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NO. 50390-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SARAH M. BROWNING,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. RCW 9A.76.170(2) and the jury instruction based upon it defining the lack of the *actus reus* to the crime of bail jumping as an affirmative defense violates due process by shifting the burden of proof on an essential element of the crime.

2. The trial court denied the defendant her statutory right to speedy trial when, without permitting the defendant to speak to the issue, it allowed counsel to withdraw on a claim that attorney-client communication was irretrievably broken and then continued the case over the defendant's objection.

3. Substantial evidence does not support the conclusion that the building the defendant illegally entered was a "dwelling" as that term is used in the burglary statute.

4. Trial counsel's failure to object when the state impeached the defendant with her prior burglary conviction denied the defendant effective assistance of counsel.

Issues Pertaining to Assignment of Error

1. Does RCW 9A.76.170(2) and the jury instruction based upon it defining the lack of the *actus reus* to the crime of bail jumping as an affirmative defense violate due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment by shifting the burden of proof on an essential element of the crime?

2. Does a trial court deny a defendant her statutory right to speedy trial if, without permitting that defendant to speak to the issue, it allows appointed counsel to withdraw on a claim that attorney-client communication was irretrievably broken and the court then continues the case over the defendant's objection?

3. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does substantial evidence support the conclusion that a house is a "dwelling" when neither the owner nor anyone else resided at that location?

4. Under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, does trial counsel's failure to object when the state impeaches a defendant charged with burglary with a prior burglary conviction deny that defendant effective assistance of counsel when the use of that evidence denies the defendant a fair trial?

STATEMENT OF THE CASE

Factual History

At around 11:00 pm on the evening of November 28, 2015, Shirley Cuccia went to the house she owns at 321 Charlotte Avenue West in Bremerton to do some work. RP 151-152. She had not lived at that location for many months and was then in the process of cleaning out the many boxes of items that filled each room and lined the hallways. *Id.* When she arrived she noticed that a screen door she had left locked earlier in the day was now open. RP 164. She also later noticed that the kitchen window had recently been broken. RP 174.

After entering the house Ms Cuccia said she heard a noise upstairs and went to investigate. RP 164. Once she got upstairs she encountered the defendant coming out of the bedroom. *Id.* Ms Cuccia was not acquainted with the defendant and had not given her permission to be in the house. RP 175. Upon seeing the defendant, Ms Cuccia confronted her and began hitting her on the head with a flashlight. RP 164. The defendant was eventually able to escape out of the house, having lost one of her shoes and having left her backpack in the building. RP 167-169. When the defendant fled Ms Cuccia called "911." RP 162.

Within a few minutes of the call two deputy sheriffs responded to the

scene in short sequence of each other. RP 82-88, 132-136. The first deputy found the defendant running down the street missing one of her shoes. RP 87-90. He then stopped his vehicle, put the defendant in handcuffs and put her in the back of his patrol car. RP 91-92. He found a number of items of jewelry in the defendant's pockets that the defendant claimed belonged to her. *Id.* Ms Cuccia later claimed those items belonged to her. RP 104-105. Upon her arrest the defendant told the deputy that she was acquainted with the homeowner, that she had been in the house with permission, that she and homeowner had gotten into a dispute, and that the homeowner was probably now making false claims to get her arrested. RP 91-92, 137. The defendant later acknowledged that her statements to the officer were false and that she did not really know the person who owned the house. RP 239. However, the defendant did admit being present in the house, stated that she had fled without one of her shoes and without her backpack. RP 253-254.

After the deputies arrested the defendant they responded to the house and spoke with Ms. Cuccia. RP 100. Once in the house the officers found the defendant's backpack and searched it, finding a number of items in it, including a jewelry box and a key fob with the keys to one of Ms Cuccia's vehicles on it. RP 104-112. They also found other items in it that Ms. Cuccia

claimed belong to her. *Id.* Both the defendant and Ms. Cuccia claimed ownership of the jewelry box. *Id.*

Procedural History

By information originally filed in December of 2015, and later amended in December of 2016 and March of 2017, the Kitsap County prosecutor charged the defendant Sarah Marie Browning with one count of residential burglary and one count of bail jumping for the defendant's failure to appear at a review hearing on November 30, 2016. CP 1-6, 41-47 and 68-70. The state also alleged the existence of the aggravating factor that the "victim of the burglary was present in the building or residence when the crime was committed, contrary to RCW 9.94A.535(3)(u)." CP 41-47.

On January 12, 2017, the court called this case for review. RP 1/12/17 1-9. At that time defendant's appointed attorney moved for a continuance in order to effectively prepare for trial. RP 1/12/17. 1-3. Although the defense attorney informed the court that the defendant had refused to sign a speedy trial waiver and objected to a continuance, the court granted the motion and reset the trial date. RP 1/12/17 3, 6.

