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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

LAMAR JEFFRIES, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Frank E. Cuthbertson, Judge

No. 15-1-04739-8

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**Brief of Respondent**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Although courts must instruct the jury on every essential element of the crime, they have considerable discretion over the wording; did the to-convict instruction omit an essential element where Instruction No. 14 listed one element as “failed to appear” merely without the qualifier “as required” and the only evidence presented was about the defendant’s failure to appear at the mandatory hearing? (Appellant’s Assignments of Error No. 4-9).
2. Viewing the evidence in the light most favorable to the State, could a reasonable jury find the defendant failed to be present and report to Courtroom 270 on January 12, 2016 at 1:00 p.m., where defendant was ordered to be; when the DPA assigned to 270 testified that the defendant was not present; he polled the gallery at 03:10 p.m.; and it is his practice to speak to anyone remaining in the gallery and halls? (Appellant’s Assignments of Error No. 1-3).
3. Did the defendant fail to establish deficient performance and prejudice based on the record below?
  - a. Can a claim of ineffective assistance succeed where there is no detailed analysis in the record or briefing to support the defendant’s claim that objections to either Deputy Csapo’s testimony or the Conditions of Release would have been sustained? (Appellant’s Assignments of Error No. 10-13).

- b. Can a claim of ineffective assistance succeed where there is no support in the record for the claim that Mr. Kibbe told the defendant there are no defenses for bail jumping besides the defendant's own prior assertions and conceding elements of charges or some charges entirely may be valid defense strategy? (Appellant's Assignments of Error No. 10-12, 14-15).

B. STATEMENT OF THE CASE.

1. PROCEDURE

On November 30, 2015, appellant Lamar Jeffries (the "defendant") was arraigned on Count I- Assault in the Third Degree in violation of RCW 9A.36.031(1)(g) for biting Deputy Csapo; Count II- Unlawful Transit Conduct in violation of RCW 9.91.025; and Count III- Resisting Arrest in violation of RCW 9A.76.041(1). CP 1-3, 36 (Exhibit 5). He was released on \$3,500.00 cash or surety bond with an order to report and be present for a pretrial conference on December 21, 2015. CP 36 (Exhibit

6). His conditions of release included the following:

I agree and promise to appear before this court or any other place as this court may order upon notice delivered to me at my address stated below or upon notice to my attorney. I agree to appear for any court date set by my attorney and I give my attorney full authority to set such dates. I understand that my failure to appear for any type of court appearance will be a breach of these conditions of release and a bench warrant may be issued for my arrest. ...

I have read the above conditions of release and any other conditions of release that may be attached. I agree to follow

said conditions and understand that a violation will lead to my arrest. FAILURE TO APPEAR AFTER HAVING BEEN RELEASED ON PERSONAL RECOGNIZANCE OR BAIL IS AN INDEPENDENT CRIME, PUNISHABLE BY 5 YEARS IMPRISONMENT OR \$10,000 OR BOTH (RCW 10.19).

CP 36 (Exhibit 6) (emphasis original).<sup>1</sup> At the pretrial hearing on December 21, 2015, the trial was continued, and a new pretrial conference was set for January 12, 2016. CP 36 (Exhibit 7). On that continuance order, defendant was ordered to “be present and report to” courtroom 270 for a pretrial conference on January 12, 2016 at 1:00 p.m. *Id.* Both defendant and his attorney, Craig Kibbe of the Department of Assigned Counsel (DAC), signed the continuance. *Id.* On January 12, 2016, the defendant failed to appear for a pretrial conference and a bench warrant was issued. CP 36 (Exhibits 8, 9, 10).

On May 17, 2016, the charges were amended Count I remained the same, Unlawful Transit Conduct and Resisting arrest were transformed into Count III- Obstructing a Law Enforcement Officer in violation of RCW 9A.76.020(1), and Count IV- Bail Jumping in violation of RCW

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<sup>1</sup> Defendant did not sign the conditions of release ordering him to make all court appearances because he was shackled at the time. CP 36 (Exhibit 6). However, Oaks testified that, in those cases, defense counsel notes on an electronic pad that defendant is unable to sign. VRP 05-09-16 (144-45). Defendant signed the continuance ordering him to appear at the specified date and time in Courtroom 270. CP 36 (Exhibit 7).

9A.76.170(1), (3)(c) was added for defendant's failure to appear on January 12, 2016. CP 5-6.

On Thursday May 19, 2016, trial commenced before the Honorable Frank E. Cuthbertson. VRP 05-19-16 (48).<sup>2</sup> The State presented testimony from multiple deputy sheriffs and the bus driver, along with numerous certified documents concerning defendant's requirement, and subsequent failure, to appear. VRP 05-19-16 (54, 76, 128, 141, 146, 148, 154, 156, 159). The defendant testified on his own behalf. VRP 05-19-16 (188). On the next day, the jury found defendant guilty of Obstructing a Law Enforcement Officer and Jumping Bail. VRP 05-20-16 (264). They were not able to reach a verdict on the assault charge. VRP 05-20-16 (263-64). Defendant was released without an increase in bail and ordered to appear on June 3, 2016, for sentencing. VRP 05-20-16 (267-69). The Order Establishing Conditions of Release signed by defendant contains the same language regarding subsequent appearances quoted above. CP 246-247.<sup>3</sup>

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<sup>2</sup> There are multiple errors in the cover sheets, naming, and numbering of the Verbatim Records of Proceedings (VRPs) in this case. For clarity, the State will be citing the VRPs as "VRP [date of proceeding] (page)." Any references to page numbers will be to the numbers printed on the pages.

<sup>3</sup> These pages will be designated along with the State's brief. The last page of the Clerk's Papers is currently CP 239. Assuming the new designation form will be CP 240, the State expects the new exhibits will start on CP 241.

When defendant failed to report and be present for sentencing on June 3, 2016, a bench warrant was issued for his arrest. CP 241-43.<sup>4</sup> The defendant was arrested on November 11, 2016, and held in-custody pending sentencing. CP 244-45.<sup>5</sup> The State elected to retry the defendant for Assault in the Third Degree along with an added charge for jumping bail again.<sup>6</sup> CP 43-44.

On appeal, defendant asserts that Mr. Kibbe failed to conduct reasonable investigation into a diminished capacity defense. App. Br. at 22. However, defendant also attempted to assert a diminished capacity defense during the second round of proceedings. At that time, his newly appointed attorney Joseph Evans felt it had neither “a factual or legal basis.” VRP 05-19-17 (3). The defendant eventually received an evaluation from Dr. Julia McLawsen, Ph.D, who found him competent. CP 99-110. She found defendant exhibited insufficient symptoms for a diagnosis of Post-Traumatic Stress Disorder (PTSD). CP 107. The evaluation also suggested that the defendant “misrepresented the nature and severity of at least some portion of his current psychiatric distress”

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<sup>4</sup> See Fn. 3.

