

No. 47161-2-II

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

STATE OF WASHINGTON, RESPONDENT

V.

ROSS CRANOR, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni. A. Sheldon, Judge

No. 13-1-00287-6

BRIEF OF RESPONDENT

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

1. Cranor contends that the trial court erred by denying his pretrial motion to sever his bail jumping charges from the underlying charges and that he was denied effective assistance of counsel because his attorney failed to renew the motion at or before the close of evidence, resulting a failure to preserve the issue for review. The State contends that counsel was not ineffective because counsel had a strategic or tactical incentive not to renew he motion; that Cranor has not shown that the trial court would have granted the motion if renewed; and, that Cranor has not shown prejudice, because the evidence was in any event insufficient to sustain his burden of proof on his affirmative defense.
2. Cranor contends that the prosecutor committed misconduct at closing argument by pointing out Cranor's the insufficiency of evidence to sustain Cranor's burden of proof for his affirmative defense. The State contends that the prosecutor's comment was not misconduct because: it was an accurate statement fact and law; it was fleeting and not flagrant or ill intentioned; and, Cranor cannot show prejudice because his affirmative defense was doomed to failure in any event because other elements of the defense lacked even any claim of evidence to sustain Cranor's burden of proof.
3. Cranor contends that his attorney provided ineffective assistance of counsel by failing to object to what Cranor has characterized as prosecutorial misconduct during closing arguments, as he alleges in item 2, above. The State contends that Cranor's claim on this point should fail because the prosecutor did not commit misconduct and because Cranor cannot show prejudice.

B. FACTS AND STATEMENT OF THE CASE

Marilyn and Scott Campbell, saw Cranor as he trespassed on their on private beach. RP Vol. I at 47-77. Both witnesses identified Cranor in open court. RP Vol. I at 46, 74. They testified that Cranor came to their house and used a telephone. RP Vol. I at 47-48, 74-75. A deputy sheriff later checked the phone number that Cranor called, which was stored in the Campbells' phone, and discovered that it was Cranor's own number. RP Vol. I at 156. After Cranor used their phone, the Campbells then watched Cranor as he returned to their private beach and began to load their possessions into a boat. RP Vol. I at 52-64, 76. After loading the Campbells' possessions into the boat, Cranor then began paddling away. RP Vol. I at 54, 76-77. The Campbells walked along the shoreline and tracked the boat as Cranor paddled away. RP Vol. I at 54, 77. When Cranor finally brought the boat ashore, Mr. Campbell saw cranor carrying three large, soft-sided bags. RP Vol. I at 78. Cranor warned Mr. Campbell to stay back, and he then escaped. RP Vol. I at 78.

A deputy sheriff and Mr. Campbell found numerous items of property with the boat that Cranor had abandoned. RP 80, 88, 137. It was later discovered that more than \$5,000.00 worth of the property that Cranor had abandoned with the boat had been stolen from a home owned

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by a Mr. Walgren, who testified and identified his property. RP 102-08, 111, 119, 137. The boat, also, had been stolen from Mr. Walgren. RP 105.

The Campbells have a cabana on their private beach. RP Vol I at 48-49, 79; Ex. 11. Inside their cabana they keep a barbeque grill with a cover on it stored up against a wall. RP Vol. I at 54-55, 88. While Cranor was loading the Campbell's possessions into the boat, Ms. Campbell watched Cranor go back and forth from the boat to the cabana. RP Vol. I at 64. The Campbells later discovered that the barbeque grill had been pushed up to the middle of the floor and that someone had been cooking on it. RP Vol. I at 54, 61, 69. The barbeque cover was missing from the cabana. RP Vol. I at 54-55, 88. The barbeque cover was found in the boat after Cranor abandoned it. RP Vol. I at 64-65, 80, 87-88, 96. The Campbells also kept a phonebook in the cabana, and after Cranor left they found the phonebook outside the cabana in a firepit. RP Vol. I at 55, 88-89, 90; Ex. 7.

