

NO. 49866-9-II

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

STATE OF WASHINGTON
v.
TYRONE VANBUREN

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

The Honorable Sally F. Olsen, Judge

APPELLANT'S OPENING BRIEF

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR.....	1
Issues Presented on Appeal.....	1
B. STATEMENT OF THE CASE.....	1
C. ARGUMENT.....	4
1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT ALL OF THE ESSENTIAL ELEMENTS OF THE CRIME OF BAIL JUMPING.....	4
a. Due Process Proof Beyond a Reasonable Doubt.....	5
b. Bail Jumping.....	6
c. Statutory Construction.....	7
d. Rule of Lenity.....	10
2. VANBUREN WAS DENIED HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE.....	12
a. Right to Present Defense.....	12
b. Standard of Review.....	13
c. Bail Jumping Defense.....	13
d. No Legislative Intent to Supersede Common Law Necessity Defense.....	18

TABLE OF CONTENTS

	Page
3. VANBUREN WAS DENIED DUE PROCESS BY INEFFECTIVE ASSISTANCE OF COUNSEL.....	21
a. VanBuren Was Entitled To Common Law Necessity Defense.....	21
b. Ineffective Assistance of Counsel.....	22
c. Prejudicial Deficient Representation.....	24
D. CONCLUSION.....	28

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Berrocal v. Fernandez, 155 Wn.2d 585, 121 P.3d 82 (2005)..... 8

In re Pers. Restraint of Hubert, 138 Wn. App. 924, 158 P.3d 1282
(2007)..... 24, 25, 28

State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d
35, 593 P.2d 546 (1979)..... 10

State v. Aho, 137 Wn.2d 736, 975 P.2d 512 (1999) 23

State v. Anderson, 96 Wn.2d 739, 638 P.2d 1205 (1982) 6

State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983)..... 5

State v. Barnes, 153 Wn.2d 378, 103 P.3d 1219 (2005) 13

State v. Cross, 156 Wn.2d 580, 132 P.3d 80, *cert. denied*, 549 U.S.
1022 (2006) 22

State v. Diana, 24 Wn. App. 908, 604 P.2d 1312 (1979) . 14, 15, 16,
17, 18, 19, 20, 22

State v. Engel, 166 Wn.2d 572, 210 P.3d 1007 (2009) 6

State v. Ermert, 94 Wn.2d 839, 621 P.2d 121 (1980) 7

State v. Flora, 160 Wn. App. 549, 249 P.3d 188 (2011) 25, 28

State v. Foster, 140 Wn. App. 266, 166 P.3d 726, *review denied*,
162 Wn.2d 1007 (2007)..... 24

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 5

State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011)..... 22, 23

State v. Hamilton, 179 Wn. App. 870, 320 P.3d 142 (2014) .. 23, 26,
27, 28

State v. Harvill, 169 Wn.2d 254, 234 P.3d 1166 (2010)..... 13

State v. Hawkins, 157 Wn. App. 739, 238 P.3d 1226 (2010), *review
denied*, 171 Wn.2d 1013 (2011) 23