<sup>5</sup> See Fn. 3.

<sup>6</sup> Because the defendant was never sentenced on these charges, these two counts were added under the original cause number.

and that he utilized “a deliberate response pattern designed to misrepresent memory deficits.” CP 106-7.

Following a finding of competency, on July 6, 2017, the Honorable Judge Elizabeth Martin granted the defendant’s motion to proceed *pro se* with Joseph Evans as standby counsel. VRP 07-06-17 (1, 19); CP 111-12. Defendant pleaded guilty to a second bail jumping charge and the assault charge was dropped. CP 155-164. Judge Cuthbertson sentenced the defendant to 22 months of prison time for each bail jumping charge to be served concurrently and to 364 days of jail time with 364 days suspended for Obstructing a Law Enforcement Officer. VRP 11-03-17 (6); CP 216-25, 228-29. Defendant timely appealed the first bail jumping charge.

## 2. FACTS

Thanksgiving of 2015 was a cold and rainy day in Spanaway Washington. VRP 05-19-16 (163, 190, 198). After a day of drinking and a trip for groceries, the defendant exited Wal-Mart to find a closed and empty bus. VRP 05-19-16 (56-58, 190); VRP 05-20-16 (224, 228). Defendant pried open the doors and moved his groceries on board. VRP 05-19-16 (56-58, 194).

When the bus driver (Mr. Charles Dixon) returned to the bus he found the doors open and multiple grocery bags on the bus. VRP 05-19-16 (57). The defendant was standing outside. VRP 05-19-16 (58, 60).

Dixon informed defendant that the doors of the bus were closed and asked him, in the future, to refrain from opening the doors when a driver was not present. VRP 05-19-16 (59). Defendant claimed the doors were open. *Id.* He became angry and verbally abusive, directing vulgar language towards Dixon. *Id.* Dixon reiterated both that the door was closed and his request that the defendant not board the bus when there is not a driver present. VRP 05-19-16 (60). Defendant responded with offensive language and hand gestures, displaying his middle finger. VRP 05-19-16 (60-61). Eventually, Dixon asked defendant to remove his bags so the bus could return to the garage. VRP 05-19-16 (61). Normally, when someone is on the bus as it goes out of service, Mr. Dixon offers to take them towards their destination if it is on his way. VRP 05-19-16 (62). However, that was not an option due to defendant's abusive and vulgar behavior. *Id.* This was the first time in his 14 years as a bus driver that Dixon has declined to drive someone while he was out of service. *Id.*

Eventually, defendant got off the bus and Dixon immediately closed the doors. VRP 05-19-16 (64). The defendant responded by kicking the doors of the bus twice.<sup>7</sup> *Id.* At that point, Dixon called the Pierce Transit communications center to notify them of the events. VRP

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<sup>7</sup> Defendant testified that he immediately complied with Mr. Dixon's requests, merely tapping the bus door with his foot to ask when the next bus came. VRP 05-19-16 (195-96). Defendant did not elaborate on why the police were called in his account of events.

05-19-16 (63-64). The communications center alerted law enforcement and directed Dixon to leave the scene. VRP 05-19-16 (65).

Deputy Michael Csapo arrived at about 8:00 p.m. in an unmarked Ford Explorer. VRP 05-19-16 (82, 85). The defendant was the only person in the area and he matched the description given to Deputy Csapo by dispatch. VRP 05-19-16 (84-85). Deputy Csapo noted that while the defendant was of similar height, the defendant was approximately 30 pounds heavier than Deputy Csapo. VRP 05-19-16 (97). When Deputy Csapo made eye contact with the defendant, defendant turned to walk away. VRP 05-19-16 (84). Deputy Csapo activated his car's emergency lights and exited the car in full uniform, ordering the defendant to stop. VRP 05-19-16 (85-86).

Deputy Csapo announced that he was a Deputy Sheriff and asked the defendant what was going on. VRP 05-19-16 (85). Defendant stated that he got off the bus when asked, did not curse at the driver, and did not kick the bus. VRP 05-19-16 (86). Deputy Csapo noted that, based on his training and experience, defendant appeared very intoxicated. VRP 05-19-16 (86, 88). He smelled heavily of alcohol and his eyes were "glassy" or "bloodshot." VRP 05-19-16 (86-87).

Deputy Csapo then returned to his vehicle to prepare a notice of exclusion from Pierce Transit for 90 days.<sup>8</sup> VRP 05-19-16 (87). This is a civil form commonly used in response to improper conduct on transit. VRP 05-19-16 (81). Deputy Csapo was seated in his car and defendant was standing at the right front fender. VRP 05-19-16 (90). The defendant was initially calm but became more animated as he made a phone call. *Id.*

The situation escalated when a second bus driving the Number One route pulled up to the stop. VRP 05-19-16 (90). Defendant started yelling, hollering, and cursing at the second bus driver. *Id.* Deputy Csapo told the defendant, through the passenger window his patrol car, to stop and return to where he had been standing. *Id.* The defendant seemed focused on the second driver and ignored the deputy's commands. *Id.* Because the defendant started moving towards the second bus, Deputy Csapo exited his vehicle and placed the defendant under arrest. VRP 05-19-16 (90-91). The defendant briefly complied with Deputy Csapo's commands and was handcuffed and placed in the back of the patrol vehicle. VRP 05-19-16 (91).

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<sup>8</sup> At trial, defendant claimed that Deputy Csapo arbitrarily increased the length of the exclusion from 30 days to 60 days and eventually to 90 days during their conversation. VRP 05-19-16 (200). It is worth noting that 90 days is the shortest available exclusion. VRP 05-19-16 (114).

Deputy Csapo advised the defendant of his Miranda rights, the defendant acknowledged them, and Deputy Csapo explained that the defendant would not be going to jail.<sup>9</sup> VRP 05-19-16 (92). Defendant responded by cursing at him and calling him a liar. *Id.* Deputy Csapo showed defendant the exclusion form and explained it and the appeals process. *Id.* Deputy Csapo then exited the vehicle and instructed the defendant to exit so he could be released. *Id.*

Once outside the vehicle, Deputy Csapo told the defendant to place his right hand on top of his head after it was uncuffed. VRP 05-19-16 (93). This common practice is meant to protect officers while they are in a particularly vulnerable position. *Id.* Defendant refused to agree to Deputy Csapo's instructions. VRP 05-19-16 (95). If the defendant complied, he would have been free to go with only the civil notice of exclusion. VRP 05-19-16 (96). Instead, Deputy Csapo informed the defendant that he was going to jail. *Id.*

As Deputy Csapo attempted to escort defendant back to the patrol car, defendant started to resist. VRP 05-19-16 (96). Eventually, Deputy Csapo was able to get the defendant up against the side of the patrol car. VRP 05-19-16 (97). He opened the door and told defendant to get in but

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<sup>9</sup> It took two attempts to properly advise the defendant of his Miranda rights. VRP 05-19-16 (92). When Deputy Csapo first tried to administer them, the defendant kept interrupting. VRP 05-19-16 (92).

the defendant refused. *Id.* Deputy Csapo held defendant against the car as he was pushing and struggling to break free. VRP 05-19-16 (98).

