

NO. 49866-9-II

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

---

STATE OF WASHINGTON,

Respondent,

v.

TYRONE VASHON VAN BUREN,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 16-1-00396-4

---

BRIEF OF RESPONDENT

---

TINA R. ROBINSON  
Prosecuting Attorney

JOHN L. CROSS  
Deputy Prosecuting Attorney

614 Division Street  
Port Orchard, WA 98366  
(360) 337-7174

**SERVICE**

Lise Ellner  
Po Box 2711  
Vashon, Wa 98070-2711  
Email: liseellnerlaw@comcast.net

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED August 9, 2017, Port Orchard, WA Made C. Kiani  
**Original e-filed at the Court of Appeals; Copy to counsel listed at left.**  
**Office ID #91103 kcpa@co.kitsap.wa.us**

**TABLE OF CONTENTS**

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

    A. PROCEDURAL HISTORY.....1

    B. FACTS .....4

III. ARGUMENT .....5

    A. THERE WAS SUFFICIENT EVIDENCE OF THE ELEMENTS OF BAIL JUMPING AND THE BAIL JUMPING STATUTE IS NEITHER AMBIGUOUS NOR VAUGE AND IS NEITHER AMBIGUOUS NOR VAGUE AS APPLIED TO VAN BUREN’S CASE.....5

        1. The offense of bail jumping is complete at the point in time a defendant fails to appear. ....10

    B. THE REQUISITES OF THE STATUTORY DEFENSE OF UNCONTROLLABLE CIRCUMSTANCES WERE NOT MET AND THE NECESSITY DEFENSE IS INAPPLICABLE. ....16

        1. The necessity defense is unavailable both as a matter of law and as a matter of fact. ....18

        2. The statutory defense was properly denied.....21

    C. COUNSEL WAS NOT INEFFECTIVE BECAUSE VAN BUREN WAS NOT ENTITLED TO THE DEFENSE THAT HE ALLEGES COUNSEL FAILED TO ADVANCE. ....25

IV. CONCLUSION.....27

## TABLE OF AUTHORITIES

### CASES

<i>State v. Jeffrey</i> , 77 Wash.App. 222, 889 P.2d 956 (1995).....	18
<i>Beauharnais v. Illinois</i> , 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952).....	8
<i>City of Seattle v. Eze</i> , 111 Wn.2de 22, 759 P.2d 366 (1988) .....	8
<i>City of Spokane v. Douglass</i> , 115 Wn.2d 171, 795 P.2d 693 (1990).....	8
<i>In re Rice</i> , 118 Wn.2d 876, 828 P.2d 1086 (1992).....	26
<i>In re Welfare of A.W.</i> , 182 Wn.2d 689, 344 P.3d 1186 (2015).....	6
<i>Merriman v. Cokeley</i> , 168 Wn.2d 627, 230 P.ed 162 (2010) .....	22
<i>Sch. Dist. ' All. for Adequate Funding of Special Educ. v. State</i> , 170 Wn.2d 599, 244 P.3d 1 (2010).....	passim
<i>State v. Ager</i> , 128 Wn.2d 85, 904 P.2d 715 (1995).....	22
<i>State v. Allenbach</i> , 136 Wn. App. 95, 147 P.3d 644 (2006).....	8
<i>State v. Carver</i> , 122 Wn. App. 300, 93 P.3d 947 (2004).....	23
<i>State v. Clark</i> , 185 Wn. App. 1014 (2014), <i>rev. denied</i> , 182 Wn.2d 1027 (2015).....	14, 15, 18, 19
<i>State v. Coleman</i> , 155 Wn. App. 951, 231 P.3d 212 (2010).....	13
<i>State v. Coucil</i> , 170 Wn.2d 704, 245 P.3d 222 (2010).....	7, 12
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	6
<i>State v. Diana</i> , 24 Wash.App. 908, 604 P.2d 1312 (1979).....	18
<i>State v. Dixon</i> , 78 Wn.2d 796, 479 P.2d 931 (1971).....	8
<i>State v. Evans</i> , 164 Wn. App. 629, 265 P.3d 179 (2011).....	8
<i>State v. Fredrick</i> , 123 Wn.App. 347, 97 P.3d 47 (2004) .....	23