State v. Hayward, 152 Wn. App. 632, 217 P.3d 354 (2009) 20

State v. Jackson, 61 Wn. App. 86, 809 P.2d 221 (1991) 10

State v. Jeffry, 77 Wn. App. 222, 889 P.2d 956 (1995)..... 15

State v. Kintz, 169 Wn.2d 537, 238 P.3d 470 (2010)..... 5

TABLE OF AUTHORITIES

Page

WASHINGTON CASES, continued

<i>State v. Kurtz</i> , 178 Wn.2d 466, 309 P.3d 472 (2013) ..	18, 19, 20, 21
<i>State v. Lanphar</i> , 124 Wn. App. 669, 102 P.3d 864 (2004)	7, 11
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	22
<i>State v. Moore</i> , 7 Wn. App. 1, 499 P.2d 16 (1972).....	6
<i>State v. Nichols</i> , 161 Wn.2d 1, 162 P.3d 1122 (2007).....	23
<i>State v. O'Brien</i> , 164 Wn. App. 924, 267 P.3d 422 (2011)..	7, 10, 12
<i>State v. Powell</i> , 150 Wn. App. 139, 206 P.3d 703 (2009).....	24
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	23
<i>State v. Riles</i> , 135 Wn.2d 326, 957 P.2d 655 (1998).....	8
<i>State v. Sullivan</i> , 28 Wn. App. 29, 621 P.2d 212 (1980).....	10
<i>State v. Sutherby</i> , 165 Wn.2d 870, 204 P.3d 916 (2009).....	22
<i>State v. Valencia</i> , 169 Wn.2d 782, 239 P.3d 1059 (2010).....	8
<i>State v. Vela</i> , 100 Wn.2d 636, 673 P.2d 185 (1983).....	8, 9
<i>State v. Walker</i> , 136 Wn.2d 767, 996 P.2d 883 (1998).....	12
<i>State v. White</i> , 137 Wn. App. 227, 152 P.3d 364 (2007)	15, 17
<i>State v. Williams</i> , 132 Wn.2d 248, 937 P.2d 1052 (1997).....	13
<i>State v. Yokel</i> , 196 Wn. App. 424, 383 P.3d 619 (2015).....	12

FEDERAL CASES

<i>Hudson v. Louisiana</i> , 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981).....	6
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	5
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).....	5
<i>McBoyle v. United States</i> , 283 U.S. 25, 51 S.Ct. 340, 75 L.Ed. 816 (1931).....	7

TABLE OF AUTHORITIES

Page

FEDERAL CASES, continued

Roe v. Flores–Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) 23

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)..... 22, 24

RULES, STATUTES, AND OTHERS

11 Wash. Prac., Pattern Jury Instr. Crim. 18.02 (4th Ed) 19

Model Penal Code, section 3.02 15, 16, 22, 26

RCW 69.51.A 18

RCW 9A.04.020 9

RCW 9A.76 1, 7

RCW 9A.76.010 14

RCW 9A.76.170 1, 2, 5, 6, 13

U.S. Const. Amend. VI 6, 12, 21, 22

U.S. Const. Amend. XIV 5

Washington Constitution, art. I, § 22 12, 22

Washington Constitution, art. I, § 3 5

Washington Constitution, art. I, § 9 6

WPIC 18.02 14, 15, 17, 19, 28

WPIC 18.2 26

WPIC 19.17 2, 3, 12, 19, 20, 26

A. ASSIGNMENTS OF ERROR

1. The state failed to prove that VanBuren committed bail jumping as contemplated under RCW 9A.76.170(1).
2. VanBuren was denied his constitutional right to present a necessity defense.
3. VanBuren was denied effective assistance of counsel.

Issues Presented on Appeal

1. Did the state fail to prove beyond a reasonable doubt that VanBuren committed bail jumping by failing to appear 38 minutes late for a court date when RCW 9A.76 explains that this chapter addresses escape scenarios?
2. Was VanBuren denied his due process right to present a defense when the trial court suppressed all evidence related to VanBuren's reasons for arriving late, even though the reasons met the definition of necessity?
3. Was VanBuren denied effective assistance of counsel to his prejudice where trial counsel raised only the statutory defense to bail jumping, but the evidence supported the common law defense?

B. STATEMENT OF THE CASE

Tyrone VanBuren was charged with attempting to elude a police officer

and with two counts of bail jumping in violation of RCW 9A.76.170(1). CP 8-15. VanBuren was acquitted of the attempting to elude charge but convicted by a jury on the two counts of bail jumping. CP 78, 80-90; RP 333.

Pretrial, the state preemptively moved to suppress any evidence related to VanBuren's failure to appear so that he could not present a statutory or necessity defense. CP 16-20; RP 9, 11. VanBuren objected on grounds that he had a valid defense to bail jumping. RP 10-15.

VanBuren argued "uncontrollable circumstances" by explaining that his ride failed to show up on time for the October 5, 2016 hearing. RP 10-13. To avoid committing the crime of driving with a license suspended, VanBuren scrambled to get a disabled friend to take him to court, which resulted in VanBuren arriving 38 minutes late, and one minute after the jury was released. RP 10-13. Defense counsel named the statutory defense to be an "affirmative defense to bail jumping of uncontrollable circumstances". RP 10.

Counsel explained that WPIC 19.17 discussed

an act of man -- I believe that is the term it uses -- and it talks about an automobile accident and forcible things that may not apply here, but I think that could be read more broadly to include an act of man; in

essence, that Mr. VanBuren had assurances of transportation with someone else. Basically he was unable to get here without another person's assistance, and -- I mean, I would ask the Court to allow that information to be brought before the jury the time that he arrived and make the jury -- allow their determination on whether or not they believe that affirmative defense can be proved by a preponderance of the evidence.

