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NO. 50636-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

LAMAR JEFFRIES,
Appellant.

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

Pierce County Cause No. 15-1-04739-8

The Honorable Frank E. Cuthbertson, Judge

BRIEF OF APPELLANT

Skylar T. Brett
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
SKYLAR T. BRETT
P.O. Box 2711
Vashon, WA 98070
(206) 494-0098
skylarbrettlawoffice@gmail.com

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ISSUES AND ASSIGNMENTS OF ERROR

1. The state presented insufficient evidence to convict Mr. Jeffries of Count IV.
2. The trial court erred by entering a conviction for Count IV.
3. No rational jury could have found beyond a reasonable doubt that Mr. Jeffries had failed to appear at the specific place and time at which he had been ordered.

ISSUE 1: To convict for bail jumping, the state must prove that the accused failed to appear for a required hearing at the specific place and time and s/he had been ordered to appear. Did the state present insufficient evidence to convict Mr. Jeffries of Count IV when the evidence showed only that he was absent from some unspecified courtroom in a busy courthouse at 3:10pm on a day when he had been ordered to report to a specific courtroom at 1:00pm?

4. The court's to-convict instruction violated Mr. Jeffries's Fourteenth Amendment right to due process.
5. The court's to-convict instruction violated Mr. Jeffries's Wash. Const. art. I, § 3 right to due process.
6. The court's to-convict instruction impermissibly relieved the state of its burden of proof.
7. The court's to-convict instruction erroneously omitted the element that Mr. Jeffries had failed to appear in court "as required."
8. The court erred by giving instruction number 14.
9. The violation of Mr. Jeffries's due process rights constitutes manifest error affecting a constitutional right.

ISSUE 2: An accused person has a due process right to have the jury instructed on each element of an offense. Did the court's to-convict instruction violate Mr. Jeffries's due process right by allowing conviction without proof that his conduct met the statutory element that he had failed to appear in court "as required"?

10. Mr. Jeffries was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

11. Mr. Jeffries was denied his Wash. Const. art. I, § 22 right to the effective assistance of counsel.
12. There is a reasonable probability that defense counsel's errors affected the outcome of Mr. Jeffries's trial.
13. Mr. Jeffries's defense attorney provided ineffective assistance of counsel by failing to object to inadmissible, prejudicial evidence.

ISSUE 3: A defense attorney provides ineffective assistance of counsel by unreasonably failing to object to inadmissible evidence that prejudices the accused. Did Mr. Jeffries's attorney provide ineffective assistance by failing to object to evidence regarding lawlessness on Pierce County buses and the need to enforce minor infractions in order to prevent criminals from "prey[ing]" on the vulnerable or to testimony that Mr. Jeffries had been released from jail under conditions that made him appear particularly dangerous?

14. Mr. Jeffries's defense attorney provided ineffective assistance of counsel by failing to conduct reasonable investigation into his diminished capacity defense.
15. Mr. Jeffries's defense attorney provided ineffective assistance of counsel by failing to reasonably research available defenses to bail jumping.

ISSUE 4: A defense attorney provides ineffective assistance of counsel by failing to conduct reasonable investigation into applicable defenses. Did Mr. Jeffries's attorney provide ineffective assistance by failing to conduct any investigation into a potential defense of diminished capacity based on the mistaken belief that it was not available to a bail jumping charge?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

After working all day on Thanksgiving, Lamar Jeffries wanted to do something nice for his sister so he went to Wal-Mart to buy groceries. RP (5/19/16) 190. When he was done shopping, Mr. Jeffries went to the bus stop and saw an empty bus with its door ajar. RP (5/19/16) 192-94. He took his groceries and boarded the empty bus, as he had done numerous times before. RP (5/19/16) 194.

When the bus driver got back, he reprimanded Mr. Jeffries for getting onto the bus when the driver was not there. RP (5/19/16) 58, 195. Mr. Jeffries got off the bus but the driver called dispatch who called the police. RP (5/19/16) 63-65 196.¹

A sheriff's deputy arrived and contacted Mr. Jeffries. RP (5/19/16) 85-86. After clarifying that he was not under arrest, Mr. Jeffries refused to comply with some of the deputy's orders. RP (5/19/16) 87-96. The deputy eventually handcuffed Mr. Jeffries and took him into custody. RP (5/19/16) 91, 96.

¹ The driver also testified that Mr. Jeffries swore at him and kicked the bus. RP (5/19/16) 59-61.