<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	6
<i>State v. Hart</i> , 195 Wn. App. 449, 381 P.3d 142 (2016), <i>rev denied</i> , 187 Wn.2d 1011 (2017).....	13, 14
<i>State v. Harvill</i> , 169 Wn.2d 254, 234 P.3d 1166 (2010).....	19
<i>State v. Hudlow</i> , 99 Wn.2d 1, 659 P.2d 514 (1983).....	22
<i>State v. Hughes</i> , 106 Wn.2d 176, 721 P.2d 902 (1986).....	22
<i>State v. Jacobs</i> , 154 Wn.2d 596, 115 P.3d 281 (2005).....	7
<i>State v. Koch</i> , 157 Wn. App. 20, 237 P.3d 287 (2010), <i>rev. denied</i> , 170 Wn.2d 1022 (2011).....	22
<i>State v. Lord</i> , 117 Wn.2d 829, 822 P.2d 177 (1991), <i>cert. denied</i> , 506 U.S. 856 (1992).....	25
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	26
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	25
<i>State v. Moles</i> , 130 Wn. App. 461, 123 P.3d 132 (2005).....	6
<i>State v. O'Brien</i> , 164 Wn.App. 924, 267 P.3d 422 (2011).....	14
<i>State v. Olson</i> , 182 Wn. App. 362, 329 P.3d 121 (2014).....	26
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995), <i>cert. denied</i> , 518 U.S. 1026 (1996).....	6
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	6
<i>State v. Scoby</i> , 117 Wn.2d 55, 810 P.2d 1358 (1991).....	6
<i>State v. Walker</i> , 136 Wn.2d 767, 996 P.2d 883 (1998).....	23
<i>State v. Walton</i> , 64 Wn. App. 410, 824 P.2d 533 (1992).....	6
<i>State v. White</i> , 137 Wn. App. 227, 152 P.3d 364 (2007).....	18
<i>State v. White</i> ,	

80 Wn. App. 406, 907 P.2d 310 (1995).....	25
<i>Strickland v. Washington</i> ,	
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	25, 26

**STATUTORY AUTHORITIES**

RCW 9A.76.010 (4).....	17
RCW 9A.76.010(4).....	18
RCW 9A.76.170.....	12, 14, 17
RCW 9A.76.170 (2).....	16
RCW 9A.76.170(1).....	9
RCW 9A.76.170(2).....	3, 18

**ADDITIONAL AUTHORITIES**

, <a href="https://mirriam-webster.com">https://mirriam-webster.com</a> .....	24
---	----

## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the state proved the charge of bail jumping beyond a reasonable doubt?

2. Whether the trial court properly ruled that Van Buren did not establish his entitlement to either the statutory bail jumping defense or the defense of necessity?

3. Whether counsel was ineffective for not asserting a necessity defense to a bail jumping charge?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Tyrone Vashon Van Buren was originally charged by information filed in Kitsap County Superior Court with attempting to elude a pursuing police vehicle. CP 1. During the pendency of the case, Van Buren failed to appear for a hearing and a first amended information was filed adding bail jump as a second count. CP 8. The case went to trial under a third amended information with a second count of bail jumping added due to Van Buren's second failure to appear. CP 30.

After various continuances and delays, the first attempt at trial of the matter commenced on October 3, 2016. Supp. CP 102 (exhibit 22). The trial court ordered Van Buren to return at 9:00 am the next day to

continue trial and Van Buren appeared as ordered. *Id.* Again, on October 4, 2016, the trial court ordered the parties to appear the next day to continue trial. Supp. CP 102 (exhibit 22) (“11:51 Court at recess until tomorrow at 9:00 am.”). Specifically, the trial court responded to the prosecutor’s question “opening at nine o’clock?” with “Yes.” Supp. CP 110 (exhibit 23). Then, a moment later, Van Buren asked “so be here at nine o’clock?” to which the trial court responded “Yes,” adding “So yes, you need to be back here—Mr. Van Buren, make sure you coordinate with your attorney, but I expect we will get started in court at nine o’clock here.” *Id.*

On October 5, the clerk’s minutes recite that at 9:09 a.m. Van Buren was not present in court. Supp. CP 107 (exhibit 22). The minutes tell that the trial court took a recess and resumed at 9:26 a.m. at which time Van Buren was still not present. *Id.* At 9:35 a.m., the trial court dismissed the jury. *Id.* At 9:38, Van Buren arrived. *Id.* This situation occasioned the second count of bail jumping in the third amended information.

After difficulty with the jury pool and witness scheduling, the second trial commenced on November 28, 2016 but was placed in recess until the recommencing on December 2, 2016. RP 1-7; 9. In limine, Van Buren sought to defend the October 5, 2016 bail jumping charge by the

statutory affirmative defense of “uncontrollable circumstances.”<sup>1</sup> RP 10-13. Van Buren asserted a jury instruction on that defense.<sup>2</sup> RP 11. The state sought to avoid that defense, moving in limine on October 4, 2016, to exclude reference to the quashing of the warrant and the number of times Van Buren had appeared as ordered. CP 20 (motion number 14). On December 12, 2016, the state’s motion regarding the bail jumping defense was supplemented asking the trial court to extend its previous ruling to the October 5 bail jumping count and extend that ruling to exclude “what happened after the failure to appear,” including the releasing of the jury and the issuance of the bench warrant. CP 38. The state asked that Van Buren make an offer of proof regarding the affirmative defense. Id.