RP 11-13.

Counsel presented the court with WPIC 19.17 in support of permitting the statutory defense. RP 11-13. The court reviewed WPIC 19.17 and granted the state's motion to suppress. RP 14-15.

I am reviewing the WPIC 19.17, the defense, and it's conceded by the defense in the first paragraph that acts of nature, such as flood, earthquake or fire or medical condition requiring hospitalization doesn't apply; or the sentence he is looking at is or an act of man, such as an automobile accident or threats of death, sexual attack or substantial bodily injury. The Court is not convinced that transportation equates to any serious defense or serious circumstances outlined in the WPIC, so I will deny --I will grant the State's motion because I don't feel that his ride didn't follow through meets the statutory definition of uncontrollable circumstances, so the motion is granted.

RP 14-15. On October 3, 2016, the trial court expressly admonished VanBruren to appear for court on October 4, 2016. Ex 22. VanBuren was present in court on October 4, 2016. At the end of the proceedings on

October 4, 2016, the court did not expressly admonish VanBuren to appear on October 5, 2016. In the morning of October 4, 2016, the court the clerk's minutes reflect the court admonishing VanBuren to be present during a brief court recess. Ex 22.

9:06 Court reviews timeline of trial and will be concluded on Thursday. The parties review witnesses to be called to testify.
9:07 Mr. Kibbe requests to name Thomas Van Buren as potential witness.
9:07 Court directs the defendant to remain in attendance.
9:08 Court is at recess until the jury is ready.
9:38 Court resumes.
9:38 Court calls for the jury panel.

Ex. 22.

At the end of the second day of trial, the court admonished VanBuren to appear the following morning at 9:00a.m. Ex 23. On October 5, 2016, Mr. VanBuren had not arrived by 9:09 a.m. Ex 22. Due to VanBuren's absence, the court dismissed the jury at 9:35. Ex 22. VanBuren entered the court room at 9:38a.m. Id.

This timely appeal follows. CP 93.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT ALL OF THE ESSENTIAL ELEMENTS OF THE CRIME OF BAIL JUMPING.

The state failed to prove that VanBuren failed to appear or surrender as contemplated under the Bail Jumping statute. RCW 9A.76.170(1) because Van Buren arrived 38 minutes late on the third day of trial. RP 56-59; Exhibit 22.

a. Due Process Proof Beyond a Reasonable Doubt.

As a part of the due process rights guaranteed under both the Washington Constitution, art. I, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

As the United States Supreme Court explained in *Winship*: "[the] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *Winship*, 397 U.S. at 364.

Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact

could find the essential elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

If substantial evidence does not support a finding that each and every element of the crime charged is proved beyond a reasonable doubt, then any remedy other than dismissal with prejudice violates a defendant's right under Washington Constitution, art. I, § 9 and United States Constitution, Sixth Amendment to be free from double jeopardy. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982); *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.*

b. Bail Jumping

The bail jumping statute, RCW 9A.76.170(1) provides:

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.

Id. Bail jumping is a form of escape." *State v. Lanphar*, 124 Wn. App. 669, 675, 102 P.3d 864 (2004). In the context of an "escape" the purpose of this statute is "to punish a person who has been released by court order and subsequently fails to appear or surrender as directed. *State v. O'Brien*, 164 Wn. App. 924, 929, 267 P.3d 422 (2011); *Lanphar*, 124 Wn. App. at 675. Chapter 9A.76 RCW is entitled "Obstructing Governmental Operation."

Procedural due process requires a criminal statute to give fair warning of prohibited conduct. *State v. Ermert*, 94 Wn.2d 839, 848, 621 P.2d 121 (1980). To make the warning fair, the line between permissible and prohibited conduct should be clear. *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816 (1931).

c. Statutory Construction

Our courts determined that the bail jumping statute is ambiguous and therefore subject to judicial interpretation for determining whether the statutory defense to bail jumping is an affirmative defense. *O'Brien*, 164

Wn. App. at 930. (holding after interpretation that statutory defense is not an affirmative defense). Because this statute is also ambiguous with regards to when a bail jumping is complete, it requires judicial interpretation. *Id.*

Interpretation of a statute is a question of law reviewed *de novo*. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). The goal of statutory construction is to ascertain and carry out legislative intent. *State v. Riles*, 135 Wn.2d 326, 340, 957 P.2d 655 (1998) (*abrogated on other grounds in State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010)). In construing intent, a statute should be interpreted sensibly. *State v. Vela*, 100 Wn.2d 636, 641, 673 P.2d 185 (1983).