(Continued)

The state charged Mr. Jeffries with unlawful transit conduct and resisting arrest. CP 1-3. The state later amended the Information to remove those charges and add a count of obstructing instead. CP 5-6.²

Two months later, the prosecutor concluded that Mr. Jeffries had not appeared at a pretrial hearing and added a charge of bail jumping. CP 5-6.

Mr. Jeffries has been diagnosed with post-traumatic stress disorder (PTSD). CP 67. He has been hospitalized in the past for acting on a delusional belief that a drug cartel is trying to kill him. CP 67. The condition also affects Mr. Jeffries's cognition and his memory. CP 116-17.

Mr. Jeffries told his trial attorney about his psychiatric condition, believing that it could be relevant to his defense. RP (5/17/16) 6. But defense counsel told Mr. Jeffries that there was no defense available to a charge of bail jumping. RP (5/26/17) 7; RP (7/6/17) 8. Counsel did not seek expert opinion regarding whether Mr. Jeffries's condition affected his ability to form the mental culpability to commit bail jumping or any of the other offenses with which he was charged. CP 66; RP (5/17/16) 6-8; RP (5/26/17) 7; RP (7/6/17) 8.

² The state also charged Mr. Jeffries with third-degree assault based on the allegation that he had attempted to bite the arresting deputy. *See* CP 1-6. But the jury did not reach a verdict on that charge and it is not the subject to this appeal. RP (5/20/16) 264.

At trial, the arresting officer – a Pierce County Sheriff’s deputy assigned to Pierce Transit – testified for the state. CP (5/19/16) 76-112. He said that things were “very chaotic” on the buses in the area before the deputies started to help keep order. RP (5/19/16) 78.

The deputy testified that the types of people who use transit in Pierce County are not like those who take the bus to work in Seattle. RP (5/19/16) 79. Rather, he said that most of the people who use the buses in Pierce County are infirm, mentally ill, elderly, or have lost their driving privileges. RP (5/19/16) 79.

The deputy testified that the bus route that Mr. Jeffries had been trying to use was particularly dangerous. RP (5/19/16) 80. He testified that people who can’t defend themselves are targeted on the buses in that area by others who are looking for victims to prey upon. RP (5/19/16) 80.

Accordingly, the deputy explained, the sheriff’s office employs “broken windows” policing on Pierce County buses by focusing on small infractions to prevent larger crimes from developing. RP (5/19/16) 79-80. The deputy said that this strategy worked to “clean up the system.” RP (5/19/16) 79-80.

Mr. Jeffries’s defense attorney did not object to any of this testimony. RP (5/19/16) 78-80.

The deputy also testified that Mr. Jeffries cursed at him and refused to put his hands on his head while he was being un-handcuffed. RP (5/19/16) 92, 95. Then the deputy claimed that Mr. Jeffries struggled when he tried to put him in the patrol car, which required calling for backup. RP (5/19/16) 96-104.

The state called a deputy prosecuting attorney to provide evidence for the bail jumping charge. RP (5/19/16) 140-58. He explained (and authenticated documents demonstrating) that Mr. Jeffries had been ordered to appear in courtroom 270 at 1:00pm on the date in question. Ex. 7; RP (5/19/16) 141. But he only testified that, on the date of the hearing, Mr. Jeffries was not present in some unspecified courtroom at 3:10pm. RP (5/19/16) 153. This was despite the fact that he had also testified that similar hearings were going on in other courtrooms in the courthouse at the same time and that accused persons were meeting with their attorneys in adjoining rooms while the hearings took place. RP (5/19/17) 142, 152-53. The witness did not say anything regarding whether Mr. Jeffries had been present in one of those meeting rooms or in another courtroom. RP (5/19/16) 140-58.

Exhibit 6 is an order establishing Mr. Jeffries's conditions of release, which was admitted in support of the bail jumping charge. Ex. 6; RP (5/19/17) 144. The document orders Mr. Jeffries not to "possess

weapons or firearms;” not to consume alcohol or illegal drugs, and not to have any “hostile contact with law enforcement.” Ex. 6, p. 2.

Defense counsel did not object to this evidence or seek to have the exhibit redacted. *See* RP (5/19/17) 144.

