

**NO. 49552-0-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**BRITT ANDERSON,**

**Appellant.**

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**RESPONDENT'S BRIEF**

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## I. ISSUE

1. Was it harmless error for the bail jump to-convict jury instruction to omit an essential element, specification of the underlying alleged crime, when that element was supported by uncontroverted evidence?

## II. SHORT ANSWER

1. Yes. It was harmless error for the bail jump to-convict jury instruction to omit an essential element, specification of the underlying alleged crime, because that element was supported by uncontroverted evidence.

## III. FACTS

On February 10, 2016, the appellant was in custody for his first appearance on an allegation of possession of stolen property in the first degree. The court found probable cause for the crime, imposed \$3,000 cash or secured bail, and ordered the appellant to appear for his arraignment on February 23, 2016. RP 3-5, 194-202, and 206.

Prior to his arraignment, the appellant posted bail and was released from custody on his case. RP 204-206.

On February 23, 2016, the appellant appeared for his arraignment and was charged by information with one count of possession of stolen property in the first degree. The court ordered the appellant to appear for pre-trial on 4/11/16, readiness hearing on 5/12/16, and jury trial on 5/16/16. The appellant signed a promise to appear for his three court dates. RP 87-90, 202, and 206-207.

On April 11, 2016, the appellant failed to appear for his pre-trial. The court noted the appellant's failure to appear and continued the case a day for the appellant to appear or have a warrant issued for his arrest. RP 91-94.

On April 12, 2016, the appellant appeared in court and the court did not issue a warrant for the appellant's arrest. RP 93.

On June 23, 2016, the State filed and the appellant was arraigned on a 3<sup>rd</sup> amended information. The 3<sup>rd</sup> amended information added one count of bail jumping, count II. RP 6-7 and 392.

On June 27, 2016, Judge Gary Bashor presided over the appellant's jury trial. The appellant was tried with his co-defendant, Samuel Skondin. RP 10-396. The appellant stipulated to his identity with regards to the bail jump charge. RP 48-49 and 192. The appellant did not object to the trial court's jury instructions for the bail jumping charge. RP 186-188 and 318-329.

The appellant did not transcribe the trial court reading the jury instructions to the jury, RP 330-331, and does not claim the trial court had failed to read the agreed upon jury instructions to the jury. Therefore, the State will assume the filed jury instructions were read to the jury for purpose of this appeal.

Instruction # 6 instructed the jury that “[a] separate crime is charged in each count. [The jury] must separately decide each count charged against each defendant. [The jury’s] verdict on one count as to one defendant should not control your verdict on any other count or as to any other defendant.”

Instruction # 9 instructed the jury that “[a] person knows or acts with knowledge with respect to a fact or circumstance when he is aware of that fact or circumstance. It is not necessary that the person know that the fact or circumstance is defined by law as being unlawful. If a person has information that would lead a reasonable person in the same situation to believe that facts exists, the jury is permitted but not required to find that he acted with knowledge or that fact.”

Instruction # 18 instructed the jury that “[a] person commits the crime of Bail Jumping when he fails to appear as required after 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 while charged with a Class B or C felony.”

Instruction # 19 instructed the jury that “[p]ossessing stolen property in the first degree is a class B felony.”

Instruction # 20 instructed the jury that “[i]t is a defense to a charge of bail jumping that: (1) uncontrollable circumstances prevented

the defendant from personally appearing in court; and (2) the defendant did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear; and (3) the defendant appeared as soon as such circumstances ceased to exist. For the purposes of this defense, an uncontrollable circumstance is 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 man 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. The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to the bail jump charge.”

Instruction # 21 instructed the jury that “[t]o convict the defendant, Britt Anderson, of the crime of Bail Jumping in count 2 of Cause No. 16-1-00216-9, each of the following elements of the crime must be proved beyond a reasonable doubt: (1) That on or about April 11, 2016, the defendant failed to appear before a court; (2) That the defendant was

charged with a class B or C felony; (3) That the defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court; and (4) That the acts occurred in the State of Washington. If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.”

On June 30, 2016, the jury found the appellant guilty of count 2, bail jumping, and was hung as to count 1, possessing stolen property in the first degree. RP 388-392 and 397.

On August 11, 2016, State elected no to retry the appellant with regards to the hung count 1, possessing stolen property in the first degree. RP 400.

On August 22, 2016, appellant was sentenced to 3 months jail for the bail jumping charge. RP 401-405.

The appellant now appeals his convictions for count 1 and count 2. The State does not respond to the issues raised by the appellant with regards to count 1 because the appellant was not convicted of count 1, the State abandoned its pursuit of count 1, and the issues raised regarding

count 1 are moot. The State only responds to the issue raised by the appellant with regards to count 2 because that was the lone count that he was found guilty of by the jury.

#### IV. ARGUMENT

**IT WAS HARMLESS ERROR FOR THE BAIL JUMP TO-CONVICT JURY INSTRUCTION TO OMIT AN ESSENTIAL ELEMENT, SPECIFICATION OF THE UNDERLYING ALLEGED CRIME, BECAUSE THAT ELEMENT WAS SUPPORTED BY UNCONTROVERTED EVIDENCE.**

“Generally, [the court] [reviews] a trial court’s choice of jury instructions for abuse of discretion. State v. Douglas, 128 Wash.App. 555, 561-62, 116 P.3d 1012 (2005). But we review de novo jury instructions challenged on an issue of law. State v. Lucky, 128 Wash.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds, State v. Berlin, 133 Wash.2d 541, 947 P.2d 700 (1997).