A reading that results in unjust and absurd consequences must be avoided. *Vela*, 100 Wn.2d at 641; *Riles*, 135 Wn.2d at 340. The legislature declared its intent to punish people who fail to appear. The bail jumping statute does not specify at which point in time a person's lack of presence constitutes a "failure to appear as required." Was the crime of bail jumping complete at 8:30 a.m., 9:30 a.m., when the case was called to the calendar for the first time, when the calendar ended, or when the day ended?

Statutes defining criminal offenses are to be construed "[t]o forbid and prevent conduct that inflicts or threatens substantial harm to individual or public interests." RCW 9A.04.020(1)(a). A defendant who appears minutes late for trial cannot be said to have inflicted substantial harm to the public interest. Moreover, under such an interpretation, a defendant awaiting a trial and who arrived after the specified time could be guilty of bail jumping even though his case had not yet been called. Conviction under those circumstances would be senseless because it does not safeguard any public interest.

If being minutes late can subject a person to five years in prison, a person could be guilty of bail jumping if he mistimed a bathroom break, or arrived minutes or hours early but went outside to take a cigarette break when his case was called. This is not a sensible interpretation. *Vela*, 100 Wn.2d at 641.

Being late should be punished, but a fine to cover the jury costs would be more appropriate because being late does not comport with the legislative purpose of preventing the obstruction of government operation and results in the ridiculous cost to the public of years of incarceration.

To avoid absurd results, at bare minimum, this Court should read

the statute to provide for an outer time limit by which a defendant must appear on the day he is required to come to court. Finally, in addressing when the crime of bail jumping is complete, the rule of lenity must be applied in VanBuren's favor.

In *O'Brien*, the court analyzed the bail jumping and utilized the rule of lenity to determine that the statutory defense was not an affirmative defense the state was required to disprove. *O'Brien*, 164 Wn. App. at 930-32.

d. Rule of Lenity.

The rule of lenity requires that "any ambiguity in a statute must be resolved in favor of the defendant." *State ex rel. McDonald v. Whatcom County Dist. Court*, 92 Wn.2d 35, 37-38, 593 P.2d 546 (1979).

"The policy behind the rule of lenity is to place the burden squarely on the legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are." *State v. Jackson*, 61 Wn. App. 86, 93, 809 P.2d 221 (1991). "[A]ny doubts in construing a penal statute must be resolved against including borderline conduct." *State v. Sullivan*, 28 Wn. App. 29, 31, 621 P.2d 212 (1980). In the absence of clear legislative intent, the rule of lenity requires this Court

to resolve any ambiguity in the bail jumping statute against the state and in favor of VanBuren.

VanBuren was running late because his ride failed to appear. He was not escaping. Had VanBuren arrived one minute earlier, he would not have been charged or sentenced to 50 months of incarceration. VanBuren's extra one minute late after dismissing the jury cannot be fairly deemed to have obstructed the operation of government in any meaningful sense.

At most, VanBuren's late arrival would have been an inconvenience to the court because juries are often required to wait for innumerable reasons. It is apparent that the statutory phrase "failure to appear as required" cannot mean that a person is guilty of bail jumping if he is not present in court at the precise minute specified in a scheduling order.

Since, the statute does not explain when a bail jumping is complete; and being 38 minutes late does not fit within the notion of an "escape"; this Court should find that under the rule of lenity, VanBuren did not commit an act of escape. *Lanphar*, 124 Wn. App. at 675.

This Court should reverse and remand for dismissal with prejudice for failure to prove the elements of the crime beyond a reasonable doubt.

2. VANBUREN WAS DENIED HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE.

The trial court denied VanBuren's request to present a defense to bail jumping due to uncontrollable circumstances. RP 11-14. The trial court ruled that the statutory defense was not available because it did not fit the statutory definition under WPIC 19.17. RP 13-14. The court did not address whether the statutory defense supplanted the common "necessity defense". RP13-14.

a. Right to Present Defense.