The State initially charged Cranor with possession of stolen property in the first degree and with burglary in the second degree. CP 67-68. Prior to trial, however, Cranor failed to appear on two on occasions, for which the State filed an amended information and added

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two counts of bail jumping. CP 64-66; Ex. 33, 35, 36, 37, 38, 39, 40; RP Vol. I at 155-63.

C. ARGUMENT

1. Cranor contends that the trial court erred by denying his pretrial motion to sever his bail jumping charges from the underlying charges and that he was denied effective assistance of counsel because his attorney failed to renew the motion at or before the close of evidence, resulting a failure to preserve the issue for review. The State contends that counsel was not ineffective because counsel had a strategic or tactical incentive not to renew he motion; that Cranor has not shown that the trial court would have granted the motion if renewed; and, that Cranor has not shown prejudice, because the evidence was in any event insufficient to sustain his burden of proof on his affirmative defense.

A pretrial motion to sever charges in a multicount trial is waived if not renewed at or before the close of evidence at trial. CrR 4.4(a)(1); *State v. Henderson*, 48 Wn. App. 543, 551, 740 P.2d 329 (1987). Before any evidence was presented at trial in the instant case, Cranor made, and later renewed, a motion to separate two counts of bail jumping from his other charges, which included of one count of possession of stolen property in the first degree and one count of burglary in the second degree. CP 64-66; RP Supp. at 2-8; Vol. I at 2-6, 23-27. Other than an ambiguous allusion to

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the severance motion, Cranor's counsel did not renew the motion at or before the close of evidence. RP Vol. I at 122-23.

Cranor contends that the trial court should have severed the bail jumping charges from his other charges because, he alleges, during voir dire members of the jury panel exhibited bias or prejudice based on the bail jumping charges. Br. of Appellant at 14-17. But scrutiny of the trial transcript shows that only a handful of potential jurors actually expressed any negativity about the bail jumping allegations, and it does not appear that any of these jurors ended up on the jury panel that heard the trial. RP Supp. at 20-21, 27, 32-33, 39-43, 56, 90, 93-94, 130-44; CP Supplemental Sub #72-74, 79. Still more, Cranor accepted the jury as empaneled even though he had an unused peremptory challenge. RP Supp. at 145.

Cranor contends that the bail jumping charges were a surprise to him brought on the eve of trial. Br. of Appellant at 3. But the record reflects that the State informed Cranor of the holdback charges of bail jumping more than two months before trial. RP Supp. at 5. Nevertheless, when arguing for severance, on November 5, 2014, Cranor's attorney told the trial court that if "the State is going to actually bring those other two counts [of bail jumping,]" he would "need to get certified copies from Kitsap County" to support his proffered defense that Cranor was in jail in

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Kitsap County when he allegedly jumped bail in the instant case. RP Supp. at 1, 3; RP Vol. I at 2-3.

Cranor had opportunity prior to the close of evidence at trial to obtain the certified copies he said he needed. Court adjourned within minutes of Cranor's statement on November 5; the trial then resumed on the morning of November 6, 2014. RP Supp. 12, 13. Latter, the court adjourned "for the week" at 5:02 p.m. on Friday, November 7, 2014, and did not resume the trial until Wednesday, November 12. RP Vol. 1 at 71. Tuesday, November 11 was a holiday (Veteran's Day), but Monday was available to Cranor.

Next, Cranor contends that trying his bail jumping charges with his other charges arising out of the same case was unfair to him because "[t]o defend the bail jumping charge" he "would have to reveal he was in custody at the time." Br. of Appellant at 5. But the State contends that it was Cranor's tactical choice to reveal that he was in custody. For Cranor to defend against the bail jumping charges, Cranor would have had to show much more than that he was merely in custody in Kitsap County. It appears that Cranor had no defense, but hoped nevertheless to persuade the jury to acquit him merely because he was in jail in Kitsap County and therefore couldn't appear in Mason County.

