

FILED
Court of Appeals
Division II
State of Washington
2/6/2019 12:32 PM

NO. 52124-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT WOLFE,
Appellant.

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

Kitsap County Cause No. 17-1-01642-8

The Honorable William C. Houser, Judge

BRIEF OF APPELLANT

Skylar T. Brett
Attorney for Appellant

LAW OFFICE OF SKYLAR T. BRETT, PLLC
PO BOX 18084
SEATTLE, WA 98118
(206) 494-0098
skylarbrettlawoffice@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ISSUES AND ASSIGNMENTS OF ERROR 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS 4

ARGUMENT 9

I. The trial court violated Mr. Wolfe’s constitutional rights by denying his motion to suppress the fruits of a warrant search of his home when the warrant was not supported by probable cause. 9

A. The affiant’s allegations of “known drug users” being present at the house do not establish probable cause because they are improperly conclusory. Even if those allegations were true, the mere presence of individuals with a criminal history is irrelevant to whether criminal activity was occurring at the house. 13

B. Many of the allegations in the warrant affidavit were stale or fail to provide any timeframe at all. 16

C. The statements set forth in the warrant affidavit from informants alleging that there was drug activity at the house fail to pass the *Aguilar-Spinelli* reliability test. 18

D. The warrant affidavit’s allegations regarding “short-stay traffic” are insufficient to establish probable case. ... 23

E.	The remaining allegations in the warrant affidavit are insufficient to establish probable case.	25
II.	There was insufficient evidence to convict Mr. Wolfe of bail jumping because no rational jury could have found beyond a reasonable doubt that he had received notice of the hearing he missed.	27
III.	The court’s to-convict instruction for bail jumping violated Mr. Wolfe’s right to due process because it relieved the state of its burden to prove each element of the charge.....	30
A.	The court’s to-convict instructions for bail jumping failed to inform the jury of the state’s burden to prove that Mr. Wolfe received notice of the missed hearing and that he failed to appear for court “as required.”	31
B.	This Court should decline to follow its prior decision on this issue in <i>Hart</i> because that decision was wrongly-decided and is harmful.	34
CONCLUSION		37

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Aguilar v. Texas</i> , 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964)	1, 7, 11, 12, 17, 18, 19, 21, 22
<i>Andresen v. Maryland</i> , 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976)	16
<i>Spinelli v. United States</i> , 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969)	1, 7, 11, 12, 17, 18, 19, 20, 21, 22

WASHINGTON STATE CASES

<i>Anfinson v. FedEx Ground Package Sys., Inc.</i> , 174 Wn.2d 851, 281 P.3d 289 (2012)	31
<i>State v. Aumick</i> , 126 Wn.2d 422, 894 P.2d 1325 (1995)	30, 34
<i>State v. Cardwell</i> , 155 Wn. App. 41, 226 P.3d 243 (2010), <i>review granted, cause remanded on other grounds</i> , 172 Wn.2d 1003, 257 P.3d 1114 (2011)	28, 32, 33
<i>State v. Chouinard</i> , 169 Wn. App. 895, 282 P.3d 117 (2012) <i>review denied</i> , 176 Wn.2d 1003, 297 P.3d 67 (2013)	28, 30
<i>State v. Cole</i> , 128 Wn.2d 262, 906 P.2d 925 (1995)	14
<i>State v. DeRyke</i> , 149 Wn.2d 906, 73 P.3d 1000 (2003)	31
<i>State v. Doughty</i> , 170 Wn.2d 57, 239 P.3d 573 (2010)	15, 23, 24
<i>State v. Duncan</i> , 81 Wn. App. 70, 912 P.2d 1090 (1996)	21, 22
<i>State v. Gaddy</i> , 152 Wn.2d 64, 93 P.3d 872 (2004)	19
<i>State v. Hart</i> , 195 Wn. App. 449, 381 P.3d 142 (2016), <i>review denied</i> , 187 Wn.2d 1011, 388 P.3d 480 (2017)	34, 35, 36, 37
<i>State v. Helmka</i> , 86 Wn.2d 91, 542 P.2d 115 (1975)	14