The Sixth Amendment to the United States Constitution and Washington Constitution, art. I, § 22 guarantee a criminal defendant the right to present a defense to the crimes charged. A defendant has the right to present admissible evidence in his defense and must show the evidence is at least minimally relevant to the fact at issue in her case. *State v. Yokel*, 196 Wn. App. 424, 432, 383 P.3d 619 (2015).

This Court reviews a trial court's refusal to give a requested jury instruction de novo where the refusal is based on a ruling of law. *State v. Walker*, 136 Wn.2d 767, 772, 996 P.2d 883 (1998); *O'Brien*, 164 Wn. App. at 930-31. This court reviews a refusal based on factual reasons for an abuse of discretion. *Walker*, 136 Wn.2d at 771-72.

Jury instructions are adequate when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). A defendant is entitled to have the jury instructed on his theory of the case when evidence supports that theory. *State v. Williams*, 132 Wn.2d 248, 258-60, 937 P.2d 1052 (1997).

b. Standard of Review.

The defendant bears the burden of establishing each element of an affirmative defense by a preponderance of the evidence. *State v. Harvill*, 169 Wn.2d 254, 258, 234 P.3d 1166 (2010). This Court must reverse the trial court when the defendant establishes each element of the defense by a preponderance of the evidence and the trial court refuses to provide the instruction. *Williams*, 132 Wn.2d at 259-60.

c. Bail Jumping Defense.

RCW 9A.76.170(2) provides a statutory defense to the charge of bail jumping as follows:

(2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the

requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

Id. RCW 9A.76.010(4) provides the definition for “uncontrollable circumstances”:

“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.

(Emphasis added) RCW 9A.76.010(4). There are no cases that expressly hold that the criteria set forth in RCW 9A.76.010(4) is exclusive. The notes to the necessity defense set forth in WPIC 18.02 provide in relevant part:

“[N]ecessity is available as a defense when the physical forces of nature or the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law.” *State v. Diana*, 24 Wn. App. at 913. The defense is not available when the “physical forces of nature or the compelling circumstance have been brought about by the accused or where a legal alternative is available to the accused.” *State v. Diana*, 24 Wn. App. at 913-14.

WPIC 18.02 notes.

The statutory defense to bail jumping is based on the common law “necessity defense”. *State v. White*, 137 Wn. App. 227, 231, 152 P.3d 364 (2007). “It is available “when circumstances cause the [defendant] to take unlawful action in order to avoid a greater injury.” *White*, 137 Wn. App. at 231 (*quoting State v. Jeffrey*, 77 Wn. App. 222, 224, 889 P.2d 956 (1995)); WPIC 18.02. Like the statutory defense, the defendant must not have caused the threatened harm, and there must be no reasonable legal alternative to breaking the law. *Jeffrey*, 77 Wn. App. at 225.

In *White* the Court explained that “the statutory defense is a specific iteration of the principles underlying the necessity defense”. *White*, 137 Wn. App. at 231. The principles underlying the necessity defense were also set forth in *State v. Diana*, 24 Wn. App. 908, 915-16, 604 P.2d 1312 (1979) citing to the Model Penal Code.

The Model Penal Code, section 3.02- provides as follows:

Justification Generally: Choice of Evils.

(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

Diana, 24 Wn. App. at 914 (quoting Model Penal Code, section 3.02 Proposed Official Draft A, 1962). The current version of the Model Penal Code has not been altered since the 1962 version.

The notes to subsection 2 of the Model Penal Code explain that the defense is available when the defendant believes his actions are necessary to avoid a greater harm. *Id.*

(1), the actor's belief in the necessity of his conduct to avoid the contemplated harm is a sufficient basis for his assertion of the defense. Under Subsection (2), however, if the defendant was reckless or negligent in appraising the necessity for his conduct, the justification provided by this section is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability. The same provision is made for cases in which the defendant recklessly or negligently brings about the situation requiring the choice of evils.

Id.

The notes expressly provide that the necessity defense was available to VanBuren because he believed that he had to be late to avoid the greater evil of committing a crime. Id. Additionally, the specific situation involved in VanBuren's case is not specifically contemplated in the statutory defense and therefore may be raised as a common law defense. See the Comment to WPIC 18.02 (Defense—Necessity).