Almost two months later the court again called the case for review. RP 3/2/17 1. At that time the defendant's attorney made an oral motion to withdraw upon his claim that "communication" between him and the

defendant “has been irretrievably broken.” RP 3/2/17 1-6. In fact, he was the second attorney appointed to represent the defendant. RP 3/2/17 11. He did not file a written motion or a supporting affirmation as part of his request. RP 3/2/17 1-13. The court granted the motion without giving the defendant the opportunity to either agree with or dispute her attorney’s claim. RP 3/2/17 1-13. However, the defendant was able to object to any continuance of the trial date during the following exchange:

MR. PEET: Your Honor, she wishes – she has something regarding speedy trial. I think it would be better served speaking to new counsel before that’s made.

THE COURT: She’s asking to have you off the case. I’m kind of in a box with regard to the speedy trial issue. Mr. Purves, because she’s asking for new counsel, does that not set out speedy trial?

MR. PURVES: I would say that, if the Court is finding that the defense is being removed for purposes of a conflict –

THE COURT: I’m not going to make another attorney be ready for trial on Monday, ma’am. I’m not doing that.

THE DEFENDANT: I’m saying, from the very beginning, I’ve never signed one paper, one speedy trial – I’ve never signed my waiver for a speedy trial. I’ve never signed any continuances for trials.

THE COURT: Well, I’m not dealing with going back on a clock over a year to look through every pleading on this case to determine what did and didn’t happen –

THE DEFENDANT: And there was –

THE COURT: Ma’am, don’t interrupt me, please.

THE DEFENDANT: Okay.

THE COURT: I'm trying not to be rude, but I'm getting very impatient, because you keep raising your hand. I'm not going back. This matter was set before me, in the middle of a trial I'm trying to conduct, with regard to an emergency need to have an attorney off a case that's set for trial Monday. I'm not going to make another attorney get ready for trial by Monday. That attorney can look into the prior history if he or she feels that speedy trial rights were in some way violated.

With the cadre of attorneys we have doing defense cases, all of them are quite capable. I doubt one of them would try to pull something over on a defendant by having them waive speedy trial rights. That's something new counsel can deal with. I'm not going to push Mr. Peet to respond to that today, and I'm not going to respond today.

RP 3/12/17 13-15.

This case later come on for trial before a jury with the state calling the two deputies who responded to Ms. Cuccia's house, Ms. Cuccia, as well as a deputy court clerk who introduced documents proving that (1) the court had ordered the defendant to be in court on November 30, 2016, and (2) the defendant had failed to appear at the date and time specified. RP 82-131, 132-141, 149-184, 187-204. Following these witnesses the state rested its case. RP 204

After the state rested, the defendant took the stand on her own behalf. RP 207-282. During her testimony she admitted that she had gone into the Ms Cuccia's house without permission. RP 212-214. However, she

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generally denied ever having the intent to commit a crime in the house and she specifically denied taking any of Ms Cuccia's property. RP 214-217. Rather, she said that she had broken into the house to get out of the cold. *Id.* At the time the temperature outside was in the twenties and although the heat was off in the house, it was much warmer inside than outside. *Id.* The defendant also claimed that on November 30, 2017, she was unable to attend court because she was very ill and had been admitted into a local hospital. RP 217-218.

During the defendant's testimony the state impeached her with a number of prior theft convictions, as well as with a prior conviction for burglary. RP 269-271. During the motions *in limine* prior to the trial in this case the defense had made no argument that allowing the state to impeach the defendant with the burglary conviction would deny the defendant a fair trial because its probative value was far outweighed by its unfair prejudicial effect. RP 1-18.

Following the presentation of evidence in this case the court instructed the jury on both crimes charges, as well as on the lesser included offense to the burglary charge of first degree criminal trespass. RP 320-336. The court, without defense objection, also gave the jury the following instruction based upon 9A.76.170(2) setting out the affirmative defense to

the bail jumping charge:

It is a defense to the charge of bail jumping that:

- (1) uncontrollable circumstances prevented the defendant from personally appearing in court; and
- (2) the defendant did not contribute to the creating of such circumstances in reckless disregard of the requirement to appear; and
- (3) the defendant appeared as soon as such circumstances ceased to exist.

For the purposes of this defense, an uncontrollable circumstance is an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of man such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is not time for a complaining to the authorities and no time or opportunity to resort to the courts.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

CP 144.

Once the court finished giving its instructions the parties presented their closing arguments. RP 336-365. The jury then retired for deliberation and eventually returned with guilty verdicts on both counts. RP 370-380; CP 150. The jury also returned a special verdict on the alleged aggravating factor that the defendant had committed the burglary while the victim was

present in the house. CP 151. Based upon this aggravating factor the court later imposed an exceptional sentence on the burglary charge of 100 months on a standard range of 63 to 84 months. CP 240-251, 252-253. The court then ran this time concurrent with a standard range sentence on the bail jumping conviction. *Id.* The defendant thereafter filed timely notice of appeal. CP 255.