That offer of proof was made: Van Buren asserted through counsel that his ride had not shown up to take him to court and he, Van Buren, had a suspended driver’s license so he could not drive himself. RP 12-13. The trial court, on December 12, ruled that

The court is not convinced that transportation equates to any serious defense or serious circumstance outlined in the WPIC [WPIC 19.17] 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.

---

<sup>1</sup> RCW 9A.76.170(2).

<sup>2</sup> Washington Pattern Instruction-Criminal (WPIC) 19.17.

RP 15.<sup>3</sup> This ruling was reduced to a written order, which order prohibits testimony and argument about warrants being quashed, about transportation issues, or about the actual time Van Buren appeared. CP 55.

At trial, Van Buren was acquitted of the eluding count but convicted on both bail jumping counts. CP 78. He received a standard range sentence. CP 80-81. Van Buren timely appealed. CP 93.

## **B. FACTS**

Since Van Buren was acquitted on the eluding charge, substantive facts of that alleged offense have no relevance in the present appeal. Moreover, the facts necessary for review of the bail jump issue have been addressed in the procedural history. Citation to actual testimony will be included in argument if necessary.

---

<sup>3</sup> It should be noted that the trial court's ruling of October 3 or 4 on the state's motion in limine 14 was not transcribed and the clerk's minutes from October 3 (Supp. CP 103) indicate that only state's motions 1-3 were granted. However, the record is clear that the ruling of December 12, 2016 just quoted is the same as, and an extension of, the same ruling in October.

### III. ARGUMENT

#### A. **THERE WAS SUFFICIENT EVIDENCE OF THE ELEMENTS OF BAIL JUMPING AND THE BAIL JUMPING STATUTE IS NEITHER AMBIGUOUS NOR VAUGE AND IS NEITHER AMBIGUOUS NOR VAGUE AS APPLIED TO VAN BUREN'S CASE.**

In his first claim, Van Buren argues that the October 5, 2016 bail jumping conviction could not be proven beyond a reasonable doubt because Van Buren was only 38 minutes late for court.<sup>4</sup> Van Buren asserts that the application of the bail jumping statute to that 38 minute tardiness shows that the statute is unconstitutionally vague or ambiguous and requires construction. Brief at 7-8. He asserts that such construction must favor him by the rule of lenity. Brief at 10. Thus Van Buren argues sufficiency of the evidence and due process.

Van Buren's claims are without merit because he appeared 38 minutes after the time that the trial court had specifically ordered him to appear and because his late appearance caused considerable damage to the due administration of justice in that the trial court had to dismiss an already chosen jury and reset the trial date. Sufficient evidence was adduced to meet the elements of bail jumping. And, the statute is neither

---

<sup>4</sup> It should be noted that nowhere in his briefing does Van Buren refer to the bail jumping charge from July 7, 2016. CP 41 (count II). But he does clearly identify that his issues flow from the 38 minutes lateness on October 5, 2016. The state will not address the charge from July 7..

ambiguous nor vague and is neither ambiguous nor vague in its application to the facts of Van Buren's case.

It is well settled that evidence is sufficient if, taken in a light most favorable to the state, it permits a rational trier of fact to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the state's evidence and all reasonable inferences that can be drawn therefrom. *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005), *citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). Thus the relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358 (1991).

"We review constitutional challenges de novo." *In re Welfare of A.W.*, 182 Wn.2d 689, 701, 344 P.3d 1186 (2015). "[I]t is well established

that statutes are presumed constitutional and that a statute's challenger has a heavy burden to overcome that presumption; the challenger must prove that the statute is unconstitutional beyond a reasonable doubt.” *Sch. Dists.’ All. for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010). Moreover, “the presumption in favor of a law’s constitutionality should be overcome only in exceptional cases.” *State v. Evans*, 164 Wn. App. 629, 638, 265 P.3d 179 (2011).

Further, interpretation of a statute is a question of law that is reviewed de novo. *State v. Coucil*, 170 Wn.2d 704, 706, 245 P.3d 222 (2010). “Where the plain words of a statute are unambiguous, our inquiry is at an end.” *Id.* But “[i]f a statute is susceptible to more than one reasonable interpretation, it is ambiguous and, absent legislative intent to the contrary, the rule of lenity requires us to interpret the statute in favor of the defendant.” *Id.*, *citing State v. Jacobs*, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005). The purpose of interpretation is to determine and carry out the intent of the legislature. 170 Wn.2d at 707. At least one court has held that the predecessor bail jumping statute is not ambiguous. *State v. Pope*, 100 Wn.App. 624, 628, 999 P.2d 51 (2000) (“Neither the phrase “convicted of” not the statute as a whole is ambiguous.” (emphasis added)).

