

NO. 46516-7-II

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

STATE OF WASHINGTON, Respondent

v.

JUSTIN SCOTT FESSEL, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-00551-4

BRIEF OF RESPONDENT

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A. **RESPONSE TO ASSIGNMENTS OF ERROR**

I. **THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE JURY'S VERDICTS OF GUILTY ON BOTH COUNTS OF BAIL JUMPING.**

II. **THE PROSECUTOR DID NOT MISSTATE THE LAW, THEREBY COMMITTING PROSECUTORIAL ERROR IN COUNT II.**

B. **STATEMENT OF THE CASE**

Fessel was charged with, and pled guilty to, possession of a controlled substance. See Exhibit 1. He was permitted to remain on release and ordered to return to court on March 12, 2013, for sentencing. RP 70-71, Exhibit 1. Fessel signed the order to appear on March 12, 2013. Exhibit 1. Fessel did not appear for his sentencing hearing on March 12, 2013. RP 101, Exhibit 2. At that time, the court ordered a no bail warrant for Mr. Fessel. Exhibit 2. Mr. Fessel appeared in court on March 13, 2013. RP 102, Exhibit 3 and 4. At that appearance, Fessel was again released by the court, and ordered to return on March 21, 2013, for sentencing. Exhibit 3 and 4. Fessel signed the order to appear on March 21, 2013. Exhibit 4. Fessel again failed to appear at the March 21, 2013, hearing. RP 104, Exhibit 5.

Fessel was convicted of two counts of bail jumping. CP 38-39. Count I pertained to the failure to appear on March 21, 2013, and Count II

pertained to the failure to appear on March 12, 2013. CP 10. This timely appeal followed. CP 65.

C. **ARGUMENT**

I. **THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE JURY'S VERDICTS OF GUILTY ON BOTH COUNTS OF BAIL JUMPING.**

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. Amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn.App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If “any rational jury could find the essential elements of the crime beyond a reasonable doubt”, the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

“Criminal intent may be inferred from circumstantial evidence or from conduct, where the intent is plainly indicated as a matter of logical probability.” *State v. Billups*, 62 Wn.App. 122, 126, 813 P.2d 149 (1991), citing *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983) and *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The appellate court’s role does not include substituting its judgment for the jury’s by reweighing the credibility of witnesses or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "It is not necessary that [we] could find the defendant guilty. Rather, it is sufficient if a reasonable jury could come to this conclusion." *United States v. Enriquez-Estrada*, 999 F.2d 1355, 1358 (9th Cir. 1993) (overruled in part on other grounds, *United States v. Peterson*, 140 F.3d 819, 822 (9th Cir. 1998)), (quoting *United States v. Nicholson*, 677 F.2d 706, 708 (9th Cir. 1982)).

The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). “The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence.” *State v. Olinger*, 130 Wn.App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

“The elements of bail jumping are satisfied if the defendant (1) was held for, charged with, or convicted of a particular crime; (2) had 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); RCW 9A.76.170. The State presents sufficient evidence that the defendant had knowledge of the requirement of a subsequent personal appearance when it “prove[s]...the defendant] was given notice of his court date...” *State v. Carver*, 122 Wn.App. 300, 306, 93 P. 3d 947 (2004). Once a defendant has been charged by an underlying offense, the trial court retains jurisdiction over that person until the charge is dismissed or adjudicated. *Downing* at 193.

Here, the defendant pled guilty to possession of a controlled substance and was ordered to return to court for sentencing. His ability to remain free pending sentencing was by operation of the trial court’s grace, and he was released pending sentencing on his written promise to return to court. He was no longer presumed innocent and had a pending term of incarceration. He was impliedly under release by court order. When a defendant shows up for a required court appearance, he is under the court’s jurisdiction and not necessarily free to leave. He is only free to leave if the court allows it—after being informed of his next court appearance and signing a promise to appear. A court can remand a

defendant into custody or place additional conditions to ensure that the defendant returns at a future hearing.

In particular, with respect to the March 21, 2013, bail jump, the trial court ordered a no-bail hold on Mr. Fessel following his failure to appear on March 12, 2013. See Exhibit 2. On March 13, 2013, when he appeared in court, he was again released by the court and allowed to leave the courtroom based on his written promise to appear on March 21, 2013. See Exhibits 3 and 4. The evidence showed that Fessel “(1) was held for, charged with, or convicted of a particular crime; (2) had knowledge of the requirement of a subsequent personal appearance; and (3) failed to appear as required.” *Downing* at 192.

The evidence is sufficient to sustain the jury’s finding that Fessel committed two counts of bail jump.

II. THE PROSECUTOR DID NOT MISSTATE THE LAW, THEREBY COMMITTING PROSECUTORIAL ERROR IN COUNT II.

Fessel advances a claim of prosecutorial misconduct, alleged to have occurred during the prosecutor’s closing argument as to Count II (the March 12, 2013, bail jump). Fessel claims that the prosecutor misstated the law when, during closing argument, she said:

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.

“A defendant claiming prosecutorial misconduct on appeal must demonstrate that the prosecutor's conduct at trial was both improper and prejudicial.” *State v. Sakellis*, 164 Wn.App. 170, 183, 269 P.3d 1029, 1037 (2011), citing *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). When a prosecutor makes an objected to remark in closing, and the objection is not sustained and no curative instruction is sought or given, the defendant must show, on appeal, that the remark constituted misconduct and that the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. *State v. Anderson*, 153 Wn.App. 417, 427, 220 P.3d 1273 (2009) (citing *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984), *review denied*, 170 Wn.2d 1002, 245 P.3d 226 (2010)). If the defendant meets his burden of demonstrating misconduct that had a substantial likelihood of affecting the verdict, the inquiry ends. *Sakellis*, at 184. “Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *State v. Brett*, 126 Wn.2d 136, 174–75, 892 P.2d 29 (1995) (citing *State v. Hughes*, 106 Wn.2d 176, 195, 721 P.2d 902 (1986)); see also *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Courts review comments made by a prosecutor

during closing argument in “the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Here, the argument of the prosecutor, when viewed in context, shows that she was simply arguing to the jury that Fessel was not credible. She was not arguing to the jury that Fessel cannot provide competent evidence. Moreover, the jury was instructed that they are the sole judges of the credibility of witnesses. She urged the jury to reject Fessel’s stated excuse for missing court on March 12, 2013. Because Fessel testified, and offered a detailed account of the alleged car accident that prevented him from appearing in court on March 12, 2013, it was proper for the prosecutor to point out that he failed to provide any documentation to support his claim, despite such documentation being easily attainable. He failed to call the police after the accident. He failed to produce the pictures he allegedly took of his car after the accident. He made an inconsistent statement about what occurred during the accident. RP 129-135.

The prosecutor’s argument was not improper, and Fessel has not shown that even if it was, there was a *substantial likelihood* that the remark affected the jury’s verdict. During cross examination of Mr. Fessel, Fessel appeared to not be telling the truth. Fessel has not shown

that it was the prosecutor's remark, rather than his disastrous testimony, that compelled the jury's verdict in Count II. Fessel's claim lacks merit. And even if it were found to have merit, this claim only affects the verdict on the count in which the affirmative defense was raised—Count II. It would not affect the verdict as to Count I.

D. CONCLUSION

Fessel's convictions should be affirmed.

DATED this 10th day of June, 2015.

Respectfully submitted:

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