The court’s to-convict instruction for the bail jumping charge listed the elements of that offense as follows:

- (1) That on or about January 12, 2016, the defendant failed to appear before a court;
 - (2) That the defendant was charged with Assault in the Third Degree;
 - (3) That the defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court; and
 - (4) That any of these acts occurred in the State of Washington.
- CP 30.

The jury found Mr. Jeffries guilty of obstructing and bail jumping. CP 34-35. The state sought to retry Mr. Jeffries for the assault charge and also added another count of bail jumping based on events that took place after trial. CP 153-54. Mr. Jeffries ended up pleading guilty to the second count of bail jumping (Count V) and the state dismissed the assault charge. *See* RP (10/20/17).

This timely appeal follows. CP 127-28.

ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. JEFFRIES OF BAIL JUMPING (COUNT IV) BECAUSE THERE WAS NO EVIDENCE THAT HE WAS ABSENT FROM THE COURTROOM AT THE TIME THAT HE HAD BEEN ORDERED TO APPEAR.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found the charge proven beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013).

The bail jumping statute provides that:

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... and who fails to appear ... as required is guilty of bail jumping.

RCW 9A.76.170(1).

To convict a person for bail jumping, the state must prove beyond a reasonable doubt s/he was absent at the specific time and place at which s/he was notified the hearing would occur. *State v. Coleman*, 155 Wn. App. 951, 964, 231 P.3d 212 (2010) *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011).

In *Coleman*, for example the court of appeals reversed a bail jumping conviction when “nothing before the jury established that [the

defendant] was absent *at the time specified* on his notice of the hearing.”
Id. at 964 (emphasis added).

Similarly, here, the state’s evidence demonstrated, at most, that Mr. Jeffries was not in some un-specified courtroom at 3:10pm. RP (5/19/17) 153; Ex, 8. But he had been ordered to report to a specific courtroom (in a busy courthouse) at 1:00pm. RP (5/19/17) 141; Ex. 7. There was no evidence that Mr. Jeffries was absent from the courthouse at 1:00pm. *See* RP (5/19/17) 150-58.

The state failed to present any evidence that Mr. Jeffries had not been present in the specific courtroom to which he had been ordered on the appointed date and time. *See* RP (5/19/17) 140-58. Mr. Jeffries was ordered to appear in courtroom 270. Ex. 7. But the state presented evidence that similar hearings were going on in various courtrooms contemporaneously and that accused persons were meeting with their attorneys in adjoining rooms while the hearings took place. RP (5/19/17) 142, 152-53. The state’s witness did not clarify which courtroom had been polled for Mr. Jeffries. *See* RP (5/19/17) 140-58. The relevant exhibits are also silent on the matter. *See* Ex. 8, 9, 10. Absent some evidence that Mr. Jeffries had been absent from room 270, specifically, or that all of the courtrooms and meeting rooms had also been polled for Mr. Jeffries, the

state failed to prove beyond a reasonable doubt that he was not present on the appointed date and time.

No rational jury could have found Mr. Jeffries guilty of Count IV beyond a reasonable doubt. *Chouinard*, 169 Wn. App. at 899. His conviction must be reversed and vacated. *Id.*

II. MR. JEFFRIES’S CONVICTION FOR COUNT IV VIOLATED HIS RIGHT TO DUE PROCESS BECAUSE THE COURT’S TO-CONVICT INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE EACH ELEMENT OF BAIL JUMPING.

A. The court’s to-convict instruction failed to inform the jury of the requirement that the state prove that Mr. Jeffries had failed to appear “as required” in order to convict for bail jumping.

To convict for bail jumping, the state must prove both a requirement of subsequent personal appearance and that the accused failed to appear “as required.” *State v. Williams*, 162 Wn.2d 177, 184, 170 P.3d 30 (2007) (Williams I); RCW 9A.76.170(1). Absent such a showing, the jury could convict for activity that is not illegal: such as missing a non-mandatory hearing or simply failing to be in the courthouse on a random day on which no hearing is held.

In Mr. Jeffries’s case, the court’s to-convict instruction did not tell the jury that it had to find he had failed to appear “as required.” CP 58. Rather, it required proof only that Mr. Jeffries “failed to appear before a court” on a specified date. CP 30.

The to-convict instruction violated Mr. Jeffries's right to due process by relieving the state of its burden to prove an element of the offense.

A trial court's failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). A "to convict" instruction must contain all the elements of the crime, because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004).