Deputy Csapo then tried turning the defendant so he could try to push defendant into the car. VRP 05-19-16 (98). Defendant resisted, pushing back into Deputy Csapo. *Id.* Deputy Csapo “struck and pushed back with [the defendant’s] rear end into” the deputy, propelling defendant into the car. *Id.* Between Deputy Csapo’s forceful push and the defendant choosing to dive in the same direction, defendant’s momentum carried him all the way across the back seat of the car. *Id.* Once defendant was in the car, he started screaming for help and Deputy Csapo called for another unit and attempted to aid defendant. VRP 05-19-16 (99).

As Deputy Csapo was pulling the defendant out of the car defendant went limp, throwing his body weight against Deputy Csapo while facing away from him. VRP 05-19-16 (99). While Deputy Csapo held the defendant up, he started to grab at the deputy’s gun belt. *Id.* Defendant was grabbing at an area that could give him access to Deputy Csapo’s firearm and other dangerous tools. VRP 05-19-16 (100). Fearing for his own safety, Deputy Csapo elected to apply a vascular neck

restraint.<sup>10</sup> The defendant reacted by dropping his full weight and tucking his chin. VRP 05-19-16 (101).

As Deputy Csapo scrambled to keep the defendant from hitting the pavement and his arm ended up across the defendant's face. VRP 05-19-16 (102). In that moment Deputy Csapo felt defendant bite down on his forearm. *Id.* Deputy Csapo felt the distinct pressure of a deliberate bite through his heavy fleece-lined jumpsuit and winter shirt. *Id.* While there was no lasting mark, Deputy Csapo experienced transient pain and redness. VRP 05-19-16 (121). When Deputy Csapo jerked his arm out of the defendant's mouth he could no longer support the defendant and defendant fell to his knees. VRP 05-19-16 (103-4). From there, defendant tried to throw himself toward the ground in an apparent attempt to injure himself. VRP 05-19-16 (104). Deputy Csapo managed to hold the defendant upright until Deputy Jorgenson and Deputy Ossman arrived. *Id.*

Deputies Jorgenson and Ossman pulled defendant up and held him against the car. VRP 05-19-16 (104). The defendant tried to throw himself to the ground again but Jorgenson caught him, injuring himself in the process. VRP 05-19-16 (106, 175). Eventually, the deputies got

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<sup>10</sup> A vascular neck restraint (VNR) is a technique where the officer places their arm over the neck of the arrestee applying pressure to cut off the blood flow, rendering the arrestee temporarily unconscious without precluding the airway. VRP 05-19-16 (100-1).

defendant seated back in the car. VRP 05-19-16 (107). When defendant started to complain about shoulder pain the deputies called for medical assistance. *Id.* The defendant continued to scream and curse while waiting for medical assistance and then throughout the exam. VRP 05-19-16 (109). Eventually, defendant was medically cleared and transported to the jail. *Id.*

C. ARGUMENT

1. DEFENDANT'S CONVICTION FOR JUMPING BAIL WAS PROPER BECAUSE THE COURT'S TO-CONVICT INSTRUCTION DID NOT ERRONEOUSLY REDUCE THE STATE'S BURDEN.

Jury instructions are reviewed de novo. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010) (citing *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000)). Failure to instruct the jury on every essential element of the crime is a due process error of constitutional magnitude. *State v. Amuck*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). “[A]n instruction containing an erroneous statement of the law is reversible error where it prejudices a party.” *Gregoire*, 170 Wn.2d at 635. “[C]onstitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless.” *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

- a. Defendant waived appeal on the to-convict instruction by not objecting at trial and because the court instructed the jury on every element it is not a manifest error of constitutional magnitude.

Generally, “jury instructions that are not objected to are treated as the properly applicable law for purposes of appeal.” RAP 2.5(a)(3); *State v. Johnson*, 188 Wn.2d 742, 755, 399 P.3d 507 (2017) (citations omitted). To preserve the issue for appeal, an objection must clearly apprise the trial court of the specific points of law that give rise to the objection.” *Stewart v. State*, 92 Wn.2d 285, 298, 597 P.2d 101 (1979) (citations omitted); *see also*, CrR 51(f). To raise an error for the first time on appeal, it must be manifest and of a constitutional magnitude. *See* RAP 2.5(a)(3); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citations omitted). For an error to be manifest the defendant must demonstrate how the error actually affected his rights at trial. *State v. Kirkman*, 159 Wn.2d at 926.

The trial court properly instructed the jury on every element and the defendant did not object to the jury instructions at trial. CP 14-33; RP 229-234. The defendant fails to point out how his rights were affected at trial, making no argument as to why the error in question is of a constitutional magnitude. App. Br. at 11-12. As such, the issue was not properly preserved for appeal and there is no manifest error affecting a constitutional right. Thus, this Court should not review the claim.

- b. The court's to-convict instruction mirrors WPIC 120.41 and properly instructs the jury on every essential element.

“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 (emphasis added); *see also*, CP 29. For the bail jumping charge, the trial court gave the following as Instruction No. 14, mirroring WPIC 120.41:

As to Count IV, to convict the defendant of the crime of bail jumping, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (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 type of these acts occurred in the State of Washington. . .

CP 30 (emphasis added).

“Jury instructions need to express legal concepts in plain language for lay jurors.” WPIC 0.10. The Washington Supreme Court Committee on Jury Instructions has noted that, when possible, they “translate[] complicated legal jargon into a series of simple, declarative, easy-to-understand sentences, while being careful to retain legal accuracy.” *Id.*

As a result, pattern instructions do not precisely follow the language of the statute. In fact, parroting statutory language “is appropriate only if the statute is applicable, reasonably clear, and not misleading.” *Bell v. State*, 147 Wn.2d 166, 177, 52 P.3d 503 (2002).

Here, the relevant statutory provision is actually quite lengthy and covers a number of different situations:

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(1). It certainly is not formatted as “simple, declarative, easy-to-understand sentences.”<sup>11</sup> See WPIC 0.10. The statute is structured as first discussing the requirement to appear and then the failure to appear. In contrast, the elements as outlined by WPIC 120.41 and Instruction No. 14 are broken into four parts. The to-convict instruction first discusses the failure to appear and ties that failure to a specific date.<sup>12</sup> It would not make sense for section one to read “failed to appear as required” because the instruction has not yet discussed any requirement to appear. Later, Instruction No. 14 outlines the requirement that defendant

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<sup>11</sup> When diagrammed, the statute reads as follows: Any person who *A* or *B* with *C*, or *D*, and who *E* or *F* is guilty of bail jumping.

