

No. 50401-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JORY DENMAN, Appellant.

Appeal from the Superior Court of Cowlitz County
The Honorable Michael Evans
No. 16-1-00583-4

**BRIEF OF APPELLANT
JORY DENMAN**

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I. ASSIGNMENTS OF ERROR

1. The conviction for bail jumping, without sufficient evidence, was error.
2. The State's closing argument, which argued facts not in evidence, was error.
3. Defense counsel's failure to object to the State's improper closing argument, was error.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is there sufficient evidence to convict a defendant of bail jumping when there is no evidence that the defendant was present in court on the date the order to appear was entered, there is no evidence that the defendant signed the order to appear, the order to appear lists a month and day to appear, but not a year, and there is no evidence of what time the court determined that the defendant failed to appear and whether or not that was after he was ordered to appear?
2. Does the State commit flagrant and ill-intentioned misconduct when they argue that the defendant signed an order to appear when there was no evidence that the defendant was the person who signed the order to appear?
3. Is defense counsel ineffective when they fail to object to

the State's improper closing argument when the State argues facts not in evidence?

III. STATEMENT OF THE CASE

Denman was originally charged with six felony drug charges: three counts of delivery of a controlled substance with a school zone enhancement, one count of possession of a controlled substance with intent to deliver, and two counts of possession of a controlled substance. CP 5-7. On the day of trial, the State filed an amended information, adding one count of bail jumping, and then moved to dismiss all of the original charges. RP 12; CP 36-38. Denman was convicted of bail jumping. RP 98; CP 73. He appeals his conviction.

1. Facts.

The only witness that testified at trial was the court clerk who handles the criminal docket, Jeanette Kline. RP 49. She takes minutes during the criminal court docket. RP 50. She testified that Denman was arraigned on May 17, 2016. RP 53. At the arraignment, future dates were set, including a pretrial on July 11, 2016 at 2:00 p.m., a readiness hearing on August 4, 2016 at 9:00 a.m., and trial the week of August 8, 2016. RP 54.

The clerk testified that she recognized Denman from previous court appearances, but did not identify him as the person present in court

on May 17, 2016. RP 52.

Q Now, Ms. Kleine, do you know the name Jory Denman?

A I do.

Q Do you see him here in the courtroom?

A I do.

Q And where is he seated?

A He is seated next to Mr. Blondin in the gray jacket.

Q Okay. And how do you recognize Mr. Denman?

A I've seen him in court before.

Q Okay. For this case?

A Yes.

RP 52.

An order to appear was signed at the arraignment. RP 54; Exh 2.; CP 12. The order to appear listed the dates as "JULY 11 2:00," "AUG 4 9:00 a.m.," and "AUG 8 a.m." Exh. 2, CP 12. No year is listed next to any of the dates. RP 65, Exh. 2, CP 12.

There is a signature line for the defendant. Exh. 2, CP 12. The only evidence that Denman signed the order was the testimony of the clerk, stating that it appeared to be the defendant's signature:

Q Okay. And is it signed by any particular individuals?

A It is.

Q Who is that?

A It appears to be Mr. Denman and Judge Evans.

RP 56. There was no testimony confirming that it was Denman's signature, no testimony that he was told the dates and times to appear, and no testimony that he was given a copy of the order.

Denman did not appear on August 4, 2016 at 9:00 a.m. RP 59.

Denman did appear at eight other hearings, many of them set at 2:00 p.m. RP 60-61.

The clerk did not have any knowledge of whether or not Denman appeared at all on August 4, 2016. RP 64. She testified that if he had, she would have directed him to contact his attorney. RP 64.

Denman quashed the warrant at the next available hearing, which was August 8, 2016. RP 62. In order to have been scheduled for that docket, he would have had to have been in contact with his attorney and his attorney would have to have contacted the court after his scheduled hearing on Thursday August 4, 2016 at 9:00 and no later than Friday, August 5, 2016 at 1:00 in order to have been added to the next available calendar on August 8, 2016. RP 63-64.

2. Closing Arguments.

The State argued that Denman signed the order to appear:

And we know from the testimony that he was aware of these dates because he signed a document saying here are your dates, you need to appear here in court on these dates and times, you are ordered to do so.