Jurors have the right to regard the court's elements instruction as a complete statement of the law. Any conviction based on an incomplete "to convict" instruction must be reversed. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). This is so even if the missing element is supplied by other instructions. *Id.*; *Lorenz*, 152 Wn.2d at 31; *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

Instruction No. 14 relieved the state of its burden to prove each element of bail jumping beyond a reasonable doubt.³

³ Alleged constitutional violations are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3). Instruction No. 14 creates a manifest error affecting a constitutional right, and thus may be reviewed for the first time on appeal. RAP 2.5(a)(3). Jury instructions are also reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864.

In order to convict a person for bail jumping, the state must prove that s/he: (1) was held for, charged with, or convicted of a particular crime; (2) was released by court order or admitted to bail with knowledge of a required subsequent personal appearance; and (3) failed to appear as required. *Williams I*, 162 Wn.2d at 184; RCW 9A.76.170(1).

The court's to-convict instruction permitted conviction even if Mr. Jeffries did not fail to appear "as required." CP 30. The instruction was not available as an accurate "yardstick," and thus did not make the state's burden manifestly clear to the average juror. *State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). Constitutional error is harmless only if it is trivial, formal, or merely academic, if it is not prejudicial to the accused person's substantial rights, and if it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

Absent a showing that the accused failed to appear "as required," the jury could convict for activity that is not illegal: such as missing a non-mandatory hearing or simply failing to be in the courthouse on a random day on which no hearing is held.

Without the missing element (that Mr. Jeffries failed to appear “as required,”) the jury could have found him guilty based on non-appearance in court at some irrelevant date and time. The jury could have convicted Mr. Jeffries even if it found that there was insufficient evidence that the January 12th hearing was required. Indeed, as argued above, the state failed to meet its burden of proof because it neglected to introduce evidence that Mr. Jeffries was absent from court at the actual time when he had been ordered to appear. The evidence against Mr. Jeffries was not overwhelming.

The error here is presumed prejudicial, and the state cannot prove harmless error under the stringent test for constitutional error. *Watt*, 160 Wn.2d at 635. Accordingly, Mr. Jeffries’s bail jumping conviction for Count IV must be reversed. *Id.*

B. This court should decline to follow its holding in *Hart*, because that decision was wrongly-decided and is harmful.

This Court has decided that a to-convict instruction similar to the one given in Mr. Jeffries’s case was constitutionally adequate. *See State v. Hart*, 195 Wn. App. 449, 456, 381 P.3d 142 (2016), *review denied*, 187 Wn.2d 1011, 388 P.3d 480 (2017).

The *Hart* court upheld the instruction because it “required the State to prove beyond a reasonable doubt that Hart ‘had been released by court

order or admitted to bail with knowledge *of the requirement* of a subsequent personal appearance before that court.” *Id.* at 456.

But the reasoning in *Hart* is unavailing because it conflates two elements of bail jumping. The statutory element of bail jumping requiring proof that the accused failed to appear in court “as required” is textually and logically distinct from the element requiring proof that the court ordered a hearing, which the accused was required to attend. The first is proved through evidence that the hearing was held on the appointed date and time and that the accused was not present. The latter is proved through evidence that the court – on some previous date – scheduled the hearing and required the presence of the accused.

Indeed, the evidence establishing the two elements necessarily occurs at different times through the actions of different parties. Even so, *Hart* holds that the element that of failure to appear “as required” was established through the state’s proof that he “had been released by court order or admitted to bail with the knowledge of the requirement of a subsequent personal appearance before the court.” *Id.* at 456.

Mr. Jeffries does not challenge the court’s instruction regarding the element that he was aware of a required appearance in court. Rather, the court did nothing to inform the jury that it had to also find that he – at some later date – actually failed to appear as he had been ordered to do.

The *Hart* court’s reasoning is flawed because it renders superfluous the language of the bail jumping statute requiring proof that the accused failed to appear “as required” by equating it with the language requiring proof that s/he was released by the court “with knowledge of the requirement of a subsequent court appearance.” *See* RCW 9A.76.170(1); *State v. LaPointe*, 1 Wn. App. 2d 261, 269, 404 P.3d 610 (2017) (statutes should not be construed in a manner rendering any of the language meaningless or superfluous).

This court should overrule its decision in *Hart* because it is both incorrect and harmful. *State v. W.R., Jr.*, 181 Wn.2d 757, 760, 336 P.3d 1134 (2014).