In *Diana*, the Court of Appeals permitted the defendant to present a medical necessity defense to possession of marijuana by offering expert opinion on the benefits of marijuana for Multiple Sclerosis. Id. The Court did not limit consideration of the necessity defense to only catastrophic events. *Diana*, 24 Wn. App. at 912-914.¹

¹ In *White*, the court discussed the lack of need to give both the common law necessity defense and the statutory affirmative defense but did not hold that the statutory defense superseded the common law defense. *White*, 137 Wn. App. at 231. The defendant therein failed to appear for a jail sentence due to his fear that the jail beds would aggravate his back. *White*, 137 Wn. App. at 232.

In ruling that White did not meet the criteria for the necessity defense, the court noted that White was not experiencing back pain when he failed to report to jail, he was given a special mattress when he was placed in custody, and White could have requested to see a doctor. *White*, 137 Wn. App. at 232. Under those circumstances, White did not establish that his failing to appear was necessary to avoid a greater harm. The

Since, *Diana*, the court has considered the viability of the common law necessity defense when marijuana is used for medical reasons. *State v. Kurtz*, 178 Wn.2d 466, 470-72, 309 P.3d 472 (2013) The Supreme Court held that when the legislature classified marijuana as a controlled substance, it did not eliminate the availability of the necessity defense. *Id.* The Court recognized that the “people passed Initiative 692, which was later codified in chapter 69.51.A RCW as the Act. The Act declared that the medical use of marijuana by qualifying patients is an affirmative defense to possession of marijuana.” *Kurtz*, 178 Wn.2d at 470.

The Court in *Kurtz* expressly held that the Act did not abrogate the common law necessity defense. *Kurtz*, 178 Wn.2d at 473. The Court explained that given the history of common law in Washington, it would not abrogate or derogate from common law “absent clear evidence from the legislature’s intent to deviate from common law.” *Id.*

d. No Legislative Intent to Supersede
Common Law Necessity Defense.

When the legislature amended the bail jumping statute to add a statutory defense, it did not express a clear legislative intent to abrogate or

Court in *White* did however consider the necessity defense rather than issuing a blanket denial.

derogate the common law necessity defense. *Id.* The WPIC 19.17, citing to *Diana*, 24 Wn. App. at 914, provides that when the bail jumping statute was amended to add a statutory defense, this defense “most likely supplants the common law defense of necessity.” *Id.*

WPIC 18.02 provides that under *Diana*, “Statutory defenses on necessity supersede the common law defense.” *Id.* WPIC 18.02 also cites to *Diana* and *Kurtz*, to require the courts analyze the legislative intent to determine if a statutory defense supersedes a common law defense. This is consistent with common law but not consistent with the WPICs that note without analysis, that the statutory defense to bail jumping supersedes the common law.

The WPIC’s are inconsistent stating that the statutory defense supersedes the common law and by requiring the courts to analyze legislative intent, which provides no express intent to supersede the common law defenses. WPIC 18.02; WPIC 19.17.

Regardless of this inconsistency, the WPIC does not provide precedential authority because – it is not legislatively derived but written by members of the Washington State Supreme Court Committee on Jury Instruction. 11 Wash. Prac., Pattern Jury Instr. Crim. 18.02 (4th Ed). “The

WPICs are not the law; they are merely persuasive authority.” *State v. Hayward*, 152 Wn. App. 632, 645-46, 217 P.3d 354 (2009).

When VanBuren arrived in court late due to uncontrollable circumstances beyond his control, he correctly determined that it was better to be late for court than to commit the crime of DWLS. This criteria fits the criteria for a necessity defense because VanBuren did not contribute to the reasons for his delayed appearance in court. *Diana*, 24 Wn. App. at 914.

VanBuren’s situation did not involve a determination of whether the statutory defense to medical marijuana superseded the common law defense issue as in *Diana* and *Kurtz*, but these cases and the Model Penal Code provide that since there is no clear legislative intent to eliminate the common law defense to bail jumping, the trial court erred and abused its discretion in denying VanBuren his right to present a defense. *Kurtz*, 178 Wn.2d at 473.

Here, the trial court did not understand the common law necessity defense as a means to understand and interpret the statutory defense. The court just reviewed WPIC 19.17 to determine that Van Buren was not entitled to the statutory defense because VanBuren’s reasons for being

late did not squarely fall within the WPIC 19.17.

The WPIC's however do not represent legislative intent and are therefore inherently inadequate as a basis for the trial court to deny a defense to bail jumping RP 14-15. The trial court erred in denying VanBuren his right to present a defense under the reasoning in *Kurtz*, because the common law defense was available to avoid the greater harm of committing the crime of driving with a suspended license.