RP 89.

IV. ARGUMENT

1. There Was Insufficient Evidence to Convict Denman of Bail Jumping.

“The standard for determining whether a conviction rests on insufficient 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.’” *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011) (internal citations omitted). “The due process clause of the fourteenth amendment to the United States Constitution requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged.” *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983); U.S. CONST. amend. XIV.

In this case, the State had the burden to prove beyond a reasonable doubt that Denman had been charged with a class B or C felony, had been admitted to bail, had “knowledge of the requirement of a subsequent

personal appearance” before the court, and failed to appear as required.
RCW 9A.76.170; CP 67-70.

a. *There Was Insufficient Evidence that Denman Was Given Notice of the Required Court Date.*

“In order to meet the knowledge requirement of the statute, the State is required to prove that a defendant has been given notice of the required court dates.” *State v. Cardwell*, 155 Wash. App. 41, 47, 226 P.3d 243, 246 (2010), *review granted, cause remanded*, 172 Wash. 2d 1003, 257 P.3d 1114 (2011).

In this case, the record shows that Denman was given an order to appear on “AUG 4” at 9:00 a.m. RP 65, Exh. 2, CP 12. No year was listed. Therefore, there was insufficient evidence that Denman was given notice to appear on August 4, 2016. Furthermore, there was no evidence presented that Denman was given a copy of the order to appear or told in open court to appear on that date. Finally, there is was no evidence that Denman signed the order to appear. The only testimony presented regarding the signature was the clerk’s testimony that the signature on the order to “appears to be Mr. Denman” RP 56. Therefore, there was insufficient evidence that Denman was given notice that he was required to appear on August 4, 2016. Therefore, the bail jumping charge should be dismissed.

- b. *There Was Insufficient Evidence that Denman Failed to Appear on the Date and Time that He Was Ordered to Appear.*

The State must prove that the defendant failed to appear on the date and time he was given notice to appear. In *Coleman*, the State's evidence showed that Coleman did not appear at 8:30; however, the notice to appear was for 9:00. *State v. Coleman*, 155 Wash. App. 951, 964, 231 P.3d 212, 219 (2010). The court of appeals reversed the conviction for insufficient evidence because "[t]aking all the evidence and reasonable inferences in the light most favorable to the State, nothing before the jury established that Coleman was absent at the time specified on his notice." *Id.*

In this case, the only evidence presented that Denman failed to appear was the clerk's minute entry from August 4, 2016 that Denman failed to appear. RP 59. The minute entry lists a date of August 4, 2016, but no time. Exh. 4. It does not show what time the hearing was, what time the Denman failed to appear, or what time the bench warrant was issued. Exh. 4. No one testified that they were present on that date and polled the gallery, called the case, or otherwise confirmed that Denman was not there. The testified that he if had appeared after the warrant was issued she would have referred him to his attorney, but she could not recall whether or not he appeared on August 4, 2016. RP 63-64. If the court

called the case and issued a warrant at 8:30, there would be insufficient evidence that Denman failed to appear at 9:00. There was no evidence presented from anyone present at court on August 4, 2016 that Denman failed to appear and there is no evidence regarding what time the minute entry or bench warrant were issued. Therefore, there is insufficient evidence that Denamn failed to appear on August 4, 2016 at 9:00 a.m. Therefore, the bail jumping charge should be dismissed.

c. *There Was Insufficient Evidence that the Person Who Was Given Notice to Appear and Who Failed to Appear Was Denman.*

The State must also prove that the person given notice to appear, and who did not appear, is the same person on trial. In *Huber*, the bail jumping conviction was reversed for insufficient evidence because the State failed to present any evidence that the defendant on trial was the same person who was given notice to appear and failed to appear. *State v. Huber*, 129 Wash. App. 499, 501–02, 119 P.3d 388, 389 (2005). The State presented evidence that the person given notice to appear and who failed to appear had the same name as the defendant, but not that it was in fact the same person, noting there was no eyewitness identification, booking photos, or fingerprints presented. *Id.* at 502-03.