The court’s to-convict instruction for bail jumping violated Mr. Jeffries’s right to due process by relieving the state of its burden of proof. *Lorenz*, 152 Wn.2d at 31. His conviction for Count IV must be reversed. *Id.*

III. MR. JEFFRIES RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO COUNSEL.

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).⁴

In order to demonstrate ineffective assistance of counsel, the accused must show deficient performance and prejudice. *Id.* Performance is deficient if it falls below an objective standard of reasonableness. *Id.* The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that counsel's mistakes affected the outcome of the proceedings. *Id.*

A "reasonable probability" under the prejudice standard for ineffective assistance requires less than the preponderance of the evidence standard. *Estes*, 188 Wn.2d at 458. Rather, "it is a probability sufficient to undermine confidence in the outcome." *Id.*; *see also Jones*, 183 Wn.2d at 339.

The presumption that a defense attorney has acted reasonably is rebutted if "no conceivable legitimate tactic explains counsel's performance." *State v. Fedoruk*, 184 Wn. App. 866, 880, 339 P.3d 233

⁴ Ineffective assistance of counsel claims are reviewed *de novo*. *Jones*, 183 Wn.2d at 338.

(2014) (*quoting State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

Here, Mr. Jeffries’s trial attorney provided ineffective assistance of counsel by failing to investigate a potentially valid defense and by failing to object to extensive, inadmissible, highly prejudicial evidence.

A. Mr. Jeffries’s defense counsel provided ineffective assistance at trial by failing to object to inadmissible, highly prejudicial evidence.

Defense counsel provides ineffective assistance by waiving a valid objection without any sound strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Evidence is not relevant unless it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Irrelevant evidence is inadmissible. ER 402.

To be relevant, evidence must: “(1) tend to prove or disprove the existence of a fact, and (2) that fact must be of consequence to the outcome of the case.” *State v. Weaville*, 162 Wn. App. 801, 818, 256 P.3d 426 (2011) (*quoting Davidson v. Municipality of Metro. Seattle*, 43 Wn. App. 569, 573, 719 P.2d 569 (1986)). In a criminal case, this includes “facts which offer direct or circumstantial evidence of any element of a claim or defense.” *Id.*

Even if it is relevant, evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice.” ER 403. Here, if this court finds that the evidence of the sex-related internet history was relevant, it was still inadmissible because any probative value was outweighed by the danger of unfair prejudice. ER 403.

1. Mr. Jeffries’s defense attorney should have objected to extensive, inadmissible police testimony regarding lawlessness on Pierce County buses and the need to enforce minor infractions in order to prevent criminals from “prey[ing]” on the vulnerable.

Without any objection by Mr. Jeffries’s attorney, the arresting deputy testified that it was “very chaotic” on buses in the area before the sheriff’s office got its contract to help keep order. RP (5/19/16) 78. He told the jury that most of the people who use the buses in Pierce County are infirm, mentally ill, elderly, or have lost their driving privileges. RP (5/19/16) 79. He said that the people who use transit in Pierce County are not like the people who take the bus to work in Seattle. RP (5/19/16) 79. The deputy testified that the bus route that Mr. Jeffries had been trying to use was particularly troublesome. RP (5/19/16) 80. He said that people who can’t defend themselves are targeted on buses by others who are looking for victims to prey upon. RP (5/19/16) 80.

In this context, the deputy explained how the deputies employ “broken windows” policing by focusing on small infractions to prevent

larger crimes from developing and in order to “clean up the system.” RP (5/19/16) 79-80.

This evidence was not relevant to any element of assault, obstruction, or bail jumping. But it encouraged the jury to convict Mr. Jeffries because he was the type of person who “prey[s]” on defenseless riders on Pierce County buses. RP (5/19/16) 80. The evidence also encouraged the inference that Mr. Griffin was either mentally ill or had “lost his driving privileges.” RP (5/19/16) 79. Accordingly, the evidence was inadmissible under ER 401, 402, and 403 because it was irrelevant and any scant probative value was outweighed by the risk of unfair prejudice to Mr. Jeffries’s defense. *Weaville*, 162 Wn. App. at 818; ER 401, ER 402, ER 403.

