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NO. 51465-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

VICTOR PASCUAL BEMEJIA,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

The trial court erred when it accepted the jury's guilty verdict on the bail jumping charge because substantial evidence does not support the conclusion that the court gave the defendant adequate notice of the location of the court where he was ordered to appear.

Issues Pertaining to Assignment of Error

Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does substantial evidence support a conviction on a bail jumping charge when the evidence at trial demonstrates that the defendant initially appeared in a basement general purpose courtroom and then later failed to appear in another courtroom on another upper floor of the courthouse when the order to appear did not designate the courtroom where the defendant was ordered to appear?

STATEMENT OF THE CASE

On January 29, 2015, Alberto Flores was working as a cashier at a Vancouver 7-11 when he heard his truck alarm sound. RP 185-189.¹ He immediately stepped outside to see a man, later identified as the defendant Victor Pascual Bemejia, walking away from that vehicle. RP 185-186, 213-214. Upon seeing this Mr. Flores returned to the store and called the police, who arrived after a brief period, found the defendant, and placed him under arrest. RP 213-214. The police found items from Mr. Flores' truck on the defendant's person. RP 233-234. They also found a small bundle of what was later tested to be methamphetamine in the defendant's pants pocket. *Id.* Upon inspecting his truck, Mr. Flores discovered some damage to the front seat that had not been there when he started his shift at the store that day. RP 195-196.

The Clark County Prosecutor charged the defendant with one count each of possession of methamphetamine, third degree malicious mischief, second degree vehicle prowling and third degree theft. CP 1-3. On June 30, 2015, the defendant made his first appearance while still in custody in the basement courtroom at the Clark County Courthouse locally know as "the

¹The record on appeal includes five volumes of continuously numbered verbatim reports. They are referred to herein as "RP [page #]."

pit.” CP 147. During that hearing the defendant was provided with the services of a spanish interpreter. *id.* During the hearing the court set bail at \$5,000.00 and appointed an attorney to represent him. CP *id.* The court then put the matter over to July 7, 2015, for arraignment, also in the “pit.” *id.* On that next date the defendant, who was still in custody, again appeared in “the pit” with his appointed attorney and plead not guilty. CP 148. He again used the services of a Spanish interpreter. *id.* The court then set the matter for a readiness hearing on August 6, 2015, and trial on August 12, 2015. CP 148-149.

On August 5, 2015, the defendant, who was still in custody, made his third appearance in the “pit” with his attorney and the prosecutor upon his attorney’s motion for his release and for a continuance of the pending readiness and trial date. CP 150, 151-152, 153-154, 155. The defendant again used the services of a Spanish interpreter. CP 155. At that time the defendant executed a speedy trial waiver that accepted October 1, 2015, as the first day in the waiver. CP 4. The court then accepted the waiver, struck the current trial dates, placed the defendant on supervised release, and ordered him to appear for a review on September 1, 2015. CP 155. The “Supervised Release Order” the defendant signed states that his next court date was on September 1, 2015, at 1:30 pm. CP 156. However, it did

not specifically state where the defendant was supposed to appear. *Id.*

Rather, what it stated on this issue was:

☒ YOUR NEXT COURT DATE IS: September 1st at 1:30 pm.

CP 156 (Capitalization in original, date and time hand written).

On September 1, 2015, Judge Vanderwood called this case for review in Courtroom 3 on the fourth floor of the Clark County Courthouse.

CP 6; *See also* Stipulated Facts on Appeal. The defendant did not appear and the court issued a warrant for his arrest. CP 6.

The prosecutor subsequently amended the information to add a count of bail jumping from a Class B or C felony. CP 7-8. The case later came on for trial before a jury, during which the state called Mr. Flores, the responding officers, the forensic scientist who confirmed that the bindle taken out of the defendant's pocket contained methamphetamine, the deputy prosecutor who was in court when the defendant was released and ordered to appear, and a Superior Court Clerk who testified that on September 1, 2015, the defendant did not appear in Judge Vanderwood's courtroom on the fourth floor of the Clark County Courthouse. RP 185, 209, 230, 277, 288, 314, 331, 352, 375; *See also* Stipulated Facts on Appeal. The defense did not present any evidence, and after instruction, argument and deliberation, the jury acquitted the defendant on the malicious mischief

charge and convicted him on all other counts. RP 426, 427-438, 439-479, 492-500; CP 96-107, 108-113. The Court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 115-126, 137-138.

ARGUMENT

THE TRIAL COURT ERRED WHEN IT ACCEPTED THE JURY'S GUILTY VERDICT ON THE BAIL JUMPING CHARGE BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE CONCLUSION THAT THE COURT GAVE THE DEFENDANT ADEQUATE NOTICE OF THE LOCATION OF THE COURT WHERE HE WAS ORDERED TO APPEAR

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3, and the United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of

the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974).