In this case, no one identified Denman as the person who appeared at the arraignment and was given notice to appear on August 4th or that he

was the same person who failed to appear on August 4th. The only evidence identifying Denman was the testimony of the clerk. She testified that the person on trial was Denman and that she recognized him from previous court appearances. RP 52. However, she did not specify which date(s) she had previously seen Denman. There was no testimony that identified Denman as the person who was present in court on May 17, 2016 when the order to appear was signed or that Denman was the person who failed to appear on August 4, 2016. And, no other evidence of identification was presented. There is insufficient evidence to prove that Denman was the same person who was present in court on May 17, 2016, when the order to appear on August 4, 2016 was entered. Therefore, the bail jumping charge should be dismissed.

2. Prosecutorial Misconduct.

A claim of prosecutorial misconduct can be raised and considered for the first time on appeal if the prosecutor's actions "were 'so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.'" *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) (internal citations omitted). An argument is flagrant and ill-intentioned when those same arguments have been held improper in a published opinion. *State v. Johnson*, 158 Wash. App. 677, 685, 243 P.3d 936, 940 (2010).

“Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial.” *In re Glasmann*, 175 Wash. 2d 696, 703-04, 286 P.3d 673, 677 (2012); *State v. Davenport*, 100 Wash.2d 757, 762, 675 P.2d 1213 (1984); *see also* WASH. CONST. art I, § 21, U.S. CONST. amend. VI, XIV. A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the conduct was improper and that it prejudiced his defense. *State v. Harvey*, 34 Wn. App. 737, 740, 664 P.2d 1281 (1983), *review denied*, 100 Wn.2d 1008 (1983). A defendant’s constitutional right to a fair trial is violated when there is a substantial likelihood that improper comments affected the jury’s verdict. *State v. Jungers*, 125 Wn. App. 895, 106 P.3d 827 (2005).

It is improper for the State to argue facts that are not in evidence. *State v. Jones*, 144 Wash. App. 284, 294, 183 P.3d 307, 313 (2008). In this case, the State argued,

And we know from the testimony that he was aware of these dates because he signed a document saying here are your dates, you need a lawyer to appear in court on these days and times, you are ordered to do so.

RP 89.

As argued above, there was no evidence that Denman signed the order to appear or that he was the person present in court on that date. Also, there was no evidence presented at trial about what the judge said,

there was no evidence that Denman was told “here are your dates” that he needed a lawyer to appear on those dates or that he was ordered to appear. The State improperly argued facts not in evidence. An objection was not made, but such argument was flagrant and ill-intentioned because it is contrary to law and clearly not supported by the evidence. A curative instruction would not have unrung the bell, as the court would not instruct the jury on the evidence or lack of evidence presented, but would have simply instructed the jury to disregard the State’s argument. The error was extremely prejudicial because it argued facts that, if true, would have established knowledge. Therefore, this court should consider the error for the first time on appeal and reverse.

4. Denman Received Ineffective Assistance of Counsel.

To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988).

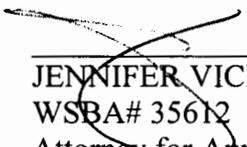
As argued above, in closing argument, the State improperly argued facts not in evidence. For the reasons stated above, the argument was improper and an objection would have likely been successful. Because these arguments were improper and prejudicial, as argued above, there was no strategic reason for failing to object. Counsel's failure to object denied Denman of effective assistance of counsel and likely affected the verdicts in this case.

V. CONCLUSION

In conclusion, there was insufficient evidence to support a conviction for bail jumping. In the alternative, this court should reverse and remand for a new trial because Denman was denied a fair trial due to prosecutorial misconduct and ineffective assistance of counsel.

Dated this 6th day of October, 2017.

Respectfully Submitted,



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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 50401-4-II
vs.)	
)	CERTIFICATE OF SERVICE
JORY DENMAN,)	
)	
Appellant.)	
)	

The undersigned certifies that on this day correct copies of this appellant's brief were delivered electronically to the following:

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The undersigned certifies that on this day correct copies of this appellant's brief were delivered by U.S. mail to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.



Signed October 6, 2017 at Tacoma, Washington.

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October 06, 2017 - 2:02 PM

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Appellate Court Case Title: State of Washington, Respondent v Jory E. Denman, Appellant
Superior Court Case Number: 16-1-00583-4

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