In an analogous context, the courts of appeals have held that a prosecutor makes an improper argument by encouraging the jury to convict in order to protect the community, “preserve civil order,” or prevent future illegal activity. *State v. Ramos*, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011); *State v. Thierry*, 190 Wn. App. 680, 691, 360 P.3d 940 (2015). Such arguments are not permitted because they raise the risk that “the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence” based on the jurors’ belief that they are “assist[ing] in the solution of some pressing social problem.” *Ramos*, 164 Wn. App. at

338. As the *Ramos* court notes, “the amelioration of society’s woes is far too heavy a burden for the individual criminal defendant to bear.” *Id.*

Similarly, the evidence in Mr. Jeffries’s case encouraged the jury to convict in order to “preserve civil order” on the transit system, to prevent future lawlessness, or to assist the sheriff’s office in its attempt to prevent people from “prey[ing]” on vulnerable bus-riders. *Id.*

Mr. Jeffries’s attorney should have objected to the inadmissible, highly prejudicial evidence and provided ineffective assistance of counsel by failing to do so. *Saunders*, 91 Wn. App. at 578.

Mr. Jeffries’s was prejudiced by his attorney’s deficient performance. *Jones*, 183 Wn.2d at 339. The evidence regarding Mr. Jeffries’s alleged conduct on the bus was already arguably irrelevant and inadmissible. The jury also apparently did not find all of the state’s evidence credible, as demonstrated by their failure to reach a verdict on the assault charge. RP (5/20/16) 264. There is a reasonable probability that the extensive police testimony encouraging the jury to convict Mr. Jeffries in order to protect the transit system from devolving into chaos was affected the outcome of Mr. Jeffries’s trial. *Id.*

2. Mr. Jeffries’s defense attorney should have objected to evidence that he was released from jail based on conditions that made him appear particularly dangerous.

Exhibit 6, which was admitted to support the bail jumping charge against Mr. Jeffries, lists out the conditions on which he was released from jail. Ex. 6. Specifically, the document orders Mr. Jeffries not to “possess weapons or firearms;” not to consume alcohol or illegal drugs, and not to have any “hostile contact with law enforcement.” Ex. 6, p. 2.

Those conditions were not relevant to any element of the offenses against Mr. Jeffries but served to make him appear dangerous and were likely read by the jury to demonstrate that a court had already concluded that Mr. Jeffries was violent, had a drinking or drug problem, and/or had had “hostile” contact with the deputies in the case. Ex. 6.

But defense counsel failed to object to Exhibit 6 or to seek redaction of the inadmissible, prejudicial information. *See RP generally*. Mr. Jeffries received ineffective assistance of counsel. *Saunders*, 91 Wn. App. at 578.

The evidence that the court had ordered Mr. Jeffries not to possess weapons, not to drink or use drugs, and to refrain from “hostile contact with law enforcement” was not relevant to any element of assault, obstructing, or bail jumping. Accordingly, it was inadmissible under ER 401 and 402. But the evidence encouraged the jury to find that the court had already concluded that Mr. Jeffries was violence or prone to “hostility” wit the police. Accordingly, any scant probative value was

outweighed by the risk of unfair prejudice under ER 403. Defense counsel had a duty to object to the inadmissible, highly prejudicial evidence and provided ineffective assistance by failing to do so. *Id.*

Again, Mr. Jeffries's was prejudiced by his attorney's deficient performance. *Jones*, 183 Wn.2d at 339. As outlined above, the jury did not find the state's evidence to be completely credible. But the evidence suggesting that he was violent or dangerous encouraged them to convict him anyway in order to protect the community. There is a reasonably probability that defense counsel's unreasonable failure to object affected the outcome of Mr. Jeffries's trial. *Id.*

B. Mr. Jeffries's defense counsel provided ineffective assistance at trial by failing to conduct reasonable investigation into a diminished capacity defense.

Mr. Jeffries informed his trial attorney that he had been diagnosed with PTSD, which affected his cognition and memory. RP (5/17/16) 6. In response, however, defense counsel told Mr. Jeffries that there was no defense available to a charge of bail jumping. RP (5/26/17) 7; RP (7/6/17) 8.

In fact, reasonable investigation and research would have shown that diminished capacity is a valid defense to both bail jumping and obstructing and that the defense would have applied to Mr. Jeffries's case

if his diagnosis did, in fact, impair his ability to form the necessary *mens rea*. See *State v. Stumpf*, 64 Wn. App. 522, 524, 827 P.2d 294 (1992).