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To successfully assert the “affirmative defense” provided by RCW 9A.76.170(2) Cranor was required to prove by a preponderance of evidence that “uncontrollable circumstances prevented [him] from appearing... and that [he] did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear...” Cranor presented no evidence to meet of his burden of proof that the circumstances were uncontrollable and that he did not recklessly contribute to the creation of those circumstances. In fact, the reason Cranor was in jail in Kitsap County is that he failed to appear in court in Kitsap County. RP Vol. I at 4. Cranor conceded this point and informed the trial court, as follows: “He [Cranor] bail jumped, as the Prosecutor indicated, in Kitsap County.” RP Vol. I at 4. Thus, Cranor could not meet his burden of proof for the “affirmative defense” to bail jumping provided by RCW 9A.76.170(2), because when he jumped bail in Kitsap County he did so in reckless disregard of the fact that he would likely be arrested for jumping bail in Kitsap County, which would lead to his missing court in Mason County.

Still more, it is doubtful that merely being in jail is an “uncontrollable circumstance” as statutorily defined for purposes of the statutory, RCW 9A.76.170(2), affirmative defense to bail jumping. As

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applied to the affirmative defense, the term “uncontrollable circumstances” is defined as follows:

“Uncontrollable circumstances” means an 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). A defendant who cannot attend court because he or she is in jail in a different county might deem it desirable that the statutory affirmative defense to bail jumping should include as a defense that the defendant was in jail in a different county, but strictly speaking, merely being in jail is not by itself an “uncontrollable circumstance” that gives rise to the statutory affirmative defense to bail jumping. *Id.*

Here, Cranor had no defense to the bail jumping charges – he ignored the statutory requirements for the affirmative defense. His only claim to a defense was that he was in jail in Kitsap County, but he offered no evidence on this point. Instead, Cranor relied on hearsay evidence embedded into exhibits admitted into the record by the State in order to argue an inference that he missed court in Mason County because he was in jail in Kitsap County. Tr. Ex. 40, 46; RP Vol. I at 160, 163, 164-65, 199. The embedded hearsay within one of these exhibits was an inference

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that counsel, himself, had appeared in court and informed the court that Cranor was in jail in Kitsap County. RP Vol. 1 at 165.

In closing argument, defense counsel told the jury that “this really seems to me to be more of a witch hunt than anything else.” RP Vol. I at 199. Cranor’s counsel argued that “the State presented evidence... that will indicate that yes, he did – in fact did have court, but he was in jail in Kitsap County.” RP Vol. I at 199. Counsel urged the jury as follows:

The fact he doesn’t testify, that can’t be held against him ‘cause he does not have the burden of proving anything. *The State presented our defense for the bail jumping charge; that he was incarcerated.* And made contact with the court even during the dates of his trial. Indicates that I was here and presenting that – the evidence, and the reason why – for his inability to be here. And so that is evidence. But that can’t be used against him. And to have a bias against him on the other charges would be inappropriate.

RP Vol. I at 200 (emphasis added). The State does not dispute that Cranor had no burden of proof or persuasion in regard to the State’s case in chief, but he did bear those burdens in regard to his affirmative defense of uncontrollable circumstances. *State v. Fredrick*, 123 Wn. App. 347, 353, 97 P.3d 47, 49 (2004); see also, *State v. Lively*, 130 Wn. 2d 1, 921 P.2d 1035 (1996).

Still more, in this arugment to the jury, defense counsel vouches for his own purported involvement in an earlier stage of the case as proof

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that his client was in jail. He told the jury, “I was here and presenting that – the evidence....” RP Vol. I at 200. When making this statement, defense counsel was apparently referring to trial exhibits 40 and 46 and to his earlier cross-examination of the court clerk through whom the State introduced these exhibits into evidence. RP Vol. I at 165. This portion of the cross examination is as follows:

BY MR. WARREN:

Q And thank you, Ms. Fogo. Going through your minutes, is there any indication as to why Mr. Cranor was not present for – for court?

A I think both the minutes that I had written personally indicated that he was in the Kitsap County Jail.

Q And people had – you’d been contacted, isn’t that correct, to learn that information?

A Either we had been contacted, the clerk’s office, or his counsel had been contacted and they indicated that during the hearing.

Q For example, I appeared and indicated to the Court?

A Correct.