<sup>12</sup> “(1) That on or about January 12, 2016, the defendant failed to appear before a court.” Instruction No. 14.

must know they are required to appear before “that court.” The only court mentioned in the instructions is the court defendant failed to appear at. As a result, the instruction requires the jury find that the defendant failed to appear at a hearing he knew he was required to appear at.

Defendant claims that this instruction relieves the State of its burden to prove each element of the crime beyond a reasonable doubt because part one does not state “. . . failed to appear *as required*. . .”<sup>13</sup> App. Br. at 10. Defendant’s claim that the omission of the “as required” language reduces the State’s burden is virtually identical to the argument presented in *Hart*. See generally, *State v. Hart*, 195 Wn. App. 449, 381 P.3d 142 (2016), *review denied*, 187 Wn.2d 1011, 388 P.3d 480 (2017).

Just like in *Hart*, defendant cannot assert any harm or prejudice the allegedly faulty instruction caused him. Defendant claims that, in a very narrow and fantastic hypothetical scenario, there is the *possibility* of a conviction that would run afoul both logic and law. Putting aside the absurdity of defendant’s contention,<sup>14</sup> this fails to recognize that the instructions do not omit the requirement that defendant fail to appear as

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<sup>13</sup> It is worth noting that WPIC 120.41 does not include the “as required” language. Defendant claims that such an alteration renders that language superfluous. App. Br. at 15. However, it may have simply been the committee’s attempt at streamlining and simplifying the language for lay jurors. See WPIC 0.10 (Plain Language).

<sup>14</sup> The core of defendant’s argument that, under this instruction, if an individual was required to appear at X time, they could be convicted of failing to appear at Y time (when they were not required to appear).

required, merely that specific language. Moreover, it should be clearly understood that the scenario defendant describes did not happen in this case. Not even defendant claims so.

Defendant was ordered to be present and report to Courtroom 270 for his hearing. CP 36 (Exhibit 7). The only evidence presented regarding his failure to appear demonstrated that he was not present at that hearing and did not report to Courtroom 270 on January 12, 2016 at 1:00 p.m. as directed. VRP 05-09-16 (141, 149); CP 36 (Exhibits 8, 9, 10). He was not present for his hearing when the gallery was polled at 3:10 p.m. VRP 05-09-16 (149-53). Substantial compliance with the order is neither relevant nor claimed. There was absolutely no evidence that defendant was present anywhere in the courthouse on January 12, 2016. Similarly, no evidence was presented regarding the defendant failing to appear at a different, nonmandatory, hearing. It is unfathomable how the jury could have (1) found the defendant failed to make such an appearance at some other place and time without a thread of evidence and (2) subsequently convicted the defendant based on said unsupported finding. Defendant cannot demonstrate any prejudice caused to him by Instruction No. 14.

It is true that the jury has the right to view the “to-convict” instruction as a complete statement of the law and is not required to look to other instructions that may supply missing elements. *State v. Smith*,

131 Wn.2d 258, 262-63, 930 P.2d 917 (1997). However, the trial court's instructions to the jury, both here and in *Hart*, included all elements. CP 14-33. They merely did not use the wording the defendant would like. Additionally, the trial court has considerable discretion regarding the precise working of jury instructions. *Kjellman v. Richards*, 82 Wn.2d 766, 768, 514 P.2d 134, 135 (1973); accord, *State v. Biggs*, 16 Wn. App. 221, 225, 556 P.2d 247 (1976) (upholding a jury instruction that gave a "somewhat vague and confusing" definition of a relevant phrase).

Moreover, any remaining modicum of probability that the jury could have reached its verdict erroneously and in the matter suggested by the defendant is resolved by Instruction No. 13:

A person commits the crime of bail jumping when he fails to appear *as required* after having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court.

CP 29 (emphasis added). Although juries do not have to search for elements outside of the to-convict instruction, they must read jury instructions as a whole and jurors are presumed to follow the court's instructions. *State v. Wiebe*, 195 Wn. App. 252, 255-56, 377 P.3d 290 (2016) (citations omitted). If the jury followed Instruction No. 13, as they

are presumed to,<sup>15</sup> they could not have found the defendant guilty for failing to appear at some other unspecified time or place.

- c. Even if this Court were to find that an essential element was omitted from the instructions, that error would be harmless.

The to-convict instruction properly instructed the jury on every essential element of the offense and the defendant cannot establish any prejudice resulting from it. However, if this Court were to find any error it would harmless. An error not harmless if it is trivial, formal, merely academic, or if the omitted element is uncontested and supported by overwhelming evidence. *Smith*, 131 Wn.2d at 264; *Neder v. United States*, 527 U.S. 1, 17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The appellate court must be able to “conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.” *Neder*, 527 U.S. at 19.

If the record does not contain evidence that could reasonably lead to a different finding on the omitted element then, “holding the error harmless does not reflect a denigration of the constitutional rights involved. On the contrary, it serves a very useful purpose insofar as it blocks setting aside convictions for small errors or defects that have little,

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<sup>15</sup> “Jurors are presumed to follow the court's instructions.” *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015).

if any, likelihood of having changed the result of the trial.” *Neder*, 527 U.S. at 19-20 (internal quotation marks eliminated) (citing *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986); *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)); *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002) (adopting *Neder*). Though Instruction No. 14 was clearly plainly worded here, courts have found that “[e]ven misleading instructions do not require reversal unless the complaining party can show prejudice.” *State v. Lundy*, 162 Wn. App. 865, 872, 256 P.3d 466 (2011) (citing *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010)). “[N]ot every omission or misstatement in a jury instruction relieves the State of its burden.” *Brown*, 147 Wn.2d at 339. The defendant is entitled to a fair, not perfect, trial. *State v. Green*, 71 Wn.2d 372, 373, 428 P.2d 540 (1967).

Defendant’s argument alleges, at best, only trivial and academic error and more importantly, the omitted element in this case in uncontested and supported by overwhelming evidence. Defendant does not actually contend that he substantially complied with the order or even that he showed up at the courthouse at all. App. Br. at 8-15. Defendant merely points out that the chaos of a busy courthouse may be confusing to some. App. Br. at 9-10. The defendant was ordered to appear in Courtroom 270 on January 12, 2016. The only evidence presented

regarding defendant's failure to appear concerns the defendant's failure to appear in Courtroom 270 on January 12, 2016. No evidence was admitted that discussed the defendant failing to appear at any other time. Thus, the jury could have only based their verdict on his failure to appear in Courtroom 270 on January 12, 2016, as required.