Perhaps as a result of his mistaken belief that there was no defense available for bail jumping, defense counsel never requested the expert evaluation, which would have been necessary to determine whether Mr. Jeffries had diminished capacity. CP 66; RP (5/17/16) 6-8; RP (5/26/17) 7; RP (7/6/17) 8. Indeed, that defense would have been applicable to the other charges against Mr. Jeffries as well if the evaluation demonstrated that his diagnosis diminished his ability to entertain the required culpable mental states. *Stumpf*, 64 Wn. App. at 524. Mr. Jeffries's trial attorney provided ineffective assistance of counsel by failing to conduct adequate investigation into the case. *Fedoruk*, 184 Wn. App. at 880.

The right to the effective assistance of counsel includes the right to reasonable investigation by counsel. *State v. Lopez*, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018) (citing *State v. Boyd*, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); *Strickland v. Washington*, 466 U.S. 668, 684, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Jones*, 183 Wn.2d at 339–40). Reasonable investigation requires looking to the merits of the state's case and possible defenses. See *Fedoruk*, 184 Wn. App. at 880.

Defense counsel also provides ineffective assistance by failing to research and apply the relevant law. *Kyllo*, 166 Wn.2d at 862.

Mr. Jeffries’s attorney was incorrect in his belief that there was no defense available to a bail jumping charge. In fact, the defense of diminished capacity is available to any offense that includes an element of a “culpable mental state.” *State v. Clark*, 187 Wn.2d 641, 650–51, 389 P.3d 462 (2017). The defense negates the mental element of an offense by demonstrating that the accused suffers from a mental disorder that diminishes his/her ability to “entertain that mental state.” *Id.*; *See also Stumpf*, 64 Wn. App. at 524 (“Diminished capacity arises out of a mental disorder, usually not amounting to insanity, that is demonstrated to have a specific effect on one’s capacity to achieve the level of culpability required for a given crime”).

Because bail jumping, obstructing, and assault all include *mens rea* elements, all of the charges against Mr. Jeffries would have been subject to a diminished capacity defense if validly raised. *See* RCW 9A.76.170(1) (bail jumping includes a knowledge element); RCW 9A.76.020 (obstructing includes a willfulness element); *State v. Williams*, 159 Wn. App. 298, 307, 244 P.3d 1018 (2011) (*Williams II*) (assault includes an intent element).

But, in order to raise diminished capacity, the accused must obtain a “corroborating expert opinion.” *Clark*, 187 Wn.2d at 651; *See also State v. Harris*, 122 Wn. App. 498, 506, 94 P.3d 379 (2004). Mr. Jeffries’s

defense attorney failed to do so in his case. RP (5/17/16) 6-8. Defense counsel provided ineffective assistance by failing to conduct necessary investigation into a potentially-valid defense. *Fedoruk*, 184 Wn. App.at 880.

There is a reasonably probability that defense counsel's unreasonable failure to investigate affected the outcome of Mr. Jeffries's trial. *Jones*, 183 Wn.2d at 339. Mr. Jeffries has been diagnosed with PTSD and has been hospitalized for his psychiatric condition in the past because he was acting on delusional beliefs that a drug cartel was out to get him. CP 67. These symptoms undermine confidence in the conclusion that Mr. Jeffries understood that the deputies were acting lawfully when they attempted to arrest him. Mr. Jeffries's condition also affects his memory and cognition. CP 116-17. Accordingly, it could have impacted his ability to understand the need for him to appear in court on the appointed date for the bail jumping charge. This evidence on the record is sufficient to undermine confidence in the outcome of Mr. Jeffries's trial without an expert evaluation into his capacity to form the mental elements required for the offenses he was charged with. *See Fedoruk*, 184 Wn. App. at 885.

Mr. Jeffries received ineffective assistance of counsel at trial, in violation of his constitutional right to counsel. *Jones*, 183 Wn.2d at 339. His convictions in Counts III and IV must be reversed. *Id.*

CONCLUSION

The state presented insufficient evidence to convict Mr. Jeffries of Count IV. The court's to-convict instruction for bail jumping lowered the state's burden of proof in violation of Mr. Jeffries's right to due process. Mr. Jeffries received ineffective assistance of counsel at trial. Mr. Jeffries's convictions for Counts III and IV must be reversed.

Respectfully submitted on June 7, 2018,



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Lamar Jeffries
504 Garfield St
Parkland, WA 98444

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney
pcpatcecf@co.pierce.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on June 7, 2018.



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

LAW OFFICE OF SKYLAR BRETT

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