<i>State v. Huft</i> , 106 Wn.2d 206, 720 P.2d 838 (1986).....	23
<i>State v. Jackson</i> , 102 Wn.2d 432, 688 P.2d 136 (1984) ..	17, 18, 19, 20, 21, 22
<i>State v. Kylo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	31, 33
<i>State v. LaPointe</i> , 1 Wn. App. 2d 261, 404 P.3d 610 (2017).....	36
<i>State v. Lorenz</i> , 152 Wn.2d 22, 93 P.3d 133 (2004).....	30, 31, 34
<i>State v. Lyons</i> , 174 Wn.2d 354, 275 P.3d 314 (2012)...	9, 16, 17, 19, 20, 27
<i>State v. McCord</i> , 125 Wn. App. 888, 106 P.3d 832 (2005).....	21
<i>State v. Neth</i> , 165 Wn.2d 177, 196 P.3d 658 (2008).....	10, 23, 24, 26
<i>State v. Ollivier</i> , 178 Wn.2d 813, 312 P.3d 1 (2013).....	22
<i>State v. Shupe</i> , 172 Wn. App. 341, 289 P.3d 741 (2012)	10, 20
<i>State v. Smith</i> , 131 Wn.2d 258, 930 P.2d 917 (1997) (Smith II)	30
<i>State v. Smith</i> , 93 Wn.2d 329, 610 P.2d 869 (1980).....	14
<i>State v. Thein</i> , 138 Wn.2d 133, 977 P.2d 582 (1999).....	14, 25
<i>State v. Thompson</i> , 93 Wn.2d 838, 613 P.2d 525 (1980)	15
<i>State v. Vasquez</i> , 178 Wn.2d 1, 309 P.3d 318 (2013).....	28, 30
<i>State v. W.R., Jr.</i> , 181 Wn.2d 757, 336 P.3d 1134 (2014).....	37
<i>State v. Watt</i> , 160 Wn.2d 626, 160 P.3d 640 (2007).....	33
<i>State v. Weyand</i> , 188 Wn.2d 804, 399 P.3d 530 (2017)	23, 27
<i>State v. Williams</i> , 162 Wn.2d 177, 170 P.3d 30 (2007).....	32
<i>State v. Youngs</i> , 199 Wn. App. 472, 400 P.3d 1265 (2017)	10, 14, 15
<i>State v. Zillyette</i> , 178 Wn.2d 153, 307 P.3d 712 (2013).....	31

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. IV 1, 9, 27
U.S. Const. Amend. XIV 1, 2, 30
Wash. Const. art. I, § 3..... 2
Wash. Const. art. I, § 7..... 1, 9, 18, 27

STATUTES

RCW 69.50.402 7
RCW 9A.76.170..... 28, 32, 36

OTHER AUTHORITIES

RAP 2.5..... 31
State v. Nimer, 246 P.3d 1194 (Utah Ct. App. 2010) 26

ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Wolfe's rights under the Fourth and Fourteenth Amendments by denying his motion to suppress.
2. The trial court violated Mr. Wolfe's rights under Wash. Const. art. I, § 7 by denying his motion to suppress.
3. The warrant for the search of Mr. Wolfe's home was not supported by probable cause.
4. The trial court erred by entering Conclusion of Law I.
5. The trial court erred by entering Conclusion of Law II.
6. The trial court erred by entering Conclusion of Law III.
7. The trial court erred by entering Conclusion of Law IV.
8. The trial court erred by entering Conclusion of Law V.
9. The trial court erred by entering Conclusion of Law VI.

ISSUE 1: Conclusory statements in a warrant affidavit are insufficient to establish probable cause and mere presence of someone suspected of a crime is insufficient to establish a nexus between the crime and the place to be searched. Did the affidavit in support of the warrant to search Mr. Wolfe's house fail to establish probable cause based on un-supported allegations that "known" drug users had been seen at the house?

ISSUE 2: Information in a warrant affidavit fails to establish probable cause if the information is "stale" or fails to set forth a timeframe to determine whether evidence of a crime will be found at a location *at the time of the search*. Did the affidavit in support of the warrant to search Mr. Wolfe's house fail to establish probable cause based on allegations from three-years earlier and allegations from some un-specified time?

ISSUE 3: An informant's tip does not establish probable cause in support of a search warrant unless the warrant affidavit establishes the basis of the informant's alleged information and the informant's veracity under the *Aguilar-Spinelli* test. Did the affidavit in support of the warrant to search Mr. Wolfe's house fail to establish probable cause based on tips from informants

who either gave no information regarding the source of their information or for whom no facts were provided to establish reliability?

ISSUE 4: Facts that are wholly consistent with legal activity do not establish probable cause to justify a warrant search. Did the affidavit in support of the warrant to search Mr. Wolfe's house fail to establish probable cause based on allegations that the house had a lot of visitors and sometimes left the front door open, that Mr. Wolfe had non-drug-related criminal convictions, and that syringes had been found across the street (when there was no nexus between the syringes and drug activity)?