Van Buren’s arguments also seem to partake of a vagueness

challenge as he claims that a criminal statute must give fair warning of prohibited conduct. Brief at 7. A criminal statute may be void for vagueness and therefore violate due process if it “fails either (1) to define the offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited or (2) to provide ascertainable standards of guilt to protect against arbitrary enforcement.” *State v. Evans*, 164 Wn. App. 629, 637, 265 P.3d 179 (2011), *citing State v. Allenbach*, 136 Wn. App. 95, 100-01, 147 P.3d 644 (2006). “Where a statute is specifically directed at a manifest evil and couched in language drawn from history and practice, courts should not parse the statute as grammarians or treat it as abstract exercise in lexicography.” *City of Spokane v. Douglass*, 115 Wn.2d 171, 180, 795 P.2d 693 (1990), *quoting State v. Dixon*, 78 Wn.2d 796, 805, 479 P.2d 931 (1971) (which quotes *Beauharnais v. Illinois*, 343 U.S. 250, 253, 72 S.Ct. 725, 96 L.Ed. 919 (1952)). “Impossible standards of specificity are not required.” *City of Seattle v. Eze*, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). “If men of ordinary intelligence can understand a penal statute, notwithstanding some possible areas of disagreement, it is not wanting for certainty.” *Eze*, 111 Wn.2d at 27.

In the present case, Van Buren argues that an ambiguity in the statute requires that the statute be interpreted. He asserts that the statute

leaves an open question as to the “time” at which a failure to be present constitutes a failure to appear as required. Brief at 8. He claims that this alleged failure to specify the point in time at which the crime of bail jumping is “complete” renders the statute ambiguous (or vague) and requires judicial interpretation. Brief at 8.

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.

Here, the jury was charged with an elemental instruction that provides

- (1) That on or about July 7th, 2016, the defendant failed to appear before a court;
- (2) That the defendant was charged with Attempting to Elude a Police Vehicle;
- (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 .

CP 74 (instruction 12) (Instruction 13, CP 75, is identical save for the different date of failure to appear.); *see State v, Downing*, 122 Wn. App. 185, 192, 93 P.3d 900 (2004) (also establishing that bail jumping charges may proceed even when underlying charge is dismissed). That instruction is taken from WPIC 120.41. Van Buren asserts no argument as to elements (2), (3), and (4). He correctly argues that a jury’s verdict cannot

be based on “mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence” but never articulates the manner in which the present jury in fact decided the present case by resort to any of these less-than-substantial considerations. Brief at 6. He argues that the state cannot prove element (1) because Van Buren was late but in fact appeared.

***1. The offense of bail jumping is complete at the point in time a defendant fails to appear.***

The plain language of the statute is clear that the offense is completed at the time that a defendant fails to appear as required. The other elements, the charge, the release from that charge, and the knowledge of the requirement to appear, all precede the actual failure to appear. Moreover, it is the failure to appear as required that constitutes the *actus reus* of the offense, there being no other condition in the elements that constitute the doing of a criminal act; being charged with a different crime, being released on that charge, and knowing that you are required to make a further appearance in that court case are simply not criminal acts. No construction or interpretation is necessary to understand this fundamental aspect of this criminal statute.

But Van Buren argues that the statute is flawed because it does not specify a point in time. Brief at 8. In the same paragraph, he asserts that a statute should not be read in a manner that allows for an unjust and absurd consequences. *Id.* With reference to the plain language only, it can be

seen that Van Buren's approach does just that. He essentially argues that he should not be criminally liable if he in fact did appear at any time on the day ordered.

First, the record is clear that Van Buren's argument is simply factually incorrect. Here, the trial court ordered him to be present at 9 a.m. the next day. Supp. CP 109, (Exhibit 23). This in direct response to Van Buren's own question to the court as to the time he was to appear. *Id.* Then, the court further admonished him to stay in contact with his attorney and advised "we will get started in court at nine o'clock here." *Id.* (emphasis added).<sup>5</sup> Van Buren was twice given the time he was to appear in a very unambiguous manner by the trial judge. The question of whether or not the bail jumping statute has a provision regarding timeliness of an appearance provides no argument in the face of a court order which clearly and unambiguously requires Van Buren to appear at "nine o'clock."

On the facts of the present case, then, there appears to be no issue at all. Van Buren was charged with eluding, was released on that charge, was ordered to appear the next day at nine o'clock by the trial court in open court (and thus cannot credibly argue that he had no knowledge of the requirement), and was not present in court when the trial court

---

<sup>5</sup>Given this record, the state cannot understand Van Buren's assertion that "At the end of the proceedings on October 4, 2016, the court did not expressly admonish VanBuren to appear on October 5, 2016." Brief at 4. Seems that Van Buren either has the dates

inquired at 9:09. At 9:09, the record shows that Van Buren failed to appear and at that time (being after the trial court's order of nine o'clock) the crime of bail jumping was complete. Van Buren makes no argument that these facts were not established beyond a reasonable doubt.