Even if this Court were to find that the trial court omitted of an essential element from the to-convict instruction, it does not require automatic reversal in this case. See *Neder*, 527 U.S. at 17; *Brown*, 147 Wn.2d at 340. Harmless error analysis serves an important role in our judicial system. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Neder*, 527 U.S. at 19 (*quoting* R. Traynor, *The Riddle of Harmless Error* 50 (1970)). The jury was instructed that they must first find defendant failed to appear on January 12, 2016 and then that he failed to appear before that court. There is no reason to believe that instructing the jury using the language "failed to appear *as required*" would have affected the verdict at all. Therefore, if this Court were to find that an essential element was omitted from the instructions, that error would be harmless.

- d. This Court should uphold *Hart* because it is correctly decided and defendant fails to prove any real harm resulting from it.

Washington courts may only overturn a prior case if it is both incorrect and harmful. *State v. Barber*, 170 Wn.2d 854, 864, 248 P.3d 494 (2011). The facts in this case are virtually identical to the facts in *Hart* and the defendant presents no new arguments. *See generally, Hart*, 195 Wn. App. 449. For all the reasons discussed above, this Court should uphold its decision in *Hart* as correctly decided.

In *Hart*, this Court correctly found that when a virtually identical<sup>16</sup> to-convict instruction was read as a whole, no elements were omitted. Part one requiring the defendant fail to appear on a given day combines with part three to establish both that the defendant was required to appear on that date and that he knew of that requirement. Defendant's myopic focus on the wording of part one fails to recognize the import of the instruction when properly read as whole. Because *Hart* is both correctly decided and reasoned, it is not harmful. However, it should be noted that even if this Court were inclined to find its decision improper, defendant cannot establish any harm caused to him by the claimed faulty instruction. For these reasons, this Court should affirm its decision in *Hart*.

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<sup>16</sup> Differences exist to tailor the instructions to the facts of the respective cases. *E.g., Hart*, 195 Wn. App. at 454-55.

2. VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, WAS SUFFICIENT EVIDENCE PRESENTED TO CONVICT THE DEFENDANT OF BAIL JUMPING WHEN IT PROVED HE WAS NOT IN THE COURTROOM HE WAS ORDERED TO APPEAR IN WHEN HIS HEARING WAS CALLED.

Due process requires that the State prove each essential element of the offense beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A challenge to the sufficiency of the evidence regarding any element is an issue of law reviewed de novo. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). To succeed on a challenge to the sufficiency of the evidence, the defendant “needs to outline evidence in [his] brief, point to deficiencies [he] contends exist, and cite to relevant authority. A bare conclusory allegation that evidence is insufficient will not suffice.” *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 39, 935 P.2d 684 (1997). “[A]ppellate courts are not in the business of searching the record in an effort to determine the nature of any alleged deficiencies to which the challenger may be referring, and then to search the law for authority to support those same alleged deficiencies.” *Mavroudis*, 86 Wn. App. at 39-40.

The standard of review “is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt.” *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The question is not whether the evidence could convince all rational triers of fact or even most rational triers of fact. It is whether the evidence could convince any one rational trier of fact. See *State v. Johnson*, 188 Wn.2d 742, 764, 399 P.3d 507 (2017); *State v. DeVries*, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citations omitted).

This Court does not need to automatically affirm the lower court’s decision but “[t]he parties are not required to prove or ‘disprove’ any factual issues at the appellate level.” *City of Sunnyside v. Gonzalez*, 188 Wn.2d 600, 612, 398 P.3d 1078 (2017) (citations omitted). This Court merely needs to be convinced that a rational trier of fact could have found that the defendant failed to appear as required. See *Green*, 94 Wn.2d at 240 (Dolliver, J., concurring in result); see also, *Jackson*, 443 U.S. at 334. “Circumstantial evidence and direct evidence carry equal weight” in this analysis. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004) (citations omitted). Any determinations about witness credibility “are for

the trier of fact' and are not subject to review." *State v. Cardenas-Flores*, 189 Wn.2d 243, 266, 401 P.3d 19 (2017) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

In a similar case, this Court held that the State does not need to prove that the defendant failed to appear at exactly the time at which he was ordered to report. *Hart*, 195 Wn. App. at 457. This is distinguishable from *Coleman* where the court polled the gallery a half-hour *before* Coleman was ordered to appear. *State v. Coleman*, 155 Wn. App. 951, 963-64, 231 P.3d 212 (2010).

At trial, the State called DPA Oaks. VRP 05-09-16 (140). Oaks testified that he is the barrel deputy assigned to Courtroom 270 and was working in "the courtroom"<sup>17</sup> on January 12, 2016. VRP 05-09-16 (141, 149). The defendant was ordered to report to Courtroom 270 for a pretrial conference on January 12, 2016 at 1:00 p.m. VRP 104, 146, 149; CP 36 (Exhibits 6, 7). On that day, Oaks polled the gallery at 3:10 p.m. and the defendant was not present nor had he reported in as required. CP 36 (Exhibit 6); VRP 05-09-16 (151). Going above what is required of him, it is Oaks' practice to, along with defense counsel, speak to anyone remaining in the gallery and check the surrounding halls as proceedings

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<sup>17</sup> While not specified in his response, from the context Oaks could only be referring to the courtroom he typically works in or the courtroom defendant was ordered to appear in, both Courtroom 270.

conclude to make sure everyone is paired with their defense attorney. VRP 05-09-16 (152). Drawing all inferences in the light most favorable to the State, the jury could have inferred that Oaks went out of his way to ensure the defendant was not present in the courtroom or hallway. The above information, none of which the defendant appears to challenge on appeal, establishes that the defendant knew he was ordered to report to Courtroom 270 for a pretrial conference on January 12, 2016 at 1:00 p.m. It also proves that the defendant was not present for that hearing.

Even without considering the testimonial evidence, the evidence presented by the exhibits alone is overwhelming. The State presented the Motion and Declaration signed by DPA Oaks stating:

The Defendant signed a scheduling order on December 21, 2015, requiring defendant to appear for a hearing on January 12, 2016. A bench warrant shall issue as the Defendant failed to appear for a hearing on January 12, 2016.

CP 36 (Exhibit 8). The State also presented the Order Authorizing the Bench Warrant signed by a court commissioner that stated, "Defendant failed to appear as ordered by the court." CP 36 (Exhibit 9). Finally, the State presented the bench warrant itself which read, "defendant having failed to appear for pre-trial conference on 1-12-16 as ordered by the court." CP 36 (Exhibit 10). Admitting the truth of the State's evidence, the jury received three documents signed under the penalty and pains of

perjury by officers of the court that all unequivocally state that the defendant failed to appear as required.