3. VANBUREN WAS DENIED DUE PROCESS
BY INEFFECTIVE ASSISTANCE OF
COUNSEL.

If counsel's response to the state's motion to suppress is determined not to include a request for the common law necessity defense, counsel was ineffective for failing to request this defense. VanBuren was denied his Sixth Amendment right to effective assistance of counsel by his attorney's failure to request as common law defense to bail jumping after the court rejected the statutory defense to bail jumping.

a. VanBuren Was Entitled To Common
Law Necessity Defense.

VanBuren was entitled to the common law necessity defense because his situation met the criteria for the necessity defense. When

VanBuren arrived in court late due to uncontrollable circumstances beyond his control, he correctly believed that it was better to be late for court than to commit the crime of DWLS. These facts fit the criteria for a necessity defense. *Diana*, 24 Wn. App. at 914; Model Penal Code (notes to subsection 2).

b. Ineffective Assistance of Counsel.

The standard of review for a challenge to the effective assistance of counsel is de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006). A defendant has an absolute right to effective assistance of counsel in criminal proceedings. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011); *Strickland v. Washington*, 466 U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Sixth Amendment to the U.S. Constitution and art. I, § 22.

While counsel is presumed effective, this presumption is overcome where the defendant establishes that (1) defense counsel's representation was deficient; falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

More than the mere presence of an attorney is required. *State v. Hawkins*, 157 Wn. App. 739, 747, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *Grier*, 171 Wn.2d at 33 (citing, *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)); *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999); *State v. Hamilton*, 179 Wn. App. 870, 879-80, 320 P.3d 142 (2014).

Trial strategies and tactics are thus **not** immune from attack on grounds of ineffective assistance of counsel. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Prejudice is established if the defendant can show that “there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.” *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If a party fails to satisfy one

element, a reviewing court need not consider both *Strickland* prongs. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726, review denied, 162 Wn.2d 1007 (2007).

c. Prejudicial Deficient Representation.

Failure to request an instruction on a potential defense can constitute ineffective assistance of counsel. *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). Counsel's performance is not deficient if the defendant would not have received a proposed instruction. *State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009).

In *Hubert*, the defendant was charged with "second degree rape under that part of the statute criminalizing sex with a person who is incapable of consent by reason of being physically helpless." *Hubert*, 138 Wn. App.at 927. An affirmative defense to this charge is that the defendant reasonably believed that the person was capable of consent. *Hubert*, 138 Wn. App.at 929.

Hubert testified that he believed that the alleged victim was awake during the sexual encounter. *Id.* Despite this evidence, Hubert's attorney did not raise the affirmative defense. *Id.* Further, his attorney admitted that

he “‘was not familiar’ with the statutory defense until Hubert’s appellate counsel brought it to his attention.” *Id.* The Court concluded that “[c]ounsel’s failure to discover and advance the defense was plainly deficient performance.” *Hubert*, 138 Wn. App. at 930.

Hubert’s counsel failed to identify and present the sole available defense to the charged crime, despite the fact that there was evidence to support that defense. *Hubert*, 138 Wn. App. at 932. The Court concluded that Hubert was denied effective assistance of counsel as a result of this failure and the resulting prejudice. *Id.*

Hubert instructs that when counsel does not request a needed instruction, performance is deficient, and when there is evidence to support the instruction, the defendant is prejudiced. In *Flora*, the Court explained that in an attempting to elude case when the night is “dark and rainy”, that evidence is sufficient to require a jury instruction on the definition of “willfully” because a jury could have believed that under such circumstances, the driver did not act knowingly under the circumstances. *State v. Flora*, 160 Wn. App. 549, 555-56, 249 P.3d 188 (2011).

Like the scenarios in *Flora*, and *Hubert*, here, there was evidence to support the necessity instruction, counsel failed to research and fully

understand the distinctions between the necessity defense and the statutory defense, had had counsel proposed the instruction, court would likely have offered the instruction and the jury could have believed VanBuren.

There was no tactical reason to fail to present the required defenses. Here the necessity defense was available to VanBuren because the notes to the Model Penal Code 3.2 provide that under the circumstances present in this case, VanBuren avoided a greater evil by choosing to be later rather than committing a crime.