*State v. Coucil, supra*, provides analytical support. There, Coucil was convicted of felony bail jumping while being convicted of a misdemeanor on the underlying charge. He argued that RCW 9A.76.170 is ambiguous in its classification provision because under those facts it could be classified as either a misdemeanor or a felony. 170 Wn.2d at 707. The Supreme Court brushed the argument aside saying "any alleged ambiguity vanishes if the offense is classified according to when the bail jumping actually occurred." 170 Wn.2d at 707-08. Thus the holding that a particular bail jumping is classified by the underlying crime extant at the time of the failure to appear. 170 Wn.2d at 711.

The focus of this holding is the time of the failure to appear. On the present record, the underlying charge could be subject to amendment downward to a misdemeanor (e.g., reckless driving) by motion of the prosecution at 9:37 a.m. on October 5, 2016 (allowing for the presence of the defendant before the trial court entertains such a motion). Under the reasoning of *Coucil*, Van Buren would still be charged with a felony bail

---

wrong or ignores exhibit 23, the transcript from October 4, 2016.

jumping because the underlying charge was a felony at the time he failed to appear. That reasoning would devolve to nonsense under Van Buren's argument because, as he asserts, it would not be possible to ascertain the actual time that he failed to appear as required because the statute is ambiguous on that point. The clear answer here is that failure to appear as required means what it unambiguously says and, again, the crime is complete at the time of that failure to appear, not at any time after that. In his ambiguity/vagueness argument Van Buren provides no competing interpretation allowing for a different application of the statute or allowing for the application of the rule of lenity.

This Court considered this statute in *State v. Hart*, 195 Wn. App. 449, 381 P.3d 142 (2016), *rev denied*, 187 Wn.2d 1011 (2017). Hart challenged the sufficiency of evidence on his bail jumping conviction. 195 Wn. App. at 457. He argued that the state failed to prove beyond a reasonable doubt that he had failed to appear "at the required specific time." *Id.* Hart relied on a case wherein a conviction had been reversed because the evidence adduced showed that the defendant had been held to have failed to appear at 8:30 a.m. when he had been ordered to appear at 9:00 a.m. *Id.* (arguing *State v. Coleman*, 155 Wn. App. 951, 231 P.3d 212 (2010)). *Coleman* was distinguished by the *Hart* Court as it affirmed Hart's conviction:

Unlike in *Coleman*, where the evidence established that the defendant had failed to appear *before* the time he was ordered to do so, here the jury could reasonably infer that Hart failed to appear at the time specified in his order based on Myklebust's testimony that Hart did not appear for his September 9 hearing, together with the clerk's minute entry showing that Hart failed to appear at that hearing and that the prosecutor had requested a bench warrant based on Hart's absence from the hearing.

155 Wn. App. at 458 (emphasis by the court). The same sort of testimony supported the conviction in the present case. Moreover, what was established by that testimony, here as in *Hart*, is that the defendant “failed to appear at the time specified in his order.”

Van Buren cites to *State v. O'Brien*, 164 Wn.App. 924, 267 P.3d 422 (2011), as authority that RCW 9A.76.170 is ambiguous. Brief at 7-8. That case did proceed to resolve an ambiguity that it found regarding the unit of prosecution under the statute. 164 Wn. App. at 928-29.<sup>6</sup> There is no further pronouncement in the case about statutory ambiguity or vagueness or the need for further construction of the statute on the question of when the crime is completed.

Similarly, *State v. Clark*, 185 Wn. App. 1014 (2014) (UNPUBLISHED AND UNBINDING), *rev. denied*, 182 Wn.2d 1027 (2015), found the statute ambiguous as to the unit of prosecution but not

---

<sup>6</sup> Van Buren asserts that the *O'Brien* Court interpreted the statute and held that the “statutory defense is not an affirmative defense.” Brief at 8. Respondent can find no statutory interpretation regarding the statutory defense nor a holding that it is not an affirmative defense in that decision. The *O'Brien* Court simply observed that that defense does not negate an element and therefore the state need not disprove his defense

otherwise. Clark also argued insufficient evidence because the state did not prove the exact time he was required to appear and because the state did not prove the exact time at which he failed to appear. 185 Wn. App. at ¶6. The first alleged insufficiency was resolved by the court by reviewing the trial court clerk's testimony that it was the judge's routine practice to order both a date and a time and that testimony allowed a reasonable inference that the judge had done so in that case. As to the second claim, the court observed that "the evidence showed that Clark failed to appear at the time he was ordered to appear." 185 Wn. App. at ¶7 (emphasis added).

At bottom, there is nothing ambiguous or vague about "the requirement of a subsequent personal appearance." That the required personal appearance is at a time specific is rather completely unremarkable. Van Buren's argument ignores that at 9:09 a.m. on October 5, 2016, the trial court, counsel, and all others involved including the court staff and the jury, had no idea where Van Buren was. He wants all those involved to simply wait quietly while he gets himself there at some unknown late time.

Van Buren was not present when the trial court inquired some nine minutes after the appointed hour. The trial court gave Van Buren nearly a half an hour of grace before it dismissed the jury; grace the trial court did

---

beyond a reasonable doubt.

not have to give. The time of the subsequent appearance was ordered and Van Buren did not comply with that order. Sufficient evidence supports the conviction and it should be affirmed.

**B. THE REQUISITES OF THE STATUTORY DEFENSE OF UNCONTROLLABLE CIRCUMSTANCES WERE NOT MET AND THE NECESSITY DEFENSE IS INAPPLICABLE.**

Van Buren next claims that the trial court erred in refusing his proffered defense of uncontrollable circumstances and erred because the common law defense of necessity should have been considered. This claim is without merit because Van Buren did not establish that he was entitled to either of the defenses.

The statutory bail jumping defense provides that

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.

RCW 9A.76.170 (2). The statute further defines “uncontrollable circumstances” as

“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). The necessity defense is written in WPIC 18.02, which provides

Necessity is a defense to a charge of(fill in crime)if

- (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and
- (2) harm sought to be avoided was greater than the harm resulting from a violation of the law; and the (sic)
- (3) the threatened harm was not brought about by the defendant; and
- (4) no reasonable legal alternative existed.

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 this charge].

The comment notes that “[s]everal statutes supersede the common law defense of necessity for particular crimes, including Bail jumping: RCW 9A.76.170 (2)...” Thus, the comment asserts that the bail jumping statutory defense takes the place of the necessity defense in bail jumping prosecutions.

***1. The necessity defense is unavailable both as a matter of law and as a matter of fact.***

In *State v. White*, 137 Wn. App. 227, 152 P.3d 364 (2007), White asserted a common law necessity defense supported by his assertion that he failed to report as ordered because he had a back injury that had been aggravated by a previous jail stay. 137 Wn. App. at 229-30. The trial court refused the necessity defense and instructed the jury on the statutory “uncontrollable circumstances” affirmative defense. *Id.*

Van Buren argues that “no cases expressly hold that the criteria set forth in RCW 9A.76.010(4) is exclusive.” Brief at 14. The *White* Court provided a review of the two defenses

It is a statutory affirmative defense to the crime of bail jumping that “uncontrollable circumstances prevented the [defendant] from appearing or surrendering.” RCW 9A.76.170(2). The defendant must not have contributed to the circumstances in “reckless disregard of the requirement to appear or surrender” and the defendant must have “appeared or surrendered as soon as such circumstances ceased to exist.” *Id.* “Uncontrollable circumstances” include medical conditions. RCW 9A.76.010(4).

567 ¶ 7 “Necessity” is a common law defense with limited application. See \*231 *State v. Jeffrey*, 77 Wash.App. 222, 224–25, 889 P.2d 956 (1995); *State v. Diana*, 24 Wash.App. 908, 913–14, 604 P.2d 1312 (1979); 11 Washington Pattern Jury Instructions: Criminal 18.02, at 63 (2d ed. pocket part 1998) (WPIC). It is available “when circumstances cause the [defendant] to take unlawful action in order to avoid a greater injury.” *Jeffrey*, 77 Wash.App. at 224, 889 P.2d 956; WPIC 18.02. The defendant must not have caused the threatened harm, and there must be no reasonable legal alternative to breaking the law. *Jeffrey*, 77

Wash.App. at 225, 889 P.2d 956; WPIC 18.02. The defendant must prove the defense by a preponderance of the evidence. *Jeffrey*, 77 Wash.App. at 225, 889 P.2d 956; WPIC 18.02.

8 ¶ 8 Comparing the two defenses, the statutory defense is a specific iteration of the principles underlying the necessity defense. In this sense, the statutory defense appears to displace the need to give a general necessity defense instruction. *Thus, giving an additional necessity defense instruction would necessarily be redundant, if not confusing.* Overall, the statutory defense was sufficient for Mr. White to argue his case theory. But we need not dwell upon legislative intent or the differences between the two defenses because, in any event, the trial evidence does not support giving a general necessity defense instruction in Mr. White's case over the statutory defense.

137 Wn. App. at 230-31 (emphasis added). Thus, the *White* Court, contrary to Van Buren's argument, does expressly hold that the statutory defense, being a particular iteration of necessity, displaces the general necessity defense in a bail jumping prosecution because giving both would be redundant and confusing. And, as can be seen, the *White* Court's holding is consistent with the WPIC comment quoted above.