RP Vol. I at 164-65. Defense counsel argued that the State’s exhibits were proof that Cranor was in jail in Kitsap County when he missed court in Mason County. RP Vol. I at 200. But even if the assertion that Cranor was in jail in Kitsap County is ultimately an accurate assertion, as a point

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of actual fact these exhibits proved only that the clerk said that someone said that Cranor was in jail in Kitsap County.

The State contends that these facts show that defense counsel had a tactical or strategic incentive to abstain from renewing the severance motion. First, regardless whether the bail jumping charges were severed from the other charges or were tried together with those charges, Cranor had no evidence with which to meet his burden of proof on the affirmative defense of uncontrollable circumstances. But despite the lack of evidence for each element of the affirmative defense, Cranor focused on the mere assertion that he was in jail, and from that assertion argued that the jury should acquit him on the bail jumping charges. RP Vol. I at 199-200.

If the court would have severed the bail jumping counts and tried them in a separate trial then Cranor would risk the exposure of the weaknesses in his assertion of an affirmative defense. Cranor would have had to prove that he was in jail in Kitsap County and that his being there constituted an uncontrollable circumstance to which he had not recklessly contributed. RCW 9A.76.170(2); *State v. Fredrick*, 123 Wn. App. 347, 353, 97 P.3d 47, 49 (2004). But by attempting such proof, Cranor would have opened the door to proof that the reason he was in the Kitsap County jail was that he had jumped bail on charges in Kitsap County. RP Vol. I at

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4. Thus, it would have been clear to a subsequent jury that Cranor recklessly contributed to his so-called uncontrollable circumstances.

On these facts the State contends that Cranor should not prevail on his claim of ineffective assistance of counsel. 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, 32-34, 246 P.3d 1260 (2011). Where there is deficient performance, to demonstrate prejudice the defendant 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).

Legitimate trial tactics are not deficient performance. *Grier*, 171 Wn.2d at 33. The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). "Deficient performance is not shown by matters that go to trial strategy or tactics."

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State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Here, Cranor's best chance for acquittal on the bail jumping charges was to go forward without severance. Regardless when the case would be tried, Cranor had no evidence to support all that was required of him when asserting the affirmative defense. RCW 9A.76.170(2); *State v. Fredrick*, 123 Wn. App. 347, 353, 97 P.3d 47, 49 (2004). But by going forward without severance Cranor managed to argue for acquittal based only upon his assertion that he was in jail, and he avoided the risk that the State would present evidence to refute Cranor's necessary assertion of "uncontrollable circumstances." RCW 9A.76.170(2).

Additionally, Cranor has not shown that the trial court would have granted a severance motion if he had renewed it, and he has not shown prejudice due to joinder. In order to demonstrate that his trial counsel was ineffective, Cranor must demonstrate that 1) a severance motion "would likely have been granted" and that 2) had the motion been granted, "there is a reasonable probability that the jury would not have found him guilty." *State v. Sutherby*, 165 Wn.2d 870, 884, 204 P.3d 916 (2009).

Washington courts disfavor severance. *State v. McDaniel*, 155 Wn. App. 829, 860, 230 P.3d 245 (2010). But severance is appropriate where "there is a risk that the jury will use the evidence of one crime to

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infer the defendant's guilt for another crime or to infer a general criminal disposition.” *Sutherby* at 883. Accordingly, CrR 4.4(b) provides that the trial court “shall grant a severance of offenses whenever ... the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.”

To determine whether severance is warranted, courts consider four factors:

(1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial.

Sutherby at 884–85 (quoting *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994)).

The first factor requires the reviewing court to evaluate the strength of the State's case for each charge. Where the State presents “strong [evidence] on each count, there is no necessity for the jury to base its finding of guilt on any one count on the strength of the evidence of another.” *State v. Bythrow*, 114 Wn.2d 713, 721–22, 790 P.2d 154 (1990).

i. Strength of the State's Evidence on Each Count

Here, the State presented strong evidence of each count. The evidence showed that two eyewitnesses,

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To prove count I, burglary in the second degree, the State had to prove that Cranor entered a building unlawfully with the intent to commit a crime. RCW 9A.52.030(1). Here, as the facts above show, the evidence was strong that Cranor entered the Campbells' cabana with the intent to commit theft.