ARGUMENT

I. RCW 9A.76.170(2) AND THE JURY INSTRUCTION BASED UPON IT DEFINING THE LACK OF THE *ACTUS REUS* TO THE CRIME OF BAIL JUMPING AS AN AFFIRMATIVE DEFENSE VIOLATES DUE PROCESS BY SHIFTING THE BURDEN OF PROOF ON AN ESSENTIAL ELEMENT OF THE CRIME.

As part of the right to due process found in both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *City of Seattle v. Slack*, 113 Wn.2d 850, 784 P.2d 494 (1989); *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). Thus, neither the court (through comment or instruction) nor the state (by argument) make any comment, argument or instruction that shifts the burden of proof on any element of the crime. *State v. Crediford*, 130 Wn.2d 747, 927 P.2d 1129 (1996).

Common law principles of criminal liability imposed two requirements for culpability: an *actus reus* and a *mens rea*. *Carter v. United States*, 530 U.S. 255, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000); *City of Seattle v. Hill*, 72 Wn.2d 786, 794, 435 P.2d 692 (1967) (criminal liability requires volitional conduct); *State v. Lindberg*, 125 Wash. 51, 215 Pac. 41 (1923) (strict liability, or *mala prohibita*, crimes comport with due process so long as one acts voluntarily).

In *State v. Utter*, 4 Wn.App. 137, 479 P.2d 946 (1971), the court explained these two components of criminal liability in the context of a defendant who appealed his manslaughter conviction for stabbing his son to death, arguing that the trial court had erred when it refused to allow the defense to argue that the defendant had not committed the “act” of killing, as was required under the statute, because he had stabbed his son while in an “automatic or unconscious state” arising from his training and combat experiences in World War II. In other words, the defendant argued that his actions involved no *actus reus*. In addressing this claim, the court noted the following concerning the requirement of an *actus reus* for the application of criminal liability:

There are two components of every crime. One is objective – the *actus reus*; the other subjective – the *mens rea*. The *actus reus* is the culpable act itself, the *mens rea* is the criminal intent with which one performs the criminal act. However, the *mens rea* does not encompass the entire mental process of one accused of a crime. There is a certain minimal mental element required in order to establish the *actus reus* itself. This is the element of volition.

State v. Utter, 4 Wn. App. at 139, 479 P.2d 946 (1971).

In further explaining this concept, the court quoted the following from Perkins on Criminal Law:

It is sometimes said that no crime has been committed unless the harmful result was brought about by a ‘voluntary act.’ Analysis of such a statement will disclose, however, that as so used the phrase

'voluntary act' means no more than the mere word 'act.' An act must be a willed movement or the omission of a possible and legally-required performance. This is essential to the *actus reus* rather than to the *mens rea*. 'A spasm is not an act.'

Perkins, Criminal Law, page 660 (1957) (footnotes omitted) (cited in *State v. Utter*, 4 Wn.App. at 140).

The court then noted the following from Wharton's Criminal Law:

The absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability.

Anderson, 1 Wharton's Criminal Law and Procedure § 50 (1957) (as cited in *State v. Utter*, 4 Wn.App. at 142).

The court in *Utter* then cited to the following cases and treatises for support of this proposition: *State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328 (1969); *People v. Wilson*, 66 Cal.2d 749, 59 Cal.Rptr. 156, 427 P.2d 820 (1967); *People v. Anderson*, 63 Cal.2d 351, 46 Cal.Rptr. 763, 406 P.2d 43 (1965); *Watkins v. Commonwealth*, 378 S.W.2d 614 (Ky.1964); *Carter v. State*, 376 P.2d 351 (Okl.Cr.1962); *People v. Gorshen*, 51 Cal.2d 716, 336 P.2d 492 (1959); *Corder v. Commonwealth*, 278 S.W.2d 77 (Ky.1955); *People v. Baker*, 42 Cal.2d 550, 268 P.2d 705 (1954); *Smith v. Commonwealth*, 268 S.W.2d 937 (Ky.1954); *Fain v. Commonwealth*, 78 Ky. 183, 39 Am.Rep. 213 (1879); 22 C.J.S. Criminal Law § 55 (1961); 21 Am.Jr.2d, Criminal Law § 29

(1965).

