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Court of Appeals  
Division II  
State of Washington

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

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STATE OF WASHINGTON,

Respondent,

v.

LILLIAN MARIE SHILLING,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 15-1-01482-8

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BRIEF OF RESPONDENT

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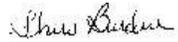
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether sufficient evidence supports a bail jumping conviction where the evidence established that Shilling was ordered to appear on a certain date and on that date she was not present?

2. Whether should the state substantially prevail, appellate costs should be taxed against Shilling (CONCESSION)?

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

### **A. PROCEDURAL HISTORY**

Lillian Marie Shilling was first charged by information filed in Kitsap County Superior Court with delivery of a controlled substance, as an accomplice. CP 1-2. Later, a second amended information added a count of bail jumping. CP 28.

At arraignment, Shilling was ordered to appear for omnibus hearing on January 26, 2016 and trial on February 16, 2016. CP 7. That order tells the defendant that she must personally appear. *Id.* The clerk's minutes recite that Shilling was given written and oral notice of those appearance dates. CP 87.

An omnibus order was entered on January 26, 2016. CP 12. On February 16, 2016, the parties agreed to continue the trial date. RP, 2/16/16, 2. In Shilling's presence, the trial was reset to March 14, 2016.

RP, 2/16/16, 3.

On March 14, 2016, the defense moved for and was granted another continuance of the trial date. RP, 3/14/16, 2. In Shilling's presence, the trial date was changed to April 11, 2016 at 9 a.m.. RP, 3/14/17, 3; CP 13 (order). The clerk's minutes recite that Shilling was given written and oral notice of the court date. CP 97. The order Setting Trial Date tells the defendant that her personal presence is required. CP 13.

On April 11, 2016, at 12:10, Defense counsel advised the trial court that Shilling had failed to appear. RP, 4/11/16, 2. On the state's motion, the trial court authorized a warrant. Id. The clerk's minutes indicate that the courtroom was polled at 12:11 and there was no response from Shilling. CP 101.

The warrant was quashed three days later. RP, 4/14/16, 2-3. Further dates were set. CP 14. Shilling also failed to appear on June 1, 2016, but no warrant issued on defense counsel's representation that Shilling was in drug treatment. RP, 6/1/16, 2-5.

After more continuances, the matter proceeded to trial. RP, 1/30/17. Shilling was acquitted of the delivery charge and convicted on the bail jumping charge. CP 59. The present appeal timely followed sentencing. CP 76.

## **B. FACTS**

The clerk's minutes show that Shilling was present in court on March 14, 2016. RP, 2/2/16, 259. There, a new trial date of April 11, 2016 was ordered. Id. The clerk's minutes show that Shilling was not present on April 11, 2016. RP, 2/2/16, 260. On April 11, the court called for Shilling at 12:11 and Shilling did not respond. Id. A bench warrant was ordered. Id.

Court calendars have multiple cases set at 9:00. RP, 2/2/16, 287. There may be as many as 25 cases set for 9 o'clock omnibus hearings. Id. Each case is addressed in turn as they come up on the calendar. Id. This explains why someone with a 9 o'clock hearing scheduled would not be called until noon. Id.

A personal appearance occurs when the court or counsel calls the defendant's name and asks her to come forward for her hearing. RP, 2/2/16, 316. On busy court days, cases scheduled at 9 o'clock may not get called until much later. RP, 2/2/16, 316-17.

Stand in defense counsel never saw Shilling present in court on April 11, 2016. RP, 2/2/16, 320.

### III. ARGUMENT

**A. THE EVIDENCE WAS SUFFICIENT WHERE, HAVING BEEN ORDERED TO ATTEND A PERSONAL APPEARANCE IN COURT, SHILLING WAS NOT PRESENT IN COURT WHEN HER CASE WAS CALLED FOR THAT PERSONAL APPEARANCE.**

Shilling argues that the evidence was insufficient to support a bail jump conviction. This claim is without merit because Shilling was not present when the trial court called her for her previously ordered personal appearance. Issues sounding in due process are reviewed de novo. *See In re Welfare of A.W.*, 182 Wn.2d 689, 701, 344 P.3d 1186 (2015).

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).

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

- (5) That on or about April 11, 2016, the defendant failed to appear before a court;
- (6) That the defendant was charged with a class B or C felony;
- (7) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and
- (8) That the acts occurred in the State of Washington.

CP \*\* (instruction #15.).<sup>1</sup> The jury was instructed on circumstantial evidence. CP 43. Neither the statute nor the jury instruction address a date or a time of an appearance. The requirement is for a “personal

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<sup>1</sup> There’s no apparent reason for the 5, 6, 7, 8 numbering of the elements. The trial court when instructing the jurors told them that the 5 should be 1. RP, 2/2/17, 369.

appearance” before the court.

Shilling was order to be personally present on April 11, 2016. No evidence adduced shows that Shilling did not have knowledge of her court date. A personal appearance before the court does not happen while Shilling sits in the gallery of the court and waits until her case is called. A personal appearance before the court happens when the case is called and she actually appears before the court. Moreover, no evidence in the case establishes that Schilling was in the courtroom at any time before her case was called at 12:10. In fact, defense counsel who was present did not see Shilling at all that morning.

This Court considered this statute in *State v. Hart*, 195 Wn. App. 449, 381 P.3d 142 (2016), *review 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). Like Hart, in the present case Shilling did not make a personal appearance as required no matter what time on April 11, 2016 the case was called.

By Shilling's logic, if the court convened late, say 9:10, all those failing to appear from orders requiring appearance at 9:00 would be immune from bail jumping liability because their cases would not have been called at 9:00. Further, if 20 cases were scheduled at 9:00, her logic would immunize 19 of those because the court can have but one personal appearance at a time. Courts with large calendars cannot operate in the manner that Shilling seems to think they should; the present case providing a good example of a case calendared at 9 but not called for personal appearance until after noon.

Shilling made no personal appearance as ordered on April 11, 2016. The time on the order to appear is not an element of bail jumping. Any reasonable trier of fact could infer that Shilling was not before the

court as ordered. There was sufficient evidence.

**B. SHOULD THE STATE SUBSTANTIALLY PREVAIL, THE STATE WILL NOT SEEK APPELLATE COSTS (CONCESSION).**

Shilling next claims that should the state substantially prevail, she should not be assessed appellate costs. By policy, this office does not intend to seek appellate costs in this case. The state has no objection to an order disallowing appellate costs.

**IV. CONCLUSION**

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

DATED November 13, 2017.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "John L. Cross", written over the typed name of the Deputy Prosecuting Attorney.

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**Transmittal Information**

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