The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar, the state charged the defendant in Count V with bail jumping under RCW 9A.76.170. Section (1) of this statute states:

(1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

RCW 9A.76.170(1).

Under this statute a person commits bail jumping if (1) he or she was

released or admitted to bail on a criminal charge, (2) if he or she had knowledge of a requirement of a subsequent personal appearance, and (3) if he or she then failed to appear as ordered. RCW 9A.76.170(1); *see also*, WPIC 121.41. While the statute requires the state to prove that the defendant had “knowledge of a requirement of a subsequent person appearance,” appellant has been unable to find any Washington cases defining just precisely what the components of that “knowledge” are. However, the notice the court gives the defendant in the order to appear must be sufficient to put a person of reasonable intelligence on notice of what the defendant is required to do. As the following explains, statutory vagueness analysis provides an apropos example of when proscribed or required conduct has been defined sufficiently to meet the due process notice requirements of Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

At a minimum under the due process clauses of the state and federal constitutions, a statute that does not give fair notice of the proscribed conduct and clear standards to prevent arbitrary enforcement does not meet the minimum notice requirements under either the state or federal constitution. *State v. Halstien*, 122 Wn.2d 109, 117, 857 P.2d 270 (1993). By contrast, the language of a statute is not unconstitutionally

vague merely because one cannot predict with complete certainty the exact point at which conduct becomes criminal. *City of Seattle v. Eze*, 111 Wn.2d 22, 27, 759 P.2d 366 (1988). Statutory language is sufficient to meet the minimum requirements of due process if a person of ordinary intelligence can understand the statute's meaning and reasonably avoid the proscribed conduct. *Seattle v. Eze*, 111 Wn.2d at 27. Thus, a statute "employ[ing] words with a well-settled common law meaning," will generally survive a constitutional claim of vagueness. *Anderson v. City of Issaquah*, 70 Wn.App. 64, 75, 851 P.2d 744 (1993). Finally, courts review statutory vagueness challenges which do not touch First Amendment rights in light of the statute's application under the facts of the case at hand. *State v. Halstien*, 122 Wn.2d at 117.

Appellant argues in this case that this is the correct analysis for determining whether or not a court's "notice" to a defendant of a mandatory subsequent appearance meets the minimum notice requirements of due process. In other words, under the facts of the individual case, would a person of average intelligence understand the steps necessary to comply with the court's order. Thus, for example, if a trial court ordered a defendant to appear on a specific day, which turned out to be a holiday, the defendant's failure to appear on the date the court

actually intended would not meet the minimum notice requirements of due process. Similarly, if a trial court ordered a defendant to appear at 3:00 pm in a specific court on a specific day when the court's docket actually started at 9:00 am., that order would not meet the minimum constitutional notice requirements of due process, at least if the docket was completed prior to 3:00 pm. As the following explains, under the facts of the case at bar, the trial court's order to the defendant of a subsequent appearance did not meet the minimum notice requirements of due process.

In the case at bar, the defendant, while in custody, was brought before the judge on three occasions in the basement courtroom of the Clark County Superior Court known as the "pit." He used a Spanish interpreter on each occasion. On the third appearance, the court released the defendant and ordered him to appear again "in court" on September 1, 2015. However, the trial court's order did not state in which courtroom the defendant was to appear. On the date designated, the Superior Court called the case in another courtroom on the fourth floor of a courthouse with 8 courtrooms for Superior Court, plus other courtrooms for District Court. In addition, the record in this case also reveals that the defendant is a native Spanish speaker and that he appeared in court each time with an interpreter. Under these facts, the trial court's deficient order requiring the

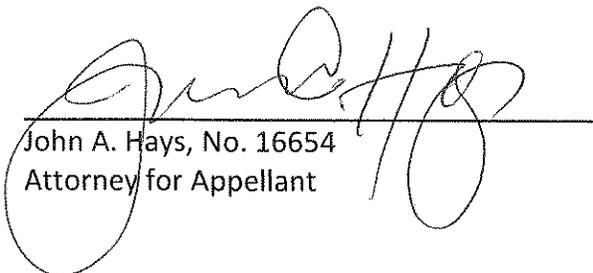
defendant to “appear in court” on the date and time set but not telling the defendant where to appear did not meet the minimum requirements of due process. Thus, the notice was defective and the state’s evidence was insufficient to prove that the defendant had “knowledge” of the appearances requirements.

CONCLUSION

Substantial evidence does not support the knowledge element of the bail jumping conviction in this case. As a result, this court should vacate that conviction and remand for dismissal.

DATED this 30th day of July, 2018.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION

ARTICLE 1, § 3

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

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

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

RCW 9A.76.170

(1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

(2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

(3) Bail jumping is:

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

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

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

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

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

NO. 51465-6-II

vs.

AFFIRMATION
OF SERVICE

VICTOR PASCUAL BEMEJIA,
Appellant.

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

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Dated this 30th day of July, 2018, at Longview, WA.


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