The decision in *Martin v. State*, 31 Ala.App., 17 S.2d 427 (1944), is perhaps one of the most oft-cited and well-known decisions on the subject of *actus reus*. See *People v. Gastello*, 57 Cal.Rptr.3d 293, 297, — P.3d — (2007) (“*Martin* is a criminal-law classic on the subject of *actus reus* and is a favorite of casebooks and law review articles.”) In this case police officers arrested the defendant who was in his home at the time and drunk. The officers then took the defendant to a public highway, where he “manifested a drunken condition by using loud and profane language.” The state later convicted the defendant of violating a criminal statute that made it illegal for a person who was intoxicated or drunk to “appear” in any public place where one or more persons are present and then “manifest a drunken condition by using loud and profane language.” The defendant appealed, arguing that he did not commit the *actus reus* of the offense because he did not volitionally “appear” in a public place; the police forced him to do so. The appellate court agreed and reversed, holding as follows:

Under the plain terms of this statute, a voluntary appearance is presupposed. The rule has been declared, and we think it sound, that an accusation of drunkenness in a designated public place cannot be established by proof that the accused, while in an intoxicated condition, was involuntarily and forcibly carried to that place by the arresting officer.

Martin v. State, 31 Ala.App. at 335.

The decision in *State v. Eaton*, 143 Wn.App. 155, 177 P.3d 157 (2008), illustrates the principle that all crimes require proof of a volitional act or of a volitional unlawful omission. In this case a defendant appealed a sentence enhancement the trial court imposed based upon his possession of methamphetamine jail personnel found on the defendant during the booking process. At the time the defendant was being booked into jail following his arrest for driving while intoxicated. On appeal the defendant argued that since he had been arrested while he had methamphetamine on his person and then taken to the jail by the police, he did not commit the *actus reus* of possessing a controlled substance in a jail facility. The Court of Appeals agreed, holding as follows concerning the missing *mens rea* element:

But even strict liability punishments, i.e., those crimes and sentence enhancements having no *mens rea* requirement, require something of an element of volition. "There is a certain minimal mental element required in order to establish the *actus reus* itself. This is the element of volition." *Utter*, 4 Wash.App. at 139, 479 P.2d 946 (emphasis added). At least one author has noted:

At all events, it is clear that criminal liability requires that the activity in question be voluntary. The deterrent function of the criminal law would not be served by imposing sanctions for involuntary action, as such action cannot be deterred. Likewise, assuming revenge or retribution to be a legitimate purpose of punishment, there would appear to be no reason to impose

punishment on this basis as to those whose actions were not voluntary.

1 Wayne R. La Fave, *Substantive Criminal Law* § 6.1(c), at 425–26 (2d ed.2003) (footnote omitted).

State v. Eaton, 143 Wn.App. at 160-61.

In the case at bar the state charged the defendant with bail jumping under RCW 9A.76.170. This first section of this statute defines this offense as follows:

(1) 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.

RCW 9A.76.170.

The *actus reus* of this offense is to “fail[] to appear” after having had “knowledge of the requirement of a subsequent person appearance.” Although stated in the negative, it still requires, as do all crimes, a volitional act on the part of the defendant. Thus, when a defendant does not appear because he or she is physically incapable of doing so, he or she has not committed the *actus reus* of the crime because there has been no volitional act. For example, if a person is incarcerated on the appearance day he or she has certainly “failed to appear.” However, as the decisions in *Martin v.*

State and *Eaton* illustrate, that act of “failing to appear” was not volitional and no *actus reus* exists. Similarly, if a person is physically incapable of appearing because of illness or some other circumstance, then the act of “failing to appear” is not volitional and no *actus reus* exists.

As was mentioned previously, at a minimum all crimes have an *actus reus* element that the state has the burden of proving beyond a reasonable doubt. Consistent with the due process requirements of Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, the legislature cannot shift the burden of proof to the defendant to disprove the existence of that *actus reus* element. However, this is precisely what the legislature did in RCW 9A.76.170(2). This section of the statute provides:

(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.

RCW 9A.76.170(2).

This statute takes the *actus reus* element of bail jumping, the volitional act of failing to appear, and makes the lack of that volitional act an affirmative defense. By doing so this provision shifts the burden of proof

to the defendant to disprove the essential *actus reus* element of the crime that the constitution requires the state to prove. Consequently, this provision violates the due process requirements of Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. This constitutional error shifting the burden of proof was repeated in this case in Jury Instruction No. 25, which is patterned after WPIC 120.41. The jury instruction the court gave in this case stated:

JURY INSTRUCTION NO. 25

It is a defense to the charge of bail jumping that:

- (1) uncontrollable circumstances prevented the defendant from personally appearing in court; and
- (2) the defendant did not contribute to the creating of such circumstances in reckless disregard of the requirement to appear; and
- (3) the defendant appeared as soon as such circumstances ceased to exist.

For the purposes of this defense, an uncontrollable circumstance is an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of man such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is not time for a complaining to the authorities and not time or opportunity to resort to the courts.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return

a verdict of not guilty.