Had counsel researched and explained to the trial court, the law on necessity defense and presented WPIC 18.2 in addition to WPIC 19.17, he would have been able to establish that VanBuren was eligible for the necessity defense. Counsel's failure to discover and advance the necessity defense was plainly deficient performance that prejudiced VanBuren.

Hamilton, 179 Wn. App. at 882 is also instructive. A defendant is prejudiced when counsel fails to make a motion to suppress prejudicial, inadmissible evidence that would have been suppressed. *Hamilton*, 179 Wn. App. at 882. In *Hamilton*, trial counsel moved to evidence found in a

purse that Hamilton's husband retrieved from their joint home, suppress based on a warrantless home entry. *Hamilton*, 179 Wn. App. at 876-77. Counsel did not move to suppress based on an unlawful warrantless search of the purse. *Id.*

The police did not have a warrant to search Hamilton's home or her purse and there were no exigent circumstances. *Hamilton*, 179 Wn. App. at 879-80. Hamilton did not consent to her husband removing the purse from the home, there was no evidence of abandonment, and Hamilton alone had the power to consent to the search, not her husband. *Id.*

The Court held that "these facts give rise to a valid argument for suppression based on an unlawful warrantless search of a purse in which Hamilton had an expectation of privacy." *Hamilton*, 179 Wn. App. at 880. In finding prejudice, the Court explained that "[m]oving to suppress the evidence would not have involved any risk to Hamilton. *Id.* If she prevailed, the charges would be dismissed. If the motion was denied, she could proceed to trial." *Id.*

The Court reversed and dismissed Hamilton's conviction because there was no tactical reason to fail to move to suppress the search of the purse, there was no risk to Hamilton and she would likely have prevailed

on a motion to suppress. *Hamilton*, 179 Wn. App. at 888.

In this case, VanBuren argued against a motion to suppress rather than in favor of a motion to dismiss. This difference is of no consequence because here as in *Hamilton*, there was no tactical reason to raise only one of two available defenses. There was no risk to VanBuren, and there was a reasonable probability the outcome would have differed if counsel had expressly requested the common law necessity defense because VanBuren did not contribute to the pressure of the circumstances, and believed in the necessity of his conduct to avoid the greater harm WPIC 18.02 notes.

Here as in *Hamilton*, *Hubert* and *Flora*, counsel's performance was deficient and prejudicial because had counsel raised the defense the court likely would have given the necessity defense instruction. *Hamilton*, 179 Wn. App. at 888; *Flora*, 160 Wn. App. at 549; *Hubert*, 138 Wn. App. at 930.

The remedy is to remand for a new trial. *Flora*, 160 Wn. App. at 556.

D. CONCLUSION

Tyrone VanBuren respectfully requests this Court reverse his

convictions and remand for dismissal with prejudice based on insufficient evidence. In the alternative, Mr. VanBuren requests this court remand for a new trial based on denial of the right to present a defense and /or based on ineffective assistance of counsel.

DATED this 20th day of June 2017.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Petitioner

I, Lise Ellner, a person over the age of 18 years of age, served the Kitsap County Prosecutor at kcpa@co.kitsap.wa.us and Tyrone VanBuren, c/o Kitsap County Jail, 614 Division MS-33, Port Orchard, WA 98366 a true copy of the document to which this certificate is affixed, on June 20, 2017. Service was made electronically to the prosecutor and via U.S. Mail to Tyrone VanBuren.



Signature

LAW OFFICES OF LISE ELLNER

June 20, 2017 - 1:58 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49866-9
Appellate Court Case Title: State of Washington, Respondent v. Tyrone Vashon Van Buren
Superior Court Case Number: 16-1-00396-4

The following documents have been uploaded:

- 4-498669_Briefs_20170620135745D2755780_0837.pdf
This File Contains:
Briefs - Appellants
The Original File Name was VanBuren AOB .pdf
- 4-498669_Designation_of_Clerks_Papers_20170620135745D2755780_4391.pdf
This File Contains:
Designation of Clerks Papers - Modifier: Supplemental
The Original File Name was VanBuren Supplemental Designation of Clerks Papers.pdf

A copy of the uploaded files will be sent to:

- kcpa@co.kitsap.wa.us
- rsutton@co.kitsap.wa.us

Comments:

Sender Name: Lise Ellner - Email: liseellnerlaw@comcast.net
Address:
PO BOX 2711
VASHON, WA, 98070-2711
Phone: 206-930-1090

Note: The Filing Id is 20170620135745D2755780