The defendant claims that the State must prove he was absent at the specific time and place he was ordered to appear. App. Br. at 8. In doing so, he misstates the law by relying on *Coleman*. See generally *Coleman*, 155 Wn. App. at 963-64. Here, the gallery was polled 3:10 p.m., well after 1:00 p.m. when the defendant was ordered to appear. CP 36 (Exhibit #7, #8); VRP 05-09-16 (151). In *Hart*, this Court found similar reliance on *Coleman* improper because Coleman was called before, not after, he was ordered to arrive. *Hart*, 195 Wn. App. at 458. Defendant's assertion that he must be proved absent at the specific time he was ordered to report is not only unsupported by case law, it is illogical. If that were true, when the minute hand hit 1:01 p.m. any defendant on the calendar not yet called could claim he was no longer required to appear. In fact, defendant was not ordered to be in the courtroom at 1:00 p.m. Defendant was ordered to "be present and report to" Courtroom 270 by 1:00 p.m. for his hearing. The commissioner does not even take the bench until 1:30 p.m. VRP 05-09-16 (152).

Defendant seems to think that multiple courtrooms operating simultaneously within a busy courthouse relieves him of his duty to appear. App. Br. at 9-10. It does not. Alternatively, defendant claims that

no evidence was presented that he failed to appear in Courtroom 270 specifically. *Id.* However, DPA Oaks is assigned to Courtroom 270, he works there every day. VRP 05-09-16 (141). The defendant was ordered to appear in Courtroom 270; when he did not, DPA Oaks moved for a bench warrant and received it, from the court in Courtroom 270. CP 36 (Exhibits 7, 8, 9). It is reasonable that a jury find the defendant failed to appear in Courtroom 270, as opposed to some random courtroom not at all associated with this case. For the above reasons, the to-convict instruction was proper and, even assuming for the sake of argument that it was faulty, there is no prejudice to the defendant.

3. THE DEFENDANT CANNOT ESTABLISH  
INEFFECTIVE ASSISTANCE OF COUNSEL  
BASED ON THE RECORD BELOW.<sup>18</sup>

Ineffective assistance of counsel claims are reviewed de novo because they present mixed questions of law and fact. *State v. Fedoruk*, 184 Wn. App. 866, 879, 339 P.3d 233 (2014). To overturn a conviction on the basis of ineffective assistance of counsel the defendant must prove two things. First, that counsel's performance was so deficient, and the resulting errors were so serious, that the attorney was no longer

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<sup>18</sup> Defendant contends that evidence of sex-related internet history was both irrelevant and unfairly prejudicial. App. Br. at 18. It seems unlikely this sentence refers to this case. The record is devoid of any reference to sex-related internet history and defendant provides no cite to the record. VRP (all); App. Br. at 18.

functioning as “counsel” as guaranteed by the Sixth Amendment. *State v. Jeffries*,<sup>19</sup> 105 Wn.2d 398, 417-18, 717 P.2d 722 (1986) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Second, that counsel’s errors were so serious that they deprived the defendant of a fair trial with a reliable result. *Jeffries*, 105 Wn.2d at 417-18.

In this case, the defendant must affirmatively prove prejudice based on the record developed in the trial court. *State v. Contreras*, 92 Wn. App. 307, 318-19, 966 P.2d 915 (1998). This requires showing “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 693-94. Because the two prongs are conjunctive, the order of analysis does not matter. *Id.* at 697. A court may first determine what, if any, prejudice the defendant has been able to affirmatively prove. *Id.*

Court appointed counsel is presumed competent. *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978) (citations omitted). “This presumption can be overcome by showing, among other things, that counsel failed to conduct appropriate investigations. . . [or] determine

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<sup>19</sup> No apparent relation to defendant or the case at bar.

what matters of defense were available[.]” *Jury*, 19 Wn. App. at 263. “If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.” *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280, 285 (2002) (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. When a claim of ineffective assistance of counsel is brought on direct appeal, the defendant is forced to rely on the trial record necessarily developed to determine guilt or innocence. *Massaro v. United States*, 538 U.S. 500, 504–05, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003). This record may not be sufficient to support a claim of ineffective assistance and, more specifically, may be devoid of evidence “of alleged errors of omission, much less the reasons underlying them.” *Id.*

- a. Deputy Csapo's testimony was relevant to proving that he was carrying out lawful duties, giving the jury a complete story of the events, and was more probative than prejudicial.

The defendant contends that Mr. Kibbe provided ineffective assistance by failing to object to "prejudicial" portions of Deputy Csapo's testimony. App. Br. at 18. The relevant testimony follows:

[Ms. Lund]<sup>20</sup> Over the years that you've been in that assignment [transit detail], have you noticed anything kind of change in the type of, I don't know, demeanor, or how things are, the smoothness of passengers and that sort of thing?

[Deputy Csapo] Yes, ma'am. When we first took over the contract in 2009 it was chaotic. There was a lot of crime, a lot of strong-arm robberies, a lot of assaults on the buses. We came in and took over, working full-time focusing on the bus system. Our main focus was petty crimes, little things, small infractions, smoking at a bus stop, things along this nature, we stopped and contacted people. What we noticed is if we focused on all the small things the larger crimes never develop. And we were able to clean up the system, and now it functions fairly well.

[Ms. Lund] And that's in particular in the last few years?

[Deputy Csapo] Yes, ma'am.

...  
[Ms. Lund] Okay. Different kinds of clientele for different types of routes?

[Deputy Csapo] Yes, ma'am. We don't have the normal, like in Seattle, you have the people that take the bus to and from work. We don't really have that. We have people that are unable to take the bus, we have the infirmed, we have the

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<sup>20</sup> Pierce County Deputy Prosecuting Attorney Kawyne Lund.

mentally ill. We have people that have lost their driver's privileges for whatever reason, um, and we have the elderly. That's primarily our clientele that use the bus system.

[Ms. Lund] And certain routes often tend to lend themselves sometimes to more interruptions or events versus say other routes.

[Deputy Csapo] Yes, ma'am. I can't tell you why, but route one, which runs from Tacoma Community College down Sixth Avenue and through downtown and onto Pacific Avenue, runs all the way out to the Wal-Mart at 20307 Mountain Highway, that route has always been particularly troublesome.

[Ms. Lund] A lot of traffic, a lot of geography to cover for route one?

[Deputy Csapo] Yes, ma'am.

[Ms. Lund] You mentioned folks are either disabled or infirmed or ill, they're elderly, et cetera. Have you found that they kind of can be particularly vulnerable on buses?

[Deputy Csapo] Well, they're targeted, to be honest, because they're people that can't defend themselves or they're just easy prey for people that look for victims.

[Ms. Lund] Okay. So you indicated that you, you know, there was obviously a decision to implement, to look for the minor infractions and to be assertive to respond to them and actually enforce them, did I understand that correctly?

[Deputy Csapo] Yes, ma'am. It's predominantly referred, normally referred to as the theory of broken windows of law enforcement. If you fix the little things, the larger events are not allowed to develop and percolate.

VRP 05-19-16 (78-81).

The bar for relevancy is set quite low. Any evidence that has the tendency to make a material fact more or less probable is relevant. ER 401. This testimony was relevant to establishing that Deputy Csapo was carrying out lawful duties when he contacted the defendant. This is necessary to prove that defendant obstructed a law enforcement officer. “The determination of whether the arrest for obstructing was lawful depends on whether the police were carrying out lawful duties.” *State v. Barnes*, 96 Wn. App. 217, 225, 978 P.2d 1131 (1999).

Defendant would later go on to testify that his interaction with Dixon was not hostile and that Deputy Csapo arbitrarily increased the length of the exclusion. VRP 05-19-16 (195-96, 199-200). The State is entitled to draw the sting from these anticipated attacks by bringing up the matters first. See *United States v. Feldman*, 788 F.2d 544, 555 (9th Cir. 1986); *United States v. Barragan*, 871 F.3d 689, 703 (9th Cir. 2017), cert. denied sub nom. *Franco v. United States*, 138 S. Ct. 1565, 200 L. Ed. 2d 757 (2018), and cert. denied, 138 S. Ct. 1572, 200 L. Ed. 2d 757 (2018). The above testimony establishes why Deputy Csapo was responding to a relatively minor dispute between defendant and Dixon. It also demonstrates Deputy Csapo’s state of mind as he arrived. In turn, this evidence could help the jury decide whether Deputy Csapo was carrying out lawful duties.

This testimony was also helpful in completing the story of the events surrounding the defendant's arrest. Evidence may be admissible as *res gestae* under ER 401 when it completes the story of the crime for the jury by providing "immediate context of happenings near in time and place." See *State v. Grier*, 168 Wn. App. 635, 649-50, 278 P.3d 225 (2012) (quotation marks omitted) (citing *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995)). Without this evidence, the jury may have wondered why Deputy Csapo was responding to a call of this nature, or at the very least what his state of mind was like as he responded. "People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard." *Old Chief v. United States*, 519 U.S. 172, 180, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

Defendant claims the above testimony encouraged the jury to convict the defendant because he was the type of person who preys on vulnerable transit users and a conviction would prevent "the transit system

from devolving into chaos.”<sup>21</sup> App. Br. at 19-20. As a purely factual matter Deputy Csapo’s testimony does neither of these things. Neither Deputy Csapo nor the prosecutor applied any of the above characteristics to the defendant.<sup>22</sup> In fact, Deputy Csapo testified his decisions were based on the defendant’s behavior, not any general views on the users of Pierce Transit. VRP 05-19-16 (114).

It seems unlikely, and there is no support in the record for the idea, that the jury concluded that the defendant preyed on vulnerable transit users. The victim in this case was a deputy sheriff and no evidence was presented regarding the defendant’s past conduct on transit. If the jury viewed the defendant as a vulnerable transit user, it is equally possible that they were sympathetic to him. To say that the above testimony was somehow Deputy Csapo’s way of communicating to the jury that a not guilty verdict would plunge the transit system into chaos is without merit. The record contains absolutely no mention of any duty the jury has besides the duty to deliberate.

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<sup>21</sup> In this section of his brief defendant also states, “The evidence also encouraged the inference that Mr. Griffin was either mentally ill or had ‘lost his driving privileges.’” App. Br. at 19. The record contains no references to “Mr. Griffin” and the only cite provided by defendant is to Deputy Csapo’s testimony. App. Br. at 19. From context, it seems likely that the sentence was meant to refer to defendant Mr. Jeffries. If that is the case, the above arguments should apply equally to that claim.

<sup>22</sup> While Deputy Csapo did mention that route Number One has been historically troublesome, he did not attribute this to the type or riders or the defendant. VRP 05-19-16 (80). In fact, he says, “I can’t tell you why.” VRP 05-19-16 (80).

CP 31. Deputy Csapo's testimony was (1) not about the defendant himself and (2) properly admitted as relevant and more probative than prejudicial.

- b. The Conditions of Release were relevant to the Bail Jump charge and carried minimal danger of prejudice, it is proper not to object to such evidence to avoid drawing undue attention to it.

Defendant further contends that defense counsel provided ineffective assistance by failing object to the admission of the defendant's original conditions of release. App. Br. at 21. Specifically, defendant claims that orders not to possess weapons or firearms, not to consume alcohol or illegal drugs, and not to have any hostile contact with law enforcement were irrelevant and unfairly prejudicial. App. Br. at 21.

Conditions of release are proscriptive and in no way act as factual assertions that defendant has previously done the things he is prevented from doing on appeal. "The two fundamental purposes of pretrial release are to *honor the presumption of innocence until guilt is proved*, while at the same time keeping the defendant in the State's constructive custody so as to assure his or her attendance before the court when required." *State v. Schultz*, 146 Wn.2d 540, 550–51, 48 P.3d 301 (2002) (emphasis added).

No legal or factual backing is provided for the argument that the jury "likely read" the prohibitions as the indications that the trial court had decided the defendant "was violent, had a drinking or drug problem,

and/or had 'hostile' contact with the deputies in the case." The record below supports no such inferences. *See generally*, VRP 05-20-16. In fact, Instruction No. 1 (mirroring WPIC 1.02) clearly states that the filing of charge is only an accusation, not evidence. It also notes that no comment on the evidence by the court is proper or intended:

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

CP 16-17. Subsequently, Instruction No. 2 reminded the jury that the defendant is presumed innocent throughout the trial until they deliberate otherwise. CP 18. Jurors are presumed to follow these instructions. *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015).

In this case, the conditions of release helped establish that the defendant was knew that he was required to appear at any subsequent mandatory hearing. CP 36 (Exhibit 6). This is an essential element at the heart of any bail jumping charge. RCW 9A.76.170. Thus, evidence on this element it is not only relevant, it is supremely probative. Defendant fails to acknowledge this probative value and fails to establish any sort of prejudice. ER 403 only excludes evidence if the "probative value is

*substantially outweighed* by the danger of unfair prejudice.” ER 403 (emphasis added).

It is hard to see how this evidence could have prejudiced the jury against defendant on the bail jump when they are determining only whether he failed to present and report to the court as required. In fact, jurors are instructed to consider each count separately. *See* CP 19. Both hostile contact with law enforcement and alcohol were already at issue in the assault and obstruction incident. However, none of this evidence was offered for the truth of these matters. Moreover, the prosecutor did not use this evidence for these purposes in any way. The jury was not even able to reach a verdict on the assault.

Even if this Court finds the Conditions of Release should have been objected to, there is no prejudice to the defendant because most of the evidence challenged here is cumulative and would have been admitted on other grounds. *Cf. Hoskins v. Reich*, 142 Wn. App. 557, 570-71, 174 P.3d 1250 (2008) (holding the improper admission of evidence is a harmless error if the evidence is cumulative or of relatively minor significance.) The defendant was charged with assault and the victim is a Deputy Sheriff; his hostile contact with law enforcement is a central issue in the case. It is not prejudicial that jury knows he was prohibited from further such contact. Additionally, Deputy Csapo testified that the

defendant smelled strongly of alcohol and the defendant answered affirmatively when the prosecutor asked if he had “quite a bit of alcohol and [was] feeling the effects that night.” VRP 05-19-16 (86-87); VRP 05-20-16 (228). The only portion of this evidence that may not have come in otherwise is the prohibition against possessing weapons and firearms. However, this is a standard bail condition suggested by the Criminal Rules in some situations.<sup>23</sup> CrR 3.2(d)(3). It should not be surprising that someone accused of assault would be prevented from possessing firearms.