CP 144.

This instruction suffers from the same error as does RCW 9A.76.170(2). It shifts the burden of proof to the defendant to disprove the essential *actus reus* element of the offense. By using this instruction the court violated the defendant's right to due process under the state and federal constitutions. This error of constitutional magnitude is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. *State v. Franklin*, 180 Wn. 2d 371, 325 P.3d 159 (2014). The state only meets this burden if an appellate court is "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). In other words, a constitutional error is only harmless if the appellate court "cannot reasonably doubt that the jury would have arrived at the same verdict in its absence." *State v. Franklin*, 180 Wn.2d at 383 (citing *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010)).

In the case at bar a careful review of the evidence elicited at trial demonstrates that the instructional error in shifting the burden of proof to the defendant was far from harmless beyond a reasonable doubt. Specifically, the defendant had testified on the day she was supposed to

appear in court she was in the hospital and impliedly incapable of going to court. This evidence was sufficient to create a reasonable doubt in the mind of the jury concerning the volitional nature of the defendant's failure to appear in court. Thus, in this case the error was not harmless beyond a reasonable doubt and as a result this court should reverse the bail jumping conviction and remand for a new trial.

II. THE TRIAL COURT DENIED THE DEFENDANT HER STATUTORY RIGHT TO SPEEDY TRIAL WHEN, WITHOUT PERMITTING THE DEFENDANT TO SPEAK TO THE ISSUE, IT ALLOWED COUNSEL TO WITHDRAW ON A CLAIM THAT ATTORNEY-CLIENT COMMUNICATION WAS IRRETRIEVABLY BROKEN.

Under CrR 3.3(b), the time for trial for a person held in jail is "60 days after the commencement date specified in this rule," or "the time specified under subsection (b)(5)." CrR 3.3(b)(1)(i)&(ii). "Initial commencement date" under CrR 3.3(c)(1) is "the date of arraignment as determined under CrR 4.1." Under CrR 3.3(h), "[a] criminal charge not brought to trial within the time period provided by this rule shall be dismissed with prejudice." CrR 3.3(h). The purpose of CrR 3.3 is to prevent undue and oppressive incarceration prior to trial. *State v. Kingen*, 39 Wn.App. 124, 692 P.2d 215 (1984).

Under CrR 3.3(f)(2), the trial court may grant a motion to continue a trial to a specific date outside of the time limits for speedy trial upon a

showing of good cause if such continuance is “required in the administration of justice” and it will not prejudice the defendant. This section states:

(f) Continuances. Continuances or other delays may be granted as follows:

(2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

CrR 3.3(f)(2).

While the trial court bears the responsibility for assuring a defendant's right to speedy trial under this rule, the decision whether or not to grant a continuance beyond the time required under CrR 3.3 lies within the sound discretion of the trial court and will only be overruled upon an abuse of that discretion. *State v. Nguyen*, 131 Wn.App. 815, 129 P.3d 821 (2006). An abuse of discretion occurs “when the trial court's decision is arbitrary or rests on untenable grounds or untenable reasons.” *State v. Lawrence*, 108 Wn.App. 226, 31 P.3d 1198 (2001).

For example, in *State v. Nguyen, supra*, a defendant was convicted of

a home invasion robbery following a trial outside the time for speedy trial. The court set the trial outside the speedy trial rule upon the state's motion that it needed more time to gather more information about some "related" home invasion robberies. In fact, the state had no evidence linking the defendant or his offense to the other defendants and the other cases. Rather, the state believed that further investigation might potentially link the cases. Following conviction the defendant appealed, arguing that the trial court had abused its discretion when it granted the state's motion to continue.

In addressing the defendant's arguments the Court of Appeals first acknowledged that separate trials for multiple defendant's charged with the same offenses were not favored at the law. Thus, it would well be within the trial court's discretion to exceed one defendant's speedy trial rights in order to facilitate a joint trial. However, the court went on to note that where the various defendants were not charged jointly and where there was no evidence to link the various similar offenses, it would be an abuse of discretion to exceed one defendant's speedy trial rights to allow the police more time to search for "potential" connections among the cases. The court held:

The suspicion that a link will "potentially" be discovered between

the case that is scheduled for trial, and other crimes not yet charged, is not like other reasons that our courts have recognized as justifying delay of trial as “required in the administration of justice.” The continuance in this case was not required to allow the State to prepare its case. The State could have proceeded to trial on December 29 on the charge for which Nguyen had already been arraigned. If forensic testing later provided evidence that Nguyen was responsible for other crimes, the State could have filed the additional charges at that time. Alternatively, if trying all the home invasion robberies together was a higher priority, the State could have waited to charge Nguyen until the testing of evidence was completed. The State has not explained why it is just to detain a defendant longer than 60 days after arraignment solely on the suspicion that he might be linked to some other crime.