To prove the count II, possession of stolen property in the first degree, the State was required to prove that Cranor knowingly possessed stolen property worth more than \$5,000.00, that he acted with knowledge that the property had been stolen, and that he withheld or appropriated the property to someone other than true owner. RCW 9A.56.150(1). Here, the evidence was strong that Cranor possessed a boatload of stolen property, that he did so knowingly while hauling it away, and that he withheld it up to the time that he was confronted by Mr. Campbell, at which point Cranor warned Mr. Campbell to stay back, and then fled. RP Vol. I at 78.

To prove each count of bail jumping in this case, the State was required to prove that Cranor was charged with class B felonies, burglary in the second degree and possession of stolen property in the first degree, that he had been released court order or admitted to bail with knowledge of the requirement to appear before the court, and that he failed to appear

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in court as required on July 22, 2013, and on May 27, 2014. RCW 9A.76.170. Strong evidence supported both of the charged counts of bail jumping. Ex. 33, 35, 36, 37, 38, 39, 40; RP Vol. I at 155-63.

ii. Clarity of the Defenses

The defendant bears the burden of showing “specific prejudice” from any possible antagonistic defenses. *State v. Grisby*, 97 Wn.2d 493, 507, 647 P.2d 6 (1982). Nothing about the charges or defenses in this case indicates the possibility of prejudice to Cranor. His apparent defense to the theft and burglary charges was apparently a general denial and mistaken identity. And, even though he presented no evidence to support the defense, his apparent defense to the bail jumping charges was the affirmative defense of uncontrollable circumstances. There was nothing antagonistic about these defenses.

iii. Jury Instructions

The third-factor examines the trial court's jury instructions. Here, the trial court instructed the jury that it “must decide each count separately” and that its “verdict on one count should not control [its] verdict on any other count.” CP 35. The reviewing court presumes that jurors follow the court’s instructions. *State v. Swan*, 114 Wn.2d 613, 661–

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62, 790 P.2d 610 (1990). Thus, this factor weighs against severance. See, *State v. McDaniel*, 155 Wn. App. 829, 861, 230 P.3d 245, 262 (2010).

iv. Cross-admissibility

The final factor looks to whether the evidence to support one charge was admissible on the others. Here, the fact that Cranor was charged with a class B felony was necessary to the proof for the charges of bail jumping. RCW 9A.76.170. Thus, the burglary and possession of stolen property charges were cross-admissible in the bail jumping charges. But the converse is not true, in that the bail jumping charges were not proof of the burglary and possession of stolen property charges.

However, our Supreme Court has held that severance is not automatically required when evidence of one count is not cross-admissible for another count. *State v. Bythrow*, 114 Wn.2d 713, 720, 790 P.2d 154 (1990). “In order to support a finding that the trial court abused its discretion in denying severance, the defendant must be able to point to specific prejudice.” *Id.* (citing *State v. Grisby*, 97 Wn.2d 493, 507, 647 P.2d 6 (1982), *cert. denied*, 459 U.S. 1211, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983)). Here, Cranor can point to no specific prejudice.

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v. Balancing the Severance Factors

Here, the State contends that balancing the factors used to determine the propriety of severance weighs plainly against it. Cranor has failed to show that the trial court would probably have granted the motion to sever if he had renewed it. Because Cranor cannot show that the trial court would have granted severance had counsel renewed the motion, his claim of ineffective assistance of counsel should fail. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

2. Cranor contends that the prosecutor committed misconduct at closing argument by pointing out Cranor's the insufficiency of evidence to sustain Cranor's burden of proof for his affirmative defense. The State contends that the prosecutor's comment was not misconduct because: it was an accurate statement fact and law; it was fleeting and not flagrant or ill intentioned; and, Cranor cannot show prejudice because his affirmative defense was doomed to failure in any event because other elements of the defense lacked even any claim of evidence to sustain Cranor's burden of proof.