There is no reason to read Conditions of Release as separate allegations by the court. They are supremely relevant to the proving the knowledge element of the bail jump charge and carry very little danger of prejudice. In fact, the substance of two of the conditions the defendant takes issue with would have come in regardless. Thus, the conditions were properly admitted.

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<sup>23</sup> This condition is suggested as a part of non-exhaustive list of conditions that may be imposed when there is a “showing of substantial danger.” CrR 3.2(d). Multiple factors support a showing of substantial danger in this case including defendant’s lengthy criminal record, the nature of the assault and obstruction charges, and defendant’s past record of interference with the administration of justice. CrR 3.2(e)(1, 3, 5); CP 216-18.

- c. Mr. Kibbe's decision to withhold objections was a valid strategic decision and failing to make a meritless objection cannot be the basis for a claim of Ineffective Assistance of Counsel.

For the reasons stated above, there was ample justification for both Deputy Csapo's testimony and the Conditions of Release to be admitted. Because the record provides ample support to overrule any objection and the defendant has not demonstrated why an objection would likely have been sustained, he cannot demonstrate the prejudice to fulfill the second prong of the Strickland test. See *State v. Contreras*, 92 Wn. App. 307, 319, 966 P.2d 915 (1998).

Even if this Court were to find prejudice, there were valid strategic reasons not to object. Mr. Kibbe may have viewed the objections to be entirely without merit and "trial counsel cannot have been ineffective for failing to raise a meritless objection." *Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005), *amended*, 04-15562, 2005 WL 1653617 (9th Cir. July 8, 2005). Alternatively, Mr. Kibbe may have declined to object because drawing the jury's attention to the respective evidence could have done more harm than good. *Cunningham v. Wong*, 704 F.3d 1143, 1159 (9th Cir. 2013) (holding that failure to object to statements made during a closing argument, "possibly to avoid highlighting them, was a reasonable strategic decision.") Parts of the Conditions of Release ordering the

defendant to appear at all subsequent hearings were relevant and incredibly probative so they likely would have come in somehow. While a redaction may have been possible, it is but one of many strategies and a redaction that leaves no gaps for the jury can be functionally difficult.

The harm caused to the defendant by either evidence is minimal. In both cases jurors would have to, against the instructions they are presumed to follow, make improper inferences about how general evidence applies to the defendant. The defendant's claims rest on the assumption that the jury took leaps and bounds from the evidence presented to construe it against defendant. This is the very thing juries are presumed not to do.

- d. Mr. Kibbe employed a valid defense strategy by focusing on the most serious charges and there is nothing in the record independent of the defendant's claims that indicates Mr. Kibbe did not conduct a proper investigation.

Defendant does not present nearly enough evidence for this Court to reconstruct the record regarding this claim. Defendant may not merely claim prejudice and proceed on appeal. *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995) (citations and quotation marks omitted). The defendant must make an affirmative showing of actual prejudice by identifying a constitutional error and showing how it affected his rights at

trial. *Id.* at 333. “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *McFarland*, 127 Wn.2d at 333-34; *see also, State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Thus, it “is not reviewable under RAP 2.5(a)(3).” *McFarland*, 127 Wn.2d at 333-34.

This entire issue is based on the defendant’s claim that Mr. Kibbe stated that there are no defenses to bail jumping. App. Br. at 22. However, defendant offers no factual support for this claim besides his own prior statements made when Mr. Kibbe was not present to rebut them. App. Br. at 22. There is no evidence that Mr. Kibbe did not investigate the possibility of a diminished capacity defense. In fact, there is some discussion of a competency evaluation which the court denied. VRP 05-17-16 (5-17). After that discussion, Judge Cuthbertson mentions that it seemed like the defendant was talking about a diminished capacity defense. VRP 05-17-16 (9). The Judge mentions that a diminished capacity defense may or may not be available and recommended the defendant speak to Mr. Kibbe. *Id.* As a result, the defendant was demonstrably aware that diminished capacity was a defense that at least warranted further discussion. There is no evidence in the record of either Mr. Kibbe or the defendant reacting to this instruction from the judge in a

way that would support the claim that Mr. Kibbe previously said there were no defenses to bail jumping.

Mr. Kibbe focused on defending against charges that carried the most combined jail time.<sup>24</sup> It is a valid strategy, and indeed possibly in the client's best interest, to concede certain elements of a charge or even several charges entirely. *U.S. v. Thomas*, 417 F.3d 1053, 1058 (9th Cir. 2018) (citations omitted).

Even if the defendant were to establish deficient performance, there is no way that he could establish prejudice. Defendant eventually received a competency evaluation which found that he was exaggerating both his symptoms of mental illness and his memory problems. CP 106-7. This competency evaluation is the only evidence we have in the record that provides actual proof of the defendant's psychological condition. Based on this evidence, there is no support for the suggestion that a jury would have found the defendant not guilty because he lacked the requisite mental state.

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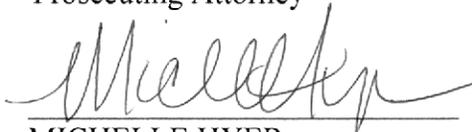
<sup>24</sup> The defense put on by Mr. Kibbe applied to both the charges of Assault in the Third Degree and Obstructing a Law Enforcement Officer. Defendant had an offender score of 7 at the time sentencing. CP 218; *see also*, RCW 9.94A.525(7). This exposed him to a standard range of 33 – 43 months on the original bail jump, a class C non-violent felony. The standard range for the assault charge was also 33-43 months but it is a considered a crime against a person. Additionally, defendant faced additional jail time of up to 364 days for the obstructing charge, a gross misdemeanor. RCW 9A.76.020; RCW 9.92.020. Though defendant was convicted of obstruction, Kibbe's strategy was effective in defending against the assault charge.

D. CONCLUSION.

For the above reasons, the State respectfully requests that this Court affirm the defendant's convictions. In so doing, the State respectfully requests this Court hold: (1) the jury was properly instructed on all the elements, (2) *Hart* was properly decided and should be upheld, (3) the State presented sufficient evidence to convict the defendant of bail jumping, (4) Mr. Kibbe's decision not object to Deputy Csapo's testimony was a valid strategic decision, (5) Mr. Kibbe's decision not object to the Conditions of Release was a valid strategic decision, and (6) Mr. Kibbe provided defendant with effective assistance of counsel.

DATED: September 5, 2018

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Evan Boeshans  
Rule 9

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9/5/18 Johnson  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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