Jury instructions are sufficient if they (1) correctly state the law, (2) are not misleading, and (3) permit counsel to argue his or her theory of the case. State v. Mark, 94 Wash.2d 520, 526, 618 P.2d 73 (1980). The jury instructions read as a whole must make the relevant legal standards manifestly apparent to the average juror. State v. Walden, 131 Wash.2d 469, 473, 932 P.2d 1237 (1997).” State v. David, 134 Wash.App. 470,

483 (2006), State v. Soper, 135 Wash.App. 89, 101-102 (2006), State v. Pirtle, 127 Wash.2d 628, 656, 904 P.2d 245 (1995).

It appears that State v. Williams, 162 Wash.2d 177 (2007) and State v. Pope, 100 Wn.App. 624 (2000), make the specification of the underlying alleged crime an essential element of the crime of bail jumping. Therefore, elements of bail jumping are that defendant “(1) was held for, charged with, or convicted of a particular crime; (2) was released by court order or admitted to bail with the requirement of a subsequent personal appearance; and, (3) knowingly failed to appear as required.” Williams, 162 Wash.2d at 183-184.

The State must prove every element of an offense beyond a reasonable doubt and jury instructions must not relieve the State of its burden to prove every element. “A to-convict instruction must include all of the elements of a crime because it is the touchstone that a jury must use to determine guilty or innocence.” Id. at 186-187.

“[N]ot every omission or misstatement in a jury instruction relieves the State of its burden.” State v. Brown, 147 Wash.2d 330, 339 (2002). A constitutional error is harmless when it appears beyond a reasonable doubt that the alleged error did not contribute to the verdict. Applied to an omitted element in a jury instruction, an error is harmless if the element is supported by uncontroverted evidence. Id. at 348.

State v. Seabolt, 181 Wash.App. 1003 (2014), is an unpublished opinion filed on or after March 1, 2013, that is not binding authority, but may be accorded such persuasive value as the court deems appropriate under GR 14.1. In Seabolt, “the State charged Seabolt with unlawful possession of methamphetamine. Seabolt was present in court for a pretrial hearing on November 20, 2012, and was given notice of another hearing set for December 10, 2012. He did not appear in the courtroom on December 10, 2012. The State amended its information to add a charge of bail jumping. As to the bail jumping charge, the State proposed the following instructions:

Possession of a Controlled Substance (methamphetamine) is a class B or class C felony.

To convict the defendant of the crime of Bail Jumping as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt -

- (1) That on or about December 10, 2012, the defendant failed to appear before a court;
- (2) That the defendant was charged with a class B or class C felony;
- (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 the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighting all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.” Id. at 1.

Seabolt did not object to the to-convict instruction and the jury found him guilty of all charges. On appeal, Seabolt argued that the trial court erred in giving the to-conviction instruction as to the bail jumping charge because it omitted the essential element of the particular underlying crime. Id. at 1.

On appeal, this court noted that “the bail jumping to-convict instruction required the jury to find that Seabolt had been charged with a class B or class C felony. A separate instruction informed the jury that possession of controlled substances (methamphetamine) is a class B or class C felony. No evidence was presented as to any other controlled substance or any other class B or class C felony. In order to convict Seabolt of bail jumping, the jury necessarily had to find beyond a reasonable doubt that he had been charged with a class B or class C felony and that the particular class B or class C felony was possession of methamphetamine. Any error in the to-conviction instruction in omitting the particular crime Seabolt was charged with was harmless.” Id. at 2. Therefore, this court affirmed Seabolt’s bail jump conviction. Id. at 2-3.

With regards to the present case, we have the exact same scenario. The appellant did not object to the bail jump jury instructions at trial. Instruction # 19 instructed the jury that “[p]ossessing stolen property in the first degree is a class B felony.” Instruction # 21 instructed the jury that “[t]o convict the defendant, Britt Anderson, of the crime of Bail Jumping in count 2 of Cause No. 16-1-00216-9, each of the following elements of the crime must be proved beyond a reasonable doubt: (1) That on or about April 11, 2016, the defendant failed to appear before a court; (2) That the defendant was charged with a class B or C felony; (3) That the defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court; and (4) That the acts occurred in the State of Washington. If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.”

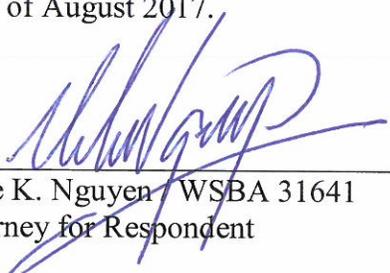
In order to convict the appellant of bail jumping, the jury necessarily had to find beyond a reasonable doubt that he had been charged with a class B or class C felony and that the particular class B felony was possessing stolen property in the first degree. Therefore, any

error in the to-conviction instruction in omitting the particular crime that the appellant was charged with was harmless because the omitted element was supported by uncontroverted evidence. Therefore, the appellant's conviction should be affirmed.

V. CONCLUSION

The appellant's appeal should be denied because it was harmless error for the bail jump to-convict jury instruction to omit an essential element, when that element was supported by uncontroverted evidence.

Respectfully submitted this 4<sup>th</sup> day of August 2017.



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Mike K. Nguyen / WSBA 31641  
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**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on August 7<sup>th</sup>, 2017.

Michelle Sasser  
Michelle Sasser

**COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE**

**August 07, 2017 - 3:56 PM**

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