State v. Nguyen, 131 Wn.App. at 820-821.

On January 12, 2017, the court called the case at bar for review. RP 1/12/17 1-9. At that time defendant’s appointed attorney moved for a continuance in order to effectively prepare for trial. RP 1/12/17. 1-3. Although the defense attorney informed the court that the defendant had refused to sign a speedy trial waiver and objected to a continuance, the court granted the motion and reset the trial date. RP 1/12/17 3, 6.

Almost two months later the court again called the case for review. RP 3/2/17 1. At that time the defendant’s attorney made an oral motion to withdraw upon his claim that “communication” between him and the defendant “has been irretrievably broken.” RP 3/2/17 1-6. In fact, he was the second attorney appointed to represent the defendant. RP 3/2/17 11. He did not file a written motion or a supporting affirmation as part of his

request. RP 3/2/17 1-13. The court granted the motion without giving the defendant the opportunity to either agree with or dispute her attorney's claim. RP 3/2/17 1-13. However, the defendant was able to object to any continuance of the trial date during the following exchange:

MR. PEET: Your Honor, she wishes – she has something regarding speedy trial. I think it would be better served speaking to new counsel before that's made.

THE COURT: She's asking to have you off the case. I'm kind of in a box with regard to the speedy trial issue. Mr. Purves, because she's asking for new counsel, does that not set out speedy trial?

MR. PURVES: I would say that, if the Court is finding that the defense is being removed for purposes of a conflict –

THE COURT: I'm not going to make another attorney be ready for trial on Monday, ma'am. I'm not doing that.

THE DEFENDANT: I'm saying, from the very beginning, I've never signed one paper, one speedy trial – I've never signed my waiver for a speedy trial. I've never signed any continuances for trials.

THE COURT: Well, I'm not dealing with going back on a clock over a year to look through every pleading on this case to determine what did and didn't happen –

THE DEFENDANT: And there was –

THE COURT: Ma'am, don't interrupt me, please.

THE DEFENDANT: Okay.

THE COURT: I'm trying not to be rude, but I'm getting very impatient, because you keep raising your hand. I'm not going back. This matter was set before me, in the middle of a trial I'm trying to conduct, with

regard to an emergency need to have an attorney off a case that's set for trial Monday. I'm not going to make another attorney get ready for trial by Monday. That attorney can look into the prior history if he or she feels that speedy trial rights were in some way violated.

With the cadre of attorneys we have doing defense cases, all of them are quite capable. I doubt one of them would try to pull something over on a defendant by having them waive speedy trial rights. That's something new counsel can deal with. I'm not going to push Mr. Peet to respond to that today, and I'm not going to respond today.

RP 3/12/17 13-15.

As this review of the record reveals, over the defendant's objection, the trial court continued this case well beyond the time required for speedy trial under CrR 3.3 when it allowed the defendant's attorney to withdraw upon his claim that attorney-client communication had been irretrievably broken. However, the court took this step without any confirmation from the defendant that she wanted a new attorney or that she believed that she had lost the ability to effectively communicate with her current attorney. As the following explains, the trial court's failure to take this step rendered the decision to appoint a new attorney and continue the case an abuse of discretion.

The decision whether or not to allow a defense attorney in a criminal case to withdraw because of a complete breakdown in attorney-client communication lies within the sound discretion of the trial court. *State v.*

Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). A trial court abuses its discretion when its decision is “manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Garcia*, 179 Wn.2d 828, 318 P.3d 266 (2014) (internal quotation marks omitted). In determining whether or not a court should allow counsel to withdraw on this basis, the court must address the issue whether the case involves a defendant’s mere general dissatisfaction with his or her counsel. *State v. Schaller*, 143 Wn.App. 258, 268, 177 P.3d 1139 (2007). In addition the court must find that the breakdown in communication is not because of the defendant’s own refusal to cooperate. *Id.* at 271.

In the case at bar the trial court did not address any of these issues when it allowed defense counsel to withdraw based upon his oral claim of a complete breakdown in attorney-client communication. Neither did the court even allow the defendant to address the issue and express her desire for or against the appointment of new counsel. Finally, the trial court’s comments to the defendant after allowing counsel to withdraw appear to indicate that the trial court found no real basis for the substitution of counsel other than the defendant unjustified intransigence. The trial court’s decision to grant defense counsel’s request to withdraw absent any argument or findings on the facts and issues relevant to that decision

constituted an abuse of discretion. Thus, in the case at bar the trial court violated the defendant's right to speedy trial when it continued the case in order to allow new counsel to prepare because there was no basis for the appointment of new counsel. As a result, and the defendant is entitled to dismissal with prejudice under CrR 3.3(h).

III. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE CONCLUSION THAT THE BUILDING THE DEFENDANT ILLEGALLY ENTERED WAS A "DWELLING" AS THAT TERM IS USED IN THE BURGLARY STATUTE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 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, 1073, 25 L.Ed.2d 368 (1970). 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." *In re Winship*, 397 U.S. at 364.

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.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence 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.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

For example, in *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the state presented the following evidence: (1) during the evening in question, someone entered the victims’ home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city), at 4:30 that same morning, (3) that the victim’s wallet was found in a bag next to

the cash machine, (4) that the bag had the defendant's fingerprints on it, and (5) that the defendant's fingerprints were also found on a piece of paper located by a second cash machine where the card was used.

Following conviction, the defendant appealed, arguing that the state had failed to present substantial evidence to support the burglary conviction. The Court of Appeals disagreed, and affirmed. The defendant then sought and obtained review by the Washington Supreme Court, which reversed, stating as follows.

Second degree burglary is defined as follows:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle.

RCW 9A.52.030(1). We agree with petitioner that the State failed to sustain its burden of proof. The State's evidence proved only that petitioner may have possessed the recently stolen bank cards in Kennewick. ***There was no direct evidence, only inferences***, that he had committed second degree burglary by entering the premises in Richland.

State v. Mace, 97 Wn.2d at 842 (emphasis added).

In the case at bar the state charged the defendant in Count I with residential burglary under RCW 9A.52.025(1). This statute states:

(1) A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

RCW 9A.52.025(1).

Although there is no definition for the term “dwelling” in RCW 9A.52, the legislature has provided a definition for this term in RCW 9A.04.110(7).

This statute provides as follows:

(7) “Dwelling” means any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging;

RCW 9A.04.110(7).

In the case at bar the evidence presented at trial by both the state and the defense was that the building in question has not being used or ordinarily used by a person for lodging. In fact, as Ms Cuccia admitted in her testimony she had not lived in the house for many months, the electricity had been turned off, and there had been a substantial water leak months prior to the defendant’s unlawful entry. The two deputies who testified confirmed this testimony in their description of the building as so full of boxes and detritus as to make it difficult to move from room to room. Thus, in the case at bar, there was a lack of substantial evidence that at the time the defendant was unlawfully in the building it was a dwelling. Consequently, the trial court erred when it accepted the jury’s verdict on a charge of residential burglary.

IV. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE IMPEACHED THE DEFENDANT WITH HER PRIOR BURGLARY CONVICTION DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at

694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to object to the admission of the defendant's prior conviction for burglary as more prejudicial than probative. Specifically, defendant argues that the use of her prior burglary conviction to impeach her testimony denied her due process under the state and federal constitution and that counsel's failure to object denied her effective assistance of counsel. The following sets out this argument.

While due process does not guarantee every person a perfect trial, the due process clauses in both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, unfairly prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). It also guarantees a fair trial untainted by unreliable, unfairly prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is embodied in ER 403, which states that the trial court should

exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value. This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in

State v. Kendrick, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

In the case at bar, the state charged the defendant with residential burglary. The defendant responded with a claim that while she had illegally entered the building thereby committing a trespass, she had done so to get out of the cold and had not formed the intent to commit a crime in the building. Without objection by the defense, the state elicited evidence from the defendant on cross-examination that she had a prior conviction for burglary, the very crime for which she was then being prosecuted. As reference to the decision in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), reveals, this type of evidence was inadmissible because its unfair prejudicial effect far outweighed its evidentiary value for impeachment.

In *Pogue, supra*, the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did

not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The

court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

In the case at bar the evidence of the defendant's prior conviction for burglary was just as unfairly prejudicial given the defendant's burglary charge as was the drug evidence in *Pogue* given the fact that the defendant in *Pogue* was charged with a drug offense. In reply the state in this case may well argue that while evidence may be excluded under ER 404(b) as well as under ER 609(a)(1) because it is more prejudicial than probative, the evidence of the prior convictions in the case at bar was *per se* admissible under ER 609(a)(2) because they were crimes of dishonesty. The defense admits that the decision in *State v. Brown*, 113 Wn.2d 520, 787 P.2d 906 (1989) supports this general principle. The following explains why this argument does not control in the case at bar.

A careful review of the *Brown* decision and those other cases stating that impeachment evidence under ER 609(a)(2) is *per se* admissible reveals

that in those cases the defendants were arguing that the admission of the impeachment evidence unconstitutionally chilled their right to testify under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. In those cases the court held that *per se* admission of crimes of dishonesty to impeach a defendant's testimony did not violate those defendant's constitutional right to testify given the fact that each defendant had the right to require that the court give a limiting instruction on the jury's use of that evidence. By contrast, in the case at bar the defendant is not arguing a violation of his right to testify under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. Rather, in this case the defendant is arguing that the *per se* admission of her prior burglary conviction violated her due process right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

As previously stated, all defendants in our courts have the right to a fair trial free from the admission of unfairly prejudicial evidence. *State v. Swenson, supra; Bruton v. United States, supra*. The fact that impeachment evidence under ER 609(a)(2) can be unfairly prejudicial is recognized by the requirement that the court give a limiting instruction if requested by the defense. In *State v. Dow*, 162 Wn.App. 324, 253 P.3d 476 (2011), the court

noted as follows concerning the potential for unfair prejudice in prior convictions admitted under ER 609(a)(2).