Moreover, under the circumstances of the present bail jumping prosecution, and given Van Buren's excuse, the necessity defense does not apply. Van Buren must establish that defense by a preponderance of the evidence. *State v. Harvill*, 169 Wn.2d 254, 258, 234 P.3d 1166 (2010). First, Van Buren's logic is dubious: He asserts that the necessity defense was available because he "he believed that he had to be late to avoid a greater evil of committing a crime." Brief at 17. But in this case, with

due consideration of his excuse, the sentence should read that he believed he should commit the felony crime of bail jumping in order to avoid the “greater evil” of committing the gross misdemeanor of driving with a suspended license. Thus a necessity defense appears to be warranted on the potential driving while suspended charge if Van Buren had driven to avoid the actual greater evil of committing felony bail jumping and occasioning the cessation of an already commenced jury trial. Further, as the necessity instruction requires, Van Buren must negate any reasonable alternatives. He well could have gotten another ride, took the bus, called a taxi, or walked to court.

Even more to the point, neither nature nor man, as those entities are referred to in the defenses, are responsible for Van Buren’s suspended driver’s license. It can be safely presumed that Van Buren accomplished that status all on his own. His inability to legally drive was “brought about by the accused” as the phrase is used in the necessity defense. Or, he did “contribute to the creation of such [uncontrollable] circumstances” as that phrase is used in the statutory defense. The duty to appear as ordered fell to Van Buren and no one else. Moreover, the record reveals that Van Buren was well aware of his suspended status when he contemplated getting to court on time.

But the state is not unaware that the statutory defense also requires

that his contribution to the uncontrollable circumstances be “in reckless disregard of the requirement to appear.” It is difficult to apprehend the proposition that Van Buren got his driver’s license suspended in reckless disregard of an order to appear that likely did not exist when his license was suspended. But the observation both does not make Van Buren’s excuse more or less reasonable and points out his difficulty in asserting necessity. The necessity defense does not include the reckless disregard language of the statutory defense. In a sense, then, the statutory defense is better for Van Buren because he could argue that in any event he was not in reckless disregard over the present failure to appear. No such argument seems to be available under a necessity defense. He is foreclosed from necessity because of the above noted logical failure, because he caused his own suspended license, and because the authorities hold that the statutory defense supersedes the necessity defense in bail jumping prosecutions.

***2. The statutory defense was properly denied.***

Here, it should first be noted that Van Buren has no argument that an act of nature caused his failure to appear. Regarding the statutory defense, he has only that his ride did not show. The trial court recognized that the section of the defense having to do with acts of nature does not apply. RP 14-15. The trial court went on to the rest of the defense ruling that “The Court is not convinced that transportation equates to any serious

defense or serious circumstances outlined in the WPIC...” RP 15. Thus the trial court ruled that Van Buren’s excuse that his ride did not come was insufficient to warrant the defense.

A criminal defendant has the right to present his defense. *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). “Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact.” *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), *rev. denied*, 170 Wn.2d 1022 (2011). “However, a defendant is not entitled to an instruction which inaccurately represents the law or for which there is no evidentiary support.” *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). Moreover, “it is prejudicial error to submit an issue to the jury when there is no substantial evidence concerning it.” *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986).<sup>7</sup>

Here, the trial court ruled that the proposed defense instruction inaccurately represented the law in the present context and that Van Buren’s offer of proof did not provide sufficient evidentiary support for

---

<sup>7</sup> Substantial evidence is that quantum of evidence “sufficient to persuade a fair-minded, rational person of the declared premise.” *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.2d 162 (2010).

the instruction (transportation issues (factual issue) and not uncontrollable circumstances (legal issue)). Review of a trial court's refusal to give a jury instruction is de novo if based on a legal issue and is abuse of discretion with regard to factual issues. *See State v. Walker*, 136 Wn.2d 767, 771-72, 996 P.2d 883 (1998).

As to the factual issue in the trial court's ruling, the trial court correctly perceived that Van Buren's failure to get a ride to court is not factually a circumstance that "prevents" him from getting to court. In the universe of possible excuses to being late, the statutory defense requires an excuse that is "uncontrollable" and that actually prevents appearance as required. Thus, alleging that one is home sick doesn't support the defense. "Fredrick presents no evidence that she was in the hospital because she was sick or any other similar barrier to her attendance." *State v. Fredrick*, 123 Wn.App. 347, 354, 97 P.3d 47 (2004). And, similarly, "I forgot" does not support the defense because the statute as currently constituted does not require "knowingly failed to appear" but rather "with knowledge of the requirement of a subsequent personal appearance." *State v. Carver*, 122 Wn. App. 300, 305-06, 93 P.3d 947 (2004).

In light of these cases, and common sense, the trial court did not abuse its discretion in finding as a matter of fact that the excuse that "my ride didn't show up" is not a sufficient excuse to establish that Van Buren

was prevented from appearing by an uncontrollable circumstance. Again, in *State v. Livingston*, 197 Wn. App. 590, ¶35, 389 P.3d 753 (section regarding bail jumping UNPUBLISHED AND UNBINDING), it was held that incarceration in another jurisdiction was not an uncontrollable circumstance warranting the giving of the defense instruction.