Cranor contends that the prosecutor committed misconduct by pointing out to the jury that Cranor had not presented sufficient evidence to support his burden of proof to on his affirmative defense of uncontrollable circumstances as a defense to the charge of bail jumping. Br. of Appellant at 18-22. To prevail on a claim of prosecutorial

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misconduct, Cranor must establish that the prosecutor's conduct was “both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). If a defendant does not object to alleged misconduct at trial, the issue of prosecutorial misconduct is waived “unless the misconduct was ‘so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.’” *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006) (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)).

As discussed throughout this brief, the defense of “uncontrollable circumstances” is an affirmative defense to the charge of bail jumping, but to assert and prevail on the “affirmative defense” provided by RCW 9A.76.170(2), Cranor was required to prove by a preponderance of evidence that “uncontrollable circumstances prevented [him] from appearing... and that [he] did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear....” A careful review of the record shows that Cranor presented absolutely no evidence at trial to prove that he did not recklessly contribute to the circumstances that prevented him from appearing in court. Nor did Cranor

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present any evidence that he was hindered by “uncontrollable circumstances” as that term is defined by RCW 9A.76.010(4). Instead, at trial Cranor presented no evidence but relied on hearsay statements embedded in court documents as proof that he was in jail in Kitsap County when he did not appear in court in Mason County. While ignoring the fact that he bore the burden of proof on his affirmative defense – a defense that he voluntarily chose to assert but was under no obligation to assert – Cranor now argues that the prosecutor committed misconduct by pointing out Cranor’s failure to present sufficient evidence to carry his burden of proof.

In closing argument, the prosecutor argued, in part, as follows:

... I would also point out that there’s no evidence before you to consider to support this defense because it has to be an uncontrollable circumstance, okay, number one. Number two, the defendant did not contribute to the creation of such circumstances in a reckless disregard of the requirement to appear. You have no evidence about that, none whatsoever. It’s evidence you don’t have.

RP Vol. I at 198. In the defense closing argument that followed, Cranor’s counsel argued as follows:

We can start off with the bail jumping. He indicates that I’ve not – we have not presented any evidence as to bail jumping – or a defense to bail jumping. Well the State presented evidence, and you’ll get to have them in your Exhibits that – that will

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indicate that yes, he did – in fact did have court, but he was in jail in Kitsap County....

RP Vol. I at 199. In the State's final closing argument, the prosecutor then argued as follows:

... Well, there's an assertion that Mr. Cranor was in custody in Kitsap County jail on the days that he missed court. But that's just an assertion. No evidence has been provided to you of that.

Now more importantly, even if that were true, it's not a defense. Bottom line, look, in order for that to be a defense, he would have to be in jail in Kitsap County for something that didn't contribute to.

[Defense Counsel]: I would object your Honor.

[The Court]: It's argument, overruled.

[Prosecutor, resuming]: It indicates in the defense instruction that an uncontrollable circumstance prevented the defendant from personally appearing in court, and the defendant did not contribute to the creation of such circumstances in a reckless disregard of the requirement to appear.

It's evidence you don't have, plain and simple. And it's the defense's burden. If he was in custody in Kitsap County jail 'cause he didn't show up over there doesn't meet the defense. If he's in Kitsap County jail because he committed a new crime –

[Defense Counsel]: I would object, your Honor.

[Prosecutor]: -- doesn't fit the defense.

[Defense Counsel]: Not – arguing facts that are not in evidence.

[The Court]: Overruled, it's argument.

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[Prosecutor]: And they are facts not in evidence. It's evidence you don't have, and that's why they can't prove the defense. Even if you were to believe the assertion that he was in Kitsap County jail at the time.

RP Vol. I at 206-07. The prosecutor then went to argue points unrelated to the bail jumping charges. RP Vol. I at 207.

Cranor concedes that he had the burden of establishing his assertion of the affirmative defense by a preponderance of the evidence. Br. of Appellant at 22, citing *State v. Frederick*, 123 Wn. App. 347, 353-54, 97 P.3d 47 (2004). Yet, Cranor contends that the prosecutor committed misconduct by pointing out Cranor's failure to present evidence to meet his burden of proof. Br. of Appellant at 18-22.

After trial, with the luxury of hindsight while sitting in a quiet office with access to the internet and JIS, it might be easy enough to form strong suppositions about whether Cranor was in custody in Kitsap County when he failed to appear for court in Mason County; but, at trial, where Cranor bore the burden of proof on his asserted affirmative defense, he offered only willy-nilly evidence in the form of hearsay statements embedded in court documents to suggest the accuracy of his factual assertion that he was in the Kitsap County jail. This embedded hearsay did not prove that Cranor was in the Kitsap County jail; instead, it only

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proved that a court document stated that someone said that he was in the Kitsap County jail. The State contends that where Cranor bore the burden of proof, the prosecutor did not err by pointing out the insufficiency of the evidence to support Cranor's assertion of fact.

Still more, in the greater context of the prosecutor's and Cranor's closing arguments, the State contends that the prosecutor's comments were neither flagrant nor ill intentioned. Here, it was only in passing that the prosecutor pointed out the weakness in Cranor's assertion that he was in the Kitsap County jail. RP Vol. I at 206. The prosecutor's comment was short and fleeting, comprising only a few words. *Id.* The prosecutor then immediately moved on by commenting, "more importantly," and then began a more detailed argument where he emphasized the fact that Cranor had presented absolutely no evidence to satisfy other requirement of his asserted affirmative defense, such as that he had not recklessly contributed to the circumstance that prevented him from appearing in court. *Id.*

Finally, Cranor has not, and cannot, show prejudice. To qualify for the "uncontrollable circumstances" affirmative defense to bail jumping, Cranor bore the burden of proving by a preponderance of evidence that he did not contribute in reckless disregard to the circumstance that prevened his appearance in court. RCW 9A.76.170(2).

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But Cranor presented absolutely no evidence to meet his burden of proof on this point.

3. Cranor contends that his attorney provided ineffective assistance of counsel by failing to object to what Cranor has characterized as prosecutorial misconduct during closing arguments, as he alleges in item 2, above. The State contends that Cranor's claim on this point should fail because the prosecutor did not commit misconduct and because Cranor cannot show prejudice.

The State respectfully refers to Part 1, above, for briefing on the legal test for claims of ineffective assistance of counsel.

Here, the State contends that, first, it is unclear whether counsel did or did not object to what Cranor now characterizes as prosecutorial misconduct. As pointed out by quotations from closing arguments in Part 2, above, Cranor's trial counsel did interject with objections during the State's closing argument.

But in any event, the State contends that Cranor's claim of an affirmative defense was doomed in any event because he failed to meet his burden of proving that he had not recklessly contributed to the circumstance that he was claiming as an uncontrollable circumstance. For this reason, Cranor's ineffective assistance of counsel claim should fail

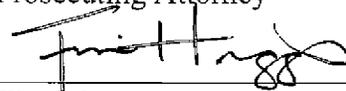
because he cannot show prejudice. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

D. CONCLUSION

The State asks that this Court deny Cranor's appeal, sustain his conviction, and return this case to the trial court for enforcement of the judgment and sentence.

DATED: October 7, 2015.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

MASON COUNTY PROSECUTOR

October 07, 2015 - 4:33 PM

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Case Name: State v. Ross Cranor

Court of Appeals Case Number: 47161-2

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MASON COUNTY PROSECUTOR

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

STATE OF WASHINGTON,)	
)	No. 47161-2-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
ROSS CRANOR,)	
)	
Appellant,)	
_____)	

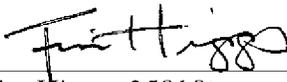
I, Tim Higgs, declare and state as follows:

On Wednesday, October 7, 2015, I deposited in the U.S. Mail,
postage properly prepaid, the documents related to the above cause number
and to which this declaration is attached, Brief of Respondent, to:

Jennifer Winkler
Nielson, Broman & Koch, PLLC
1908 E Madison St
Seattle, WA 98122-2842

I, Tim Higgs, declare under penalty of perjury of the laws of the
State of Washington that the foregoing information is true and correct.

Dated this 7th day of October, 2015, at Shelton, Washington.



Tim Higgs (25919)