When prior conviction evidence is admitted under ER 609(a)(2), a limiting instruction should be given that the conviction is admissible only on the issue of the witness' credibility and that it may not be considered on the issue of guilt. The potentially prejudicial nature of prior conviction evidence makes limiting instructions critically important. If counsel requests a jury instruction limiting the use of admitted ER 609 evidence, the trial court must give one.

State v. Dow, 162 Wn.App. at 333.

As the *Pogue* case and logic explain, the closer the defendant's prior convictions are to the charge pending before the jury the higher the likelihood of unfair prejudice. Similarly when multiple convictions are admitted the likelihood of unfair prejudice also increases. In the case at bar not only was the defendant's current charge exactly the same as the charge admitted under ER 609(a)(2), but the court also admitted a number of theft convictions into evidence for impeachment. While the defense does not argue that trial counsel was ineffective for failing to object to the admission of these crimes, the fact that the jury was informed of them at the same time exacerbates the unfair prejudicial effect of admitting the burglary convictions while lessening the state's need to use that conviction to impeach. Thus, the possibility of unfair prejudice arising from informing the jury that the defendant had a conviction for the exact same crime as the

charge currently before them was extreme and had the effect of denying the defendant a fair trial.

In this case the state may also argue that the court's use of the limiting instruction absolutely precludes an argument of unfair prejudice over the admission of evidence under ER 609(a)(2). However, any such argument should fail because our case law recognizes that some errors cause sufficient unfair prejudice that no limiting instruction can ameliorate that error. *See State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). In this case the defendant argues that the admission of her burglary conviction was so prejudicial in any jury's mind to overcome the court's limiting instruction. In other words, in this case the admission of this evidence simply denied the defendant a fair trial because no reasonable jury would be able to only use it for its ostensive purpose for impeachment. Rather, a reasonable jury would be compelled to use it improperly and simply convict the defendant of the current crime because her prior conviction proved her propensity to do just what the state was arguing she did again: unlawfully enter a building with the intent to commit a crime therein.

Defendant argues that no reasonably prudent attorney would fail to object to this evidence given the grossly unfair prejudice that the evidence caused. Finally, while the evidence in this case was strong to convict, it was

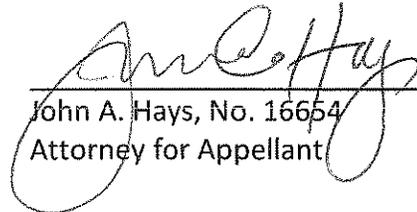
not overwhelming. Thus, trial counsel's failure to object to the admission of the defendant's prior burglary conviction under a due process argument caused prejudice to the defendant's case. As a result, this court should reverse and remand for a new trial.

CONCLUSION

For the reasons set out herein, this court should vacate the defendant's convictions based upon the court's failure to bring the defendant to trial within the time required under CrR 3.3. In the alternative, this court should vacate the defendant conviction for bail jumping and remand for a new trial with an instruction that does not shift the burden of proof on an essential element of the crime. In addition, this court should vacate the defendant's conviction for residential burglary and remand with instructions to enter judgment and sentence on a charge of second degree burglary.

DATED this 10th day of January, 2018.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

JURY INSTRUCTION NO. 25

It is a defense to the charge of bail jumping that:

- (1) uncontrollable circumstances prevented the defendant from personally appearing in court; and
- (2) the defendant did not contribute to the creating of such circumstances in reckless disregard of the requirement to appear; and
- (3) the defendant appeared as soon as such circumstances ceased to exist.

For the purposes of this defense, an uncontrollable circumstance is an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of man such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is not time for a complaining to the authorities and not time or opportunity to resort to the courts.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 9A.76.120
Bail Jumping

(1) 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.

(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.

(3) Bail jumping is:

(a) A class A felony if the person was held for, charged with, or convicted of murder in the first degree;

(b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in the first degree;

(c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony;

(d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

vs.

SARAH M. BROWNING,
Appellant.

NO. 50390-5-II

AFFIRMATION
OF SERVICE

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 10th day of January, 2018, at Longview, WA.


Diane C. Hays

JOHN A. HAYS, ATTORNEY AT LAW

January 10, 2018 - 2:56 PM

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