As to the legal aspect of the trial court's ruling, the question turns on the use of the word "uncontrollable." Thus the statutory examples of an automobile accident, a serious personal injury, or a crime committed against the person. The word is defined as "incapable of being controlled." Merriam-Webster online dictionary, <https://merriam-webster.com>. Car accidents, serious injuries, and crimes are incapable of being controlled; procuring a reliable ride to court simply is controllable. In this connection, we never heard from Van Buren why he did not simply call a taxi. That was a simple and eminently controllable way to avoid criminal liability and avoid harming the due administration of justice.

Whether or not Van Buren could get a ride to court was an issue completely within his control. His failure to control his own situation does not establish the statutory defense. The trial court did not err in not allowing the defense.

**C. COUNSEL WAS NOT INEFFECTIVE BECAUSE VAN BUREN WAS NOT ENTITLED TO THE DEFENSE THAT HE ALLEGES COUNSEL FAILED TO ADVANCE.**

Van Buren next claims that he was denied effective assistances of counsel because trial counsel failed to raise and advocate for a necessity defense. This claim is without merit because counsel, who is at least presumed to know the law, read *State v. White, supra*, and the WPIC comment, *supra*, and therefore knew that a necessity instruction advanced in bail jumping prosecution would be redundant and confusing.

A claim of ineffective assistance of counsel is reviewed de novo. *See State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992). The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. A reviewing court must

make every effort to eliminate the distorting effects of hindsight. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). To show deficient representation, the defendant must show that the representation fell below an objective standard of reasonableness based on all the circumstances. *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995).

Regarding jury instructions, “[t]o establish ineffective assistance based on counsel's failure to request a jury instruction, the defendant must show that he was entitled to the instruction.” *State v. Olson*, 182 Wn. App. 362, 373-74, 329 P.3d 121 (2014).

To show prejudice, the defendant must establish that “there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” *Strickland*, 466 U.S. at 687. Prejudice is established when there is a “breakdown in the adversary process that renders the result unreliable.” 466 U.S. at 687.

Van Buren cannot make these necessary showings in the present case. As noted above, in considering Van Buren’s defenses, trial counsel would have quickly come across *State v. White* and the WPIC comment. And, Van Buren cites to no similarly direct authority in arguing that trial counsel should have known otherwise. No case or other authority holds that a necessity defense instruction should be given instead of or at the

same time as the uncontrollable circumstance instruction. Again, as has been seen, the authorities are to the contrary. Van Buren's argument here is inventive but, again, no direct authority supports it.

Moreover, as argued above, Van Buren was not entitled to the instruction in the first instance. It would have been redundant and confusing if given at the same time as the uncontrollable circumstances instruction (which he also was not entitled to). And, it is clear that Van Buren's offer of proof was insufficient to establish either of the defenses.

In this case, counsel was not deficient for failing to assert a legal theory of defense that cuts against direct authority. Further, he is not deficient for failing to assert a defense that could not be established either as a matter of law or a matter of fact. There being no deficiency, there is no ineffective assistance. This claim has no merit.

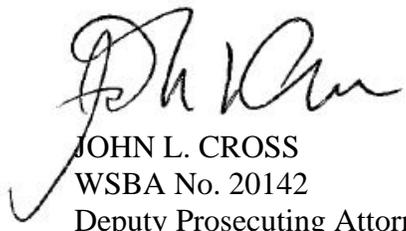
#### **IV. CONCLUSION**

For the foregoing reasons, Van Buren's conviction and sentence should be affirmed.

DATED August 9, 2017.

Respectfully submitted,

TINA R. ROBINSON  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "John L. Cross". The signature is fluid and cursive, with the first name "John" being the most prominent part.

JOHN L. CROSS  
WSBA No. 20142  
Deputy Prosecuting Attorney

Office ID #91103  
kcpa@co.kitsap.wa.us

**KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION**

**August 09, 2017 - 1:55 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, Appellant  
**Superior Court Case Number:** 16-1-00396-4

**The following documents have been uploaded:**

- 0-498669\_Briefs\_20170809135322D2238377\_6816.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was State of Washington v Tyrone Van Buren 49866-9.pdf*

**A copy of the uploaded files will be sent to:**

- Liseellnerlaw@comcast.net
- kcpa@co.kitsap.wa.us
- rsutton@co.kitsap.wa.us

**Comments:**

The previously filed document was not signed. Signatures are now in place.

---

Sender Name: Marti Blair - Email: mblair@co.kitsap.wa.us

**Filing on Behalf of:** John L. Cross - Email: jcross@co.kitsap.wa.us (Alternate Email: )

Address:  
614 Division Street, MS-35  
Port Orchard, WA, 98366  
Phone: (360) 337-7171

**Note: The Filing Id is 20170809135322D2238377**