10. The state presented insufficient evidence to convict Mr. Wolfe of bail jumping.
11. No rational jury could have found beyond a reasonable doubt that Mr. Wolfe was given notice of the hearing he missed, as required to convict him of bail jumping.

ISSUE 5: In order to prove that a person has committed the offense of bail jumping, the state is required to prove beyond a reasonable doubt that s/he received notice of a required court hearing and then failed to appear for that hearing. Is Mr. Wolfe's bail jumping conviction supported by insufficient evidence when the state's evidence that he had received notice of the missed hearing was equivocal, at best?

12. The court's to-convict instruction violated Mr. Wolfe's Fourteenth Amendment right to due process.
13. The court's to-convict instruction violated Mr. Wolfe's Wash. Const. art. I, § 3 right to due process.
14. The court's to-convict instruction impermissibly relieved the state of its burden of proof.
15. The court's to-convict instruction erroneously omitted the element that Mr. Wolfe had been given notice of the hearing he missed.
16. The court's to-convict instruction erroneously omitted the element that Mr. Wolfe's had failed to appear in court "as required."
17. The court erred by giving instruction number 20.

18. The violation of Mr. Wolfe's due process rights constitutes manifest error affecting a constitutional right.

ISSUE 6: 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. Wolfe's due process right by allowing conviction without proof that he had received notice of the hearing he missed or that his conduct met the statutory element that he had failed to appear in court "as required"?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Timothy Calnan was suspicious of his new neighbor. RP 357-60.¹ Calnan had bought two adjacent properties as investments and did not like the amount of traffic at Robert Wolfe's longtime family home, which was across the street. RP 354.

Mr. Wolfe rented out four or five rooms in the large house and lived in an additional bedroom with his girlfriend. RP 225-26. There was a lot of vehicle and foot traffic to and from the house. RP 357-59. Calnan complained about the traffic to the police. RP 196.

A Kitsap County Sheriff's detective applied for a warrant to search the house where Mr. Wolfe and his tenants lived. *See* CP 23-32. The affidavit in support of the warrant was lengthy but very repetitive. CP 23-32. The affiant recounts the reports of heavy traffic at the house (which the detective described as "short-stay traffic") several times. CP 26, 27, 31. The affidavit also notes that Calnan told the detective that sometimes the front door to the house is left open. CP 26. The detective describes three "known" drug users (Corbin Egeler, Angela Smiley, and Corey Butler) who were present near the house at various points. *See* CP 26-30. The affidavit claims that one of those people (Butler) "made a motion that he

¹ All citations to the verbatim report of proceedings refer to the chronologically-numbered volumes spanning 6/11/18 through 7/6/18.

might have” used drugs at the house when he was confronted by the officer. CP 29. The detective does not explain what that means. *See* CP 29. Neither Egeler nor Smiley made any statements about drug activity at the house. CP 23-32.

Some of the facts described in the affidavit were very old. For example, the affiant notes that there were complaints about suspected drug activity at the house three years earlier. CP 26. Those complaints do not seem to have led to any arrests or further investigation. CP 26.

Other allegations in the affidavit do not specify a timeframe. For example, two named informants (Cynthia Sylvester and Shawna Orłowski) told the detective that drugs were used at the house, but they did not say when that had occurred. CP 28-31. One of those informants (Orłowski) claimed to have personally seen the drug use but the other (Sylvester) did not provide any basis for her belief. CP 28-31.

The affidavit also describes encounters with two other people (Kathi Haselow-Silva and an unnamed “black male adult on crutches”), neither of whom made any allegations regarding drug use at the house. *See* CP 29-31.

Calnan told the detective that he had found syringes on his own property, across the street from the house. CP 27, 31-32. The affidavit does not allege that any syringes were found on the property of Mr.

Wolfe's home. *See* CP 23-32. The affidavit does not provide any information regarding the nature of the syringes or whether they were of a type with legitimate, medical uses. *See* CP 23-32.

The affidavit also recounted that a man who had done work at Calnan's properties claimed that there was a piece of paper put in the window of Mr. Wolfe's home when visitors were not welcome. CP 27-28. The worker did not explain how he had reached that conclusion. CP 27-28.

A magistrate issued a warrant to search Mr. Wolfe's home based on the affidavit. CP 35-36.

There were thirteen people in the house when it was searched. RP 205. The search revealed syringes, digital scales, and burnt tinfoil in some of the rooms that Mr. Wolfe rented out. RP 214, 244-50, 269-71, 311-13. But there was no suspected drug paraphernalia visible in the living room or other common areas, except for the scale. RP 316.

Mr. Wolfe shared a bedroom with his girlfriend in a converted garage on the ground level of the house. RP 303. The common areas and all but one of the remaining bedrooms were on other levels of the large house. RP 208, 218-21.

The police found small amounts of methamphetamine and heroin in the room that Mr. Wolfe shared with his girlfriend. RP 261-65. Mr. Wolfe's girlfriend admitted that those drugs belonged to her. RP 303-04.

The state charged Mr. Wolfe with two counts of drug possession for the methamphetamine and heroin that belonged to his girlfriend. CP 42-49. The state also charged him with maintaining a home for purposes of drug use under RCW 69.50.402(1)(f). CP 42.

Mr. Wolfe missed an omnibus hearing early in the proceedings. *See* RP 329. The state added a charge of bail jumping. CP 42-46.

Pre-trial, Mr. Wolfe moved to suppress the evidence seized from his home, arguing that the warrant affidavit did not establish probable cause. *See* CP 9-14. Mr. Wolfe argued that the statements from people alleging that drugs were used in the house did not meet the *Aguilar-Spinelli* test for reliability. CP 9-14. The remaining allegations in the affidavit, he argued, were insufficient to establish probable cause because they were equivocal, with potentially innocent explanations. CP 9-14.

The court denied Mr. Wolfe's motion to suppress the evidence seized from his home. CP 66-69.

At trial, in support of the bail jumping charge, the state attempted to prove that Mr. Wolfe had received notice of the hearing that he missed by admitting the notice setting the hearing and the transcript from the previous hearing, when notice was allegedly given. *See* RP 324-32; Ex. 61, 64.

The transcript from the hearing (when Mr. Wolfe allegedly received notice of the missed hearing) reads as follows, in its entirety:

COURT: State versus Wolfe.

DEFENSE COUNSEL: Your Honor, that is my matter.

COURT: Okay, 17-1-01642-18. It comes for omnibus today.

DEFENSE COUNSEL: He is here. I have some additional research that I need to do on this matter, so I am asking to set an omni for January 19th and a new trial date of February 26th.

COURT: Any objection?

PROSECUTOR: No, there is no objection.

COURT: This is a first request. I will grant it

[Whereupon, the proceedings adjourned.]

Ex. 64.

No one gave Mr. Wolfe oral notice that a hearing had actually been set for January 19th or that he was required to appear at that hearing. *See* Ex. 64.

The state attempted to overcome this evidentiary shortcoming by offering the paper notice setting the hearing as well. Ex. 60. But the notice setting the hearing did not have Mr. Wolfe's signature or any other indication that he had been given a copy. *See* Ex. 60.

The state's only witness in support of the bail jumping charge, a deputy clerk, said that the defense attorney is usually given two copies of the notice and is expected to give one of those copies to the accused. RP 340. The clerk testified that it is not the clerk's responsibility to give a copy of the notice document to the accused. RP 340. The witness did not know whether Mr. Wolfe's attorney had actually given him a copy of the

notice setting the hearing for January 19th because she was not in the courtroom at the time. RP 343-44.

The to-convict instruction for the bail jumping charge listed the elements as follows:

- (1) That on or about January 19, 2018, the defendant failed to appear before a court;
 - (2) That the defendant was charged with a class B or C felony;
 - (3) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and
 - (4) These acts occurred in the State of Washington.
- CP 92.

The instructions did not inform the jury that the state was required to prove that Mr. Wolfe had been given notice of the missed hearing or that he had failed to appear “as required” by court order. *See* CP 70-94.

The jury found Mr. Wolfe guilty of each of the charges. CP 96-97. This timely appeal follows. CP 109.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. WOLFE’S CONSTITUTIONAL RIGHTS BY DENYING HIS MOTION TO SUPPRESS THE FRUITS OF A WARRANT SEARCH OF HIS HOME WHEN THE WARRANT WAS NOT SUPPORTED BY PROBABLE CAUSE.

In order to justify issuance of a search warrant, a warrant affidavit must demonstrate probable cause to believe that evidence of a crime will be found on the premises at the time of the search. *State v. Lyons*, 174 Wn.2d 354, 360, 275 P.3d 314 (2012); U.S. Const. Amend. IV; art. I, § 7.

A trial court's conclusion that probable cause has been established is reviewed *de novo*. *State v. Shupe*, 172 Wn. App. 341, 349, 289 P.3d 741 (2012).

The allegations in a warrant affidavit must not be merely conclusory. *State v. Youngs*, 199 Wn. App. 472, 476, 400 P.3d 1265 (2017). Rather, the requesting officer must set forth all facts and circumstances, specific to the case, necessary for the magistrate to determine whether probable cause has been shown. *Id.*

To establish probable cause, a warrant affidavit must establish a nexus between criminal activity, the item to be seized, and the place to be searched. *State v. Neth*, 165 Wn.2d 177, 182–83, 196 P.3d 658 (2008).

A trial court's failure to suppress evidence seized pursuant to an improper warrant is presumed to be prejudicial. *Shupe*, 172 Wn. App. at 351-52. Reversal is required unless the state can prove beyond a reasonable doubt that the improperly-admitted evidence did not contribute to the verdict. *Id.*

In an effort to assist the Court with parsing Mr. Wolfe's arguments regarding the lengthy warrant affidavit, the following table attempts to clarify those allegations (in the same order in which they are presented in the affidavit), the reason for their inadequacy in establishing probable

cause, and the subsection in which the allegation is addressed herein. Each claim is set forth in significantly more detail in the subsections that follow:

Allegations in Affidavit	Reason for inadequacy
Mr. Wolfe has prior convictions for burglary, forgery, and misdemeanor assault. CP 25.	- Irrelevant to suspected drug activity. (Subsection (E)).
Complainant (later revealed to be Calnan) says there are a lot of people coming and going from the house and that the door sometimes is left open. CP 26. Calnan mentions “short-stay” traffic. CP 26, 27, 31.	- Too many innocent potential explanations to establish probable cause. (Subsection (D)).
Three-year-old allegations of “suspected narcotics activity” from unnamed complainants. CP 26.	- Stale information. - Unnamed complainants don’t pass <i>Aguilar-Spinelli</i> test. (Subsections (B) and (C)).
Corbin Egeler was arrested at the house in June 2017 on an outstanding warrant. Affiant states that Egeler is “known to associate with the local Heroin crowd.” CP 27.	- Arrest for unspecified reason is irrelevant to suspected drug activity. - Claim that Egeler is “known to associate” with drug users is improperly conclusory. Even if that claim is true, Egeler’s mere presence does not establish that criminal activity was taking place at the house. (Subsection (A)).
Syringes and caps found on Calnan’s property. CP 27, 31.	- Syringes have lawful, innocent uses. - No information connecting these syringes with drug use. - Syringes were not found on Mr. Wolfe’s property. (Subsection (E)).
Jeffrey Whallon says there is often a piece of paper in the window, indicating that the house is not taking visitors. CP 27-28.	- Conclusion regarding piece of paper has no basis of knowledge under <i>Aguilar-Spinelli</i> . (Subsection (C)(1)).

<p>Angela Smiley is present in the driveway. Affiant claims that she is “known to associate with other drug users.” CP 28.</p>	<p>- Claim that Smiley is “known to associate” with drug users is improperly conclusory. Even if that claim is true, Smiley’s mere presence does not establish that criminal activity was taking place at the house. (Subsection (A)).</p>
<p>Detective saw several people come in and out of the house, including Mr. Wolfe, within a ten-minute period. There were also people “just hanging out in the driveway.” CP 28.</p>	<p>- presence of people in and around house is not evidence of criminal activity. (Subsection (D)).</p>
<p>Cynthia Sylvester, whom another officer describes as a “former drug user” says that “Heroin is being sold from this house for sure.” CP 28-29.</p>	<p>- No timeframe attached to allegation. - Claim that Sylvester is a former drug user improperly conclusory. - fails basis of knowledge prong of <i>Aguilar-Spinelli</i> test. (Subsections (A), (B), and (C)(1)).</p>
<p>Corey Butler, whom another officer describes as a “drug user and thief” “made a motion that he might have” used drugs at the house. CP 29.</p>	<p>- Claim that Butler is a “drug user and a thief” is improperly conclusory. - Butler does not actually allege that he has used drugs at the house. (Subsection (A))</p>
<p>Kathi Haselow-Silva appears to be waiting for someone in the house and says that she does not know anyone who lives in the area. CP 30.</p>	<p>- Does not allege any drug activity. - No information in affidavit linking her presence to drug activity. (Subsection (D), footnote 6).</p>
<p>Shawan Orłowski is confronted by another officer regarding suspected drug paraphernalia in her car. The officer tells her that “everyone knows” that the house is being used for drugs. Orłowski says that she has seen people use drugs at the house. CP 29-30.</p>	<p>- No timeframe for allegations. - Fails veracity prong of the <i>Aguilar-Spinelli</i> test. (Subsections (B) and (C)(2)).</p>

<p>Another officer sees an “black male adult on crutches” walk toward the house, keep walking upon seeing the officer, then turn around and go back to the house. CP 31.</p>	<p>- Irrelevant to suspected drug activity. (Subsection (D)).</p>
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------

- A. The affiant’s allegations of “known drug users” being present at the house do not establish probable cause because they are improperly conclusory. Even if those allegations were true, the mere presence of individuals with a criminal history is irrelevant to whether criminal activity was occurring at the house.

The detective who wrote the warrant affidavit alleges, without any supporting facts, that three “known” drug users or “known” associates of drug users (Egeler², Smiley, Sylvester, and Butler) were present at Mr. Wolfe’s house at various times. *See* CP 27-29. The detective’s claims that those people were “known” drug users or associates of drug users are insufficient to establish probable cause to believe that drug activity was occurring in Mr. Wolfe’s house because they are conclusory and unsupported by any concrete facts. Indeed, even if those claims had been supported by facts, they would still be insufficient to establish probable cause because the mere presence of those individuals does not establish any nexus between their alleged drug use and Mr. Wolfe’s home.

² The affiant also states that Egeler was arrested at the house on an outstanding warrant several months before the warrant search. CP 27. But the affidavit does not specify the offense underlying that arrest CP 27. Accordingly, Egeler’s arrest, itself, is irrelevant to any alleged drug activity at Mr. Wolfe’s house.

A finding of probable cause must be “grounded in fact.” *State v. Thein*, 138 Wn.2d 133, 146–47, 977 P.2d 582 (1999) (citing *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995); *State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869 (1980); *State v. Helmka*, 86 Wn.2d 91, 92-93, 542 P.2d 115 (1975)). Information that is not grounded in fact is inherently unreliable and “frustrates the detached and independent evaluative function of the magistrate.” *Id.*; *See also Youngs*, 199 Wn. App. at 476. Accordingly, probable cause cannot be established through conclusory statements, providing an officer’s belief without any facts and circumstances underlying that belief. *Youngs*, 199 Wn. App. at 476; *Helmka*, 86 Wn.2d at 92.

Here, the affiant’s allegations regarding “known” drug users and “known” associates of drug users being present at Mr. Wolfe’s house are not supported by any underlying facts or circumstances. *See* CP 23-32. Those claims are too conclusory for provide the basis for a finding of probable cause. *Id.*

Additionally, in order to support the issuance of a warrant, an affidavit must establish probable cause to believe that evidence of a crime will be found *in the specific place to be searched*. *Thein*, 138 Wn.2d at 147-48. Thus, for example, evidence that a person is a drug dealer is insufficient to justify a warrant search of his/her home absent some other

facts supporting the conclusion that s/he is dealing drugs out of the home, specifically. *Id.*

In this case, even if the affiant had established that the four individuals were drug users with concrete facts, the claims relating to them would still be insufficient to justify a search of Mr. Wolfe's house because there is nothing in the affidavit creating a nexus between their alleged drug use and Mr. Wolfe's house. *Id.*

In fact, "mere proximity to others independently suspected of criminal activity" is insufficient to justify even a *Terry* stop under the much lower reasonable suspicion standard. *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010) (quoting *State v. Thompson*, 93 Wn.2d 838, 841, 613 P.2d 525 (1980)). Even if the affidavit had properly demonstrated that drug users had visited Mr. Wolfe's house, that information would have been insufficient to establish reasonable suspicion, much less probable cause. *Id.*

Because they are improperly conclusory and fail to establish a nexus between criminal activity and Mr. Wolfe's house, the portions of the affidavit related to "known" drug users being present at the house cannot establish probable cause to justify issuance of the search warrant. *Id.*; *Youngs*, 199 Wn. App. at 476.

B. Many of the allegations in the warrant affidavit were stale or fail to provide any timeframe at all.

The warrant affidavit recounts complaints from un-named people who alleged that there was drug activity at the house three years previously. CP 26. Two of the named informants (Sylvester and Orłowski) told the detective about drug activity at the house but did not say when that activity allegedly happened. CP 28-31. None of this information can support a determination that the affidavit establishes probable cause that drugs would be found at the house at the time of the warrant search because it is either stale or fails to provide a necessary timeframe. *See Lyons*, 174 Wn.2d at 360–61.

The passage of time between an affiant’s observations and the presentation of the affidavit to the magistrate can undermine a finding of probable cause because the passage renders it “no longer probable that the search will reveal criminal activity or evidence.” *Id.* Such “stale” information is insufficient to justify issuance of a search warrant because it does not demonstrate that evidence of a crime will be found at the time of the search. *Id.* (citing *Andresen v. Maryland*, 427 U.S. 463, 478 n. 9, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976)).

In Mr. Wolfe’s case, the allegations in the warrant affidavit regarding the anonymous complaints from 2014 were stale by any

measure.³ *See* CP 26. That portion of the affidavit is irrelevant to whether there was probable cause to believe that evidence of a crime would have been found in Mr. Wolfe's house in late 2017. *Id.*

Likewise, an affidavit for a search warrant does not establish timely probable cause if it fails to state when an informant allegedly observed reported criminal activity. *Lyons*, 174 Wn.2d at 358. This is so even if the affidavit clarifies when the officer received the tip from the informant, because the magistrate is still left without knowledge of how old the information, itself, is. *Id.* at 361 (noting that federal courts have also held that two separate statements of time are necessary to determine staleness: when the affiant received the tip *and* when the informant observed the criminal activity).

In Mr. Wolfe's case, the warrant affidavit claims that two informants (Sylvester and Orlowski) alleged that drug activity was occurring in the house. CP 28-30. But the affiant does not clarify the timeframe during which that alleged activity took place. *See* CP 28-30. Indeed, as far as the magistrate knew, those informants could have been discussing the same alleged activity from 2014.

³ Because of the unnamed complainants, lack of information regarding the basis for the information, and lack of other corroborating information for those complaints, the 2014 allegations would not pass the *Aguilar-Spinelli* test anyway. *See State v. Jackson*, 102 Wn.2d 432, 433, 688 P.2d 136 (1984).

The affidavit's claims by informants regarding drug activity in Mr. Wolfe's house are inadequate to establish probable cause to support the search warrant because there is insufficient information to determine whether the allegations were timely. *Id.*

Because they are irrelevant to the determination of whether evidence of a crime would be found in Mr. Wolfe's house *at the time of the warrant search* in late 2017, the portions of the warrant affidavit reciting anonymous tips from 2014 and from some unspecified timeframe cannot establish probable cause. *Id.*

C. The statements set forth in the warrant affidavit from informants alleging that there was drug activity at the house fail to pass the *Aguilar-Spinelli* reliability test.

Under art. I, § 7 of the Washington constitution, in order to support a finding of probable cause, tips from informants set forth in a warrant affidavit must be accompanied by facts sufficient to establish the basis of the information and the credibility of the informant. *Jackson*, 102 Wn.2d at 433 (citing *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964)).

Under this *Aguilar-Spinelli* test, in order for an informant's tip to establish probable cause, a warrant affidavit must (1) "set forth some of the underlying circumstances from which the informant drew his

conclusion so that a magistrate can independently evaluate the reliability of the manner in which the informant acquired his information” and (2) set forth “some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable.” *Jackson*, 102 Wn.2d at 435; *See also State v. Gaddy*, 152 Wn.2d 64, 72, 93 P.3d 872 (2004).

The affidavit must set forth these underlying circumstances with enough specificity for the magistrate to “independently judge the validity of both the affiant’s and informant’s conclusions.” *Lyons*, 174 Wn.2d at 359 (*citing Spinelli*, 393 U.S. at 413).

The affidavit for the warrant in Mr. Wolfe’s case includes statements by three⁴ informants: Whallon, Sylvester, and Orłowski. CP 27-30. None of those informants’ tips passes constitutional muster under the *Aguilar-Spinelli* test.

1. The statements in the warrant affidavit by informants Whallon and Sylvester fail to set forth sufficient basis of knowledge to meet the requirements of *Aguilar-Spinelli*.

To meet the “basis of knowledge” prong of the *Aguilar-Spinelli* test, a warrant affidavit must “contain some of the underlying

⁴ The affidavit states that a fourth individual, Butler, “made a motion that he might have” used drugs at Mr. Wolfe’s house. CP 29. That purely equivocal statement is far too attenuated to qualify as an informant’s tip of criminal activity.

circumstances that led the informant to believe that evidence could be found at the specified location.” *Lyons*, 174 Wn.2d at 359. Typically, this is met if an informant declares that s/he has personally witnessed the facts asserted. *Jackson*, 102 Wn.2d at 437. If the informant is passing on hearsay, there must be some other showing of a sufficient basis for the knowledge alleged. *Id.*; *See also Shupe*, 172 Wn. App. at 350–51 (finding that a neighbor’s tip alleging drug activity failed to meet the basis of knowledge prong).

In the warrant affidavit in Mr. Wolfe’s case, the detective recounts a tip from Whallon, who had been doing work on a house across the street. CP 27-28. Whallon claims that there is often a piece of paper in a window of Mr. Wolfe’s house, indicating when visitors are not welcome. CP 27-28. The affidavit does not specify how Whallon reached that conclusion or whether it was simple speculation.⁵ *See* CP 27-28. Whallon’s tip fails the basis of knowledge prong of the *Agular-Spinelli* test. *Id.*

The affidavit also recounts a tip from Sylvester who claimed that “heroin is being sold from [the] house for sure.” CP 28-29. Again, the affidavit does not clarify how Sylvester came to that conclusion, which

⁵ Indeed, even if the warrant affidavit had established a basis of knowledge for Whallon, there is no information in the affidavit creating a nexus between this practice and drug dealing. *See* CP 23-32.

could have been based only on rumors. CP 28-29. Sylvester's tip also fails the first prong of the *Aguilar-Spinelli* test. *Id.*

The warrant affidavit's tips from Whallon and Sylvester fail the first prong of the *Aguilar-Spinelli* test and cannot establish probable cause to justify the warrant search of Mr. Wolfe's house. *Id.*

2. The affidavit fails to establish the veracity of the remaining informant under *Aguilar-Spinelli*.

The most common way to meet the second, "veracity" prong of the *Aguilar-Spinelli* test is to set forth an informant's track record regarding whether s/he has provided the police with accurate information in the past. *Jackson*, 102 Wn.2d at 437. Merely naming an informant is insufficient to show his/her reliability. *State v. McCord*, 125 Wn. App. 888, 893, 106 P.3d 832 (2005); *See also State v. Duncan*, 81 Wn. App. 70, 78, 912 P.2d 1090 (1996).

The warrant affidavit also includes statements from third informant, Orłowski, who claims to have personally seen people use drugs in Mr. Wolfe's house. CP 30-31. Though Orłowski's claim to be passing on firsthand information arguably suffices as a "basis of knowledge" under *Aguilar-Spinelli*, the affidavit fails to establish her reliability or veracity under the second prong. *Id.*

The affidavit does not set forth any facts or corroborating circumstances by which a magistrate could independently judge Orłowski's reliability. *See* CP 30-31. This, alone, renders Orłowski's tip unreliable under the second prong of the *Aguilar-Spinelli* test. *Id.*⁶

Indeed, the detective asked Orłowski about Mr. Wolfe's house only after confronting her regarding suspected drug paraphernalia in her car. CP 30-31. In this context, Orłowski's reliability is further undermined by the fact that she was likely attempting to protect her self-interest in order to dissuade the detective from investigating her further. *See Duncan*, 81 Wn. App. at 78 (an informant is less likely to meet the veracity test when his/her statements are "colored... with self-interest").

The final informant tip in the warrant affidavit – that from Orłowski – fails the second, "veracity" prong of the *Aguilar-Spinelli* test. *Jackson*, 102 Wn.2d at 437. Orłowski's tip cannot establish probable cause to justify the search of Mr. Wolfe's home. *Id.*

⁶ Tips by "citizen informants" (as differentiated from professional or criminal informants) are presumptively reliable. *State v. Ollivier*, 178 Wn.2d 813, 850, 312 P.3d 1 (2013). But Orłowski is not a "citizen informant" who voluntarily contacted the police in order to report criminal activity. Rather, she is a "criminal" informant who made her statements after being confronted by an officer regarding suspicions of her own drug use. CP 30-31. Orłowski's tip is not presumptively reliable.

D. The warrant affidavit's allegations regarding "short-stay traffic" are insufficient to establish probable cause.

Even facts that are "unusual" or "seem odd and perhaps suspicious" are not enough to establish probable cause if they are consistent with legal activity. *Neth*, 165 Wn.2d at 184.

For example, the fact of an individual's two-minute visit to a suspected drug house at 3:20am is not sufficient to establish reasonable suspicion to justify a *Terry* stop under the much lower reasonable suspicion standard. *Doughty*, 170 Wn.2d at 62–63. This is because such a short visit (even to a suspected drug house) does not constitute a specific and articulable fact that the person has committed a crime. *Id.* at 63; *See also State v. Weyand*, 188 Wn.2d 804, 815, 399 P.3d 530 (2017) (even suspicious actions do not establish probable cause if they are "equivocal" as to whether a crime has occurred").

Similarly, high electrical usage is insufficient to establish probable cause that a person is growing marijuana because "there are too many plausible reