficient evidence that Fessel was released by court order under RCW 9A.76.170(1). CP 46-47; RP 190-95.

Fessel's written motion noted that although the State had introduced numerous scheduling orders and clerk's minutes, it failed to introduce any evidence proving Fessel was released by court order. CP 46-47. In response, the State maintained the exhibits introduced at trial and "all reasonable inferences," supported the jury's guilty verdict. Supp. CP ___ (State's Response to Defense Motions, filed 6/25/14).

In arguing the motion, defense counsel clarified the sufficiency challenge was not regarding Fessel's "knowledge of his subsequent court dates," but rather, that no evidence proved Fessel was released by court order. RP 191. Defense counsel noted Fessel's initial order of release that

³ The rule provides in relevant part:

(c) New Charges After Arrest of Judgments. When judgment is arrested and there is reasonable ground to believe that the defendant can be convicted of an offense properly charged, the court may order the defendant to be recommitted or released to answer a new indictment or information. If judgment was arrested because there was no proof of a material element of the crime the defendant shall be dismissed.

existed throughout his case was absent. RP 193-94. Counsel argued the exhibits presented by the State were silent on the matter of release, as evidence by the fact that “boxes aren’t checked, there’s no indication of release, of release, bail, or anything like that.” RP 193.

Defense counsel argued the State was asking the Court to draw inferences to support its contention that sufficient evidence was presented.

Defense counsel explained:

I think the Court and, and I and Ms. Bryant [Prosecutor] may be able to say, ‘oh, well, we know that the Defendant comes in and the Court signs an order. There’s no other way he would be out of custody,’ but the jury doesn’t know that, the State didn’t present that evidence. There isn’t sufficient evidence to, to meet all the elements.

RP 194.

The trial court denied the motion, explaining that while it was “kind of an interesting situation,” it had reviewed case law, and “I just don’t see it.” RP 196.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO PROVE BAIL JUMPING

a. The State Failed to Present Sufficient Evidence of Bail Jumping Because it Failed to Admit A Release Order into Evidence.

The State bears the burden of proving all elements of a charged offense beyond a reasonable doubt as a matter of due process. In re

Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A conviction must be reversed where, viewing the evidence in the light most favorable to the State, no rational trier of fact could find all elements of the charged crime beyond a reasonable doubt. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). This court should hold the State to its burden and hold that the State did not present sufficient evidence to sustain a bail jumping conviction because no evidence showed Fessel was released by a court order.

Jury instructions to which neither party objects become the law of the case and delineate the State's proof requirements. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (citing State v. Hanes, 74 Wn.2d 721, 725, 446 P.2d 344 (1968)). Neither the State nor Fessel objected to the definitional or to-convict instructions with regard to bail jumping. RP 138-46. These instructions became the law of this case.

The court instructed the jury generally, "A person commits the crime of Bail Jumping when he fails to appear as required after having been released by court order, with knowledge of the requirement of a subsequent personal appearance before a court." CP 32 (instruction 7); RP 157. Each of the two bail jumping to-convict instructions required each of the following elements to be proved beyond a reasonable doubt:

- (1) That on or about [March 12 and 21, 2013 respectably], the defendant failed to appear before a court;
- (2) That the defendant had been convicted of Possession of a Controlled Substance;
- (3) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and
- (4) That any of these acts occurred in the State of Washington.

CP 33-34 (instructions 8-9) (emphasis added); RP 157-59 (emphasis added).

In light of these jury instructions, the State was required to prove Fessel had been released by a court order.⁴ Accord State v. Malvern, 110 Wn. App. 811, 813, 43 P.3d 533 (2002) (reciting elements of bail jumping to include that the defendant “was released by court order”); State v. James, 104 Wn. App. 25, 36, 15 P.3d 1041 (2000) (“The corpus delicti [of bail jumping] includes: (1) being released from custody by a court order”); State v. Pope, 100 Wn. App. 624, 627, 999 P.2d 51 (reciting elements of bail jumping to include that the defendant “was released by court order”), rev. denied, 141 Wn.2d 1018 (2000). Even when viewed in the

⁴ The bail jumping statute, RCW 9A.76.170(1), provides alternate means for this element of the crime: “Any person having been released by court order or admitted to bail” (Emphasis added.) As the trial court’s to-convict instruction on bail jumping makes clear, however, the State was required to prove the specific element of being released by court order in this case. CP 33-34; RP 157-59.

light most favorable to the prosecution, the State failed to put forth evidence that Fessel had been released by a court order.

In its failed attempt to meet its burden, the State put on the testimony of three witnesses; defense counsel Jeffery Riback, prosecutor Erin Culver, and Nancy Campbell, who was employed by the Clark County Clerk's Office. See RP 54-109.

Campbell testified regarding the contents of certified copies of various court documents that were admitted into evidence and confirmed that each was a true and accurate copy. RP 54-68; Exs. 1-5. None of these documents was a court order releasing Fessel

Exhibit 1 was a Memorandum of Disposition filed with the superior court clerk on February 14, 2013. Fessel signed this notice, which ordered him to return to court on March 12, 2013 at 1:30 p.m. and contained a boldface admonition that "FAILURE TO RETURN TO COURT AS ORDERED MAY CONSTITUTE THE CRIME OF BAIL JUMP." Ex. 1. While this notice informed Fessel he was required to be present at court on March 12, 2013 subject to criminal penalty, this notice was not a court order that released Fessel. Indeed, the memorandum of disposition contained a specific check-line indicating "the defendant shall be released from custody today on the above-captioned case(s) only." Ex. 1. Significantly, this provision was not checked. Ex. 1.

Exhibit 2 was a certified copy of clerk's minutes entry on March 12, 2013 that noted Fessel was not in custody and did not appear at the scheduled hearing. Ex. 2. Exhibit 2 cannot be construed as a court order at all, let alone a court order that released Fessel.

Similarly, exhibit 3 was a certified copy of clerk's minutes entry on March 13, 2013 that noted Fessel was not in custody and did appear at the scheduled hearing. Ex. 3. Exhibit 3 cannot be construed as a court order releasing Fessel.

Exhibit 4 was a scheduling order filed on March 13, 2013. Fessel signed this notice, which ordered him to return to court on March 21, 2013 at 1:30 p.m. for sentencing. The order contained an admonition that, "defendant shall personally appear in court for each of the dates set forth above. Ex. 4. Failure to appear may result in the issuance of a warrant and may constitute the crime of Bail Jumping, pursuant to RCW 9A.76.170." Ex. 4. While this notice informed Fessel he was required to be present at court on March 21, 2013 subject to criminal penalty, this notice was not a court order that released Fessel.

Finally, exhibit 5 was a certified copy of clerk's minutes entry on March 21, 2013 that noted Fessel was not in custody and did not appear at the scheduled hearing. The minutes indicated a warrant was authorized. Ex. 5. Again, exhibit 5 cannot be construed as a court order that released

Fessel. The warrant authorized Fessel's arrest for failing to appear at the March 21, 2013 sentencing hearing. It did not establish that Fessel had been released by a court order.

Culver testified that Fessel's sentencing had been "set over" to allow him to take care of child care issues. RP 71. Culver maintained that Fessel had signed and also been given a copy of the memorandum of disposition, which showed when the next court hearing was scheduled. RP 72-74.

Riback also explained that Fessel had been given copies of the memorandum of disposition, and that Fessel was to appear in court on March 12, 2013. RP 100, 104. Riback could not recall whether Fessel appeared for court on March 12, 2013. RP 101. Riback said Fessel did not appear on March 12 or 21, 2013. RP 101, 104.

This was the sole extent of the evidence put forth by the State to prove the elements of bail jumping. Thus, the State's evidence showed only (1) a warning to Fessel that he needed to appear at all hearings, (2) minute entries and court orders that set forth new court hearing dates for sentencing, (3) and that a warrant was authorized for Fessel's failure to appear at the sentencing hearing. Even when viewed in the light most favorable to the State, no rational finder of fact could have found that this evidence established that Fessel had been released by court order.

Fessel also testified. He acknowledged he received copies of the memorandum of disposition and knew that he was required to appear in court on March 12, 2013. RP 132-33. Fessel's testimony did not establish he had been released by a court order.

Defense counsel pointed out this dearth of evidence to jurors during closing, arguing, "The State has the burden to prove everything beyond a reasonable doubt. Those elements aren't in there on a whim. That is the law, that's the State's burden, that's they system. They haven't given you any evidence that he [Fessel] was released by Court order." RP 175. Defense counsel explained that none of the exhibits submitted by the State showed Fessel had been released by court order. RP 173-76.

In rebuttal, the State was unable to point to any court order that released Fessel. Instead, the State argued the orders directed Fessel "what has to be done in the future." RP 176. The State maintained, "both of these orders indicate that failure to come back will result in potential bail jumping. That right there says these orders are directing what he's supposed to do on a given day." RP 176. The State's plea to jurors to presume it had proved all the elements of bail jumping demonstrates the State did not actually prove all the elements of bail jumping.

In returning a guilty verdict on bail jumping, the jury was left with no choice but to presume, as the State had asked, that a court order had released Fessel. But this presumption was not supported by the evidence. Outside of pure conjecture, there was not sufficient evidence to rationally conclude that Fessel had been released by a court order. Because the State failed to meet its burden of proof, this court must reverse the bail jumping convictions and remand for dismissal of the charges with prejudice. Hickman, 135 Wn.2d at 99.

b. The Trial Court Erred in Denying Fessel’s Motion to Arrest Judgment Where the State Failed to Present Sufficient Evidence.

Under CrR 7.4(a)(3), a defendant may bring a motion for arrest of judgment for “insufficiency of the proof of a material element of the crime.” In ruling on a motion to arrest judgment, the trial court does not weigh the evidence, but only examines the sufficiency thereof. State v. Coleman, 54 Wn. App. 742, 746, 775 P.2d 986 (sufficiency of the evidence is legally the same issue as insufficiency of the proof of a material element of the crime), rev. denied, 113 Wn.2d 1017 (1989). In reviewing a trial court’s decision on a motion for arrest of judgment, this Court applies the same standard as the trial court: that is, whether there is sufficient evidence that could support a verdict. State v. Longshore, 97 Wn. App. 144, 147, 982 P.2d 1191 (1999), aff’d, 141 Wn.2d 414, 5 P.3d

1256 (2000). Evidence is sufficient if any rational trier of fact viewing it most favorably to the State could have found the essential elements of the charged crime beyond a reasonable doubt. Id.

As discussed above, the State was required to prove Fessel had been released by a court order. Fessel's motion to arrest judgment centered on the State's failure to prove this essential element of bail jumping. CP 46-47; RP 190-95. For the reasons set forth above, the trial court erred by denying Fessel's motion to arrest judgment.

2. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT DENIED FESSEL A FAIR TRIAL.

The prosecutor misstated the law when she encouraged jurors to reject the affirmative defense of uncontrollable circumstances arguing the defense required something more than "just his [Fessel's] word." RP 177. This argument constitutes prejudicial misconduct, and violated Fessel's right to a fair trial.

a. Introduction to Applicable Law.

A prosecutor is a quasi-judicial officer who has a duty to ensure a defendant in a criminal prosecution is given a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Id.

Defendants are among the people the prosecutor represents and, therefore, the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Id. When a prosecutor commits misconduct, she may deny the accused a fair trial. Id.; U.S. Const. amend. 14; Wash. Const. art. 1, § 3.

“A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial.” State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). The prosecutor is therefore forbidden from appealing to the passions of the jury and thereby encouraging it to render a verdict based on emotion rather than properly admitted evidence. Viereck v. United States, 318 U.S. 236, 247-78, 63 S. Ct. 561, 87 L. Ed. 734 (1943); State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

In addition, a prosecutor who misstates the law of a case commits a serious irregularity that has the potential to mislead the jury. State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); State v. Walker, 164 Wn. App. 724, 736, 265 P.3d 191 (2011); see also State v. Estill, 80

Wn.2d 196, 199, 492 P.2d 1037 (1972) (arguments concerning questions of law must be confined to the instructions given by the court).

Prosecutorial misconduct violates the defendant's right to a fair trial and requires reversal of the conviction when the prosecutor's argument was improper misconduct and there is a substantial likelihood the misconduct affected the verdict. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). In general, arguments that have an inflammatory effect on the jury are not curable by instruction. State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158, rev. denied, 175 Wn.2d 1025 (2012)

- b. The Prosecutor's Argument that 'Uncontrollable Circumstances' Required Something More Than Just Fessel's 'Word' Was an Improper Misstatement of the Law.

The prosecutor may not misstate the law to the jury. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). A prosecutor's argument to the jury must be confined to the law stated in the trial court's instructions. Walker, 164 Wn. App. at 736. "A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury." Id. (citing Davenport, 100 Wn.2d at 764. When the prosecutor mischaracterizes the law and there is a substantial likelihood the misstatement affected the

verdict, the right to a fair trial is violated. Id. (citing State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988)).

Here, during rebuttal closing argument the prosecutor encouraged jurors to reject the affirmative defense of uncontrollable circumstances arguing the defense required something more than “just his [Fessel’s] word.” RP 177. This argument was a misstatement of the law.

It is an affirmative defense to the crime of bail jumping that “uncontrollable circumstances” prevented a defendant from appearing.

RCW 9A.76.170(2). “Uncontrollable circumstances” are defined as:

[A]n act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of a human being such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

RCW 9A.76.010(4).

Normally, affirmative defenses must be proved by the defendant by a preponderance of the evidence. State v. Camara, 113 Wn.2d 631, 639-40, 781 P.2d 483 (1989) (consent defense to rape); See also State v. Riker, 123 Wn.2d 351, 368, 869 P.2d 43 (1994) (“Generally, an affirmative defense which does not negate an element of the crime charged, but only excuses the conduct, should be proved by a preponderance of the evidence.”). This is so because generally,

affirmative defenses are uniquely within the defendant's knowledge and ability to establish. State v. Knapp, 54 Wn. App. 314, 320, 773 P.2d 134, rev. denied, 113 Wn.2d 1022 (1989).

A mere preponderance of the evidence denotes a quantum of proof less than clear, cogent, and convincing evidence, and proof beyond a reasonable doubt. Bland v. Mentor, 63 Wn.2d 150, 154, 385 P.2d 727 (1963). A preponderance may be established not necessarily, "by the greater number of witnesses testifying to a fact but by the evidence that has the most convincing force[.]" Black's Law Dictionary 1220 (8th Ed.).

In keeping with this standard of proof, defense counsel argued during closing argument that Fessel had demonstrated through his testimony that "uncontrollable circumstances" in the form of a car accident prevented his appearance in court on March 12, 2013. RP 169-72. Defense counsel argued Fessel's testimony was corroborated by Riback's testimony that Fessel showed him pictures of the damage to his car. RP 169-70. Defense counsel noted it was up to the jury to evaluate Fessel's credibility and determine, "whether or not you feel that by a preponderance you think that he [Fessel] got into an automobile accident that day." RP 169.

On rebuttal, the prosecutor encouraged the jury to reject the defense theory that a car accident prevented Fessel's personal appearance

at court because only Fessel testified to that fact. The prosecutor argued:

So the affirmative defense, I won't belabor it, I already talked about it a bit, but just in response, it's not just his word. Proving it by a preponderance doesn't – is not just that he says it, okay? He does have to prove it. Otherwise the affirmative defense would be he just says he was somewhere else.

RP 177.

Defense promptly objected on the basis the prosecutor was misstating the law. RP 177. The trial court told the prosecutor to proceed, explaining counsel's remarks were not evidence. RP 177.

The prosecutor is entitled to make a fair response to the arguments of defense counsel. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). The prosecutor's rebuttal response was not a fair one because it was a misstatement of the law. Under a preponderance of the evidence standard, how much evidence Fessel presented in support of this affirmative defense was irrelevant so long as the jury believed the evidence that Fessel did present.

The State cannot show, as it must, that the misconduct was harmless. Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). Statements made during closing argument are

presumably intended to influence the jury. State v. Reed, 102 Wn.2d 140, 146, 684 P.2d 699 (1984).

Under the prosecutor's erroneous version of the law, the fact that Fessel testified a car accident prevented his appearance in court was not sufficient to satisfy the affirmative defense. Jurors would be particularly tempted to follow the prosecutor's approach because her comments had the ring of truth. To a layperson, the prosecutor's explanation that an uncontrollable circumstances defense to bail jumping required something more than just the defendant's "word," sounds correct and provided a simple (albeit mistaken) way for jurors to decide guilt or innocence. This increased the odds jurors would convict Fessel of bail jumping rather than acquit him based upon his "uncontrollable circumstances" defense.

Moreover, the trial court legitimized the prosecutor's misstatement of the law by failing to rule on defense counsel's timely objection. Davenport, 100 Wn.2d at 764. The trial court's refusal to sustain defense counsel's objection all but endorsed the State's argument that Fessel's defense of uncontrollable circumstances could not stand.

Some misstatements of the law can be overlooked because they are relatively minor or so obvious that even lay jurors can act without prompting on the instruction to disregard any argument not supported by the court's instructions. But some misstatements are not so easily

dismissed, particularly those pertaining to the State's burden and proof requirements. See State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997) (argument that jury could only acquit if it found a witness was lying or mistaken misstated the State's burden of proof, was "flagrant and ill-intentioned," and required a new trial). This is particularly true in cases such as this, where credibility of witnesses is a central question. State v. Padilla, 69 Wn. App. 295, 302, 846 P.2d 564 (1993); see also Walker, 164 Wn. App. at 738 (finding mostly unobjected-to prosecutorial misconduct prejudicial because case was "largely a credibility contest").

Although jurors are instructed to disregard any argument not supported by the court's instructions, the problem is that the jury was in no position to determine whether the prosecutor's misstatement of the law was actually supported by the trial court's instructions. The prosecutor's arguments have a seductive attraction even though they are wrong. The harm in this case is that jurors concluded the prosecutor's misstatements of the law were consistent with the jury instructions and provided a convenient and understandable way to decide Fessel's guilt.

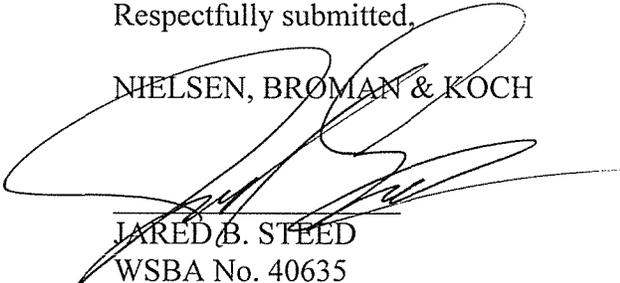
D. CONCLUSION

The State did not produce sufficient evidence to sustain Fessel's bail jumping convictions. Accordingly, Fessel asks this court to reverse his bail jumping convictions and remand for dismissal of those charges with prejudice. In the alternative, this court should reverse Fessel's convictions and remand for a new trial because prosecutorial misconduct deprived Fessel a fair trial.

DATED this 9th day of March, 2015.

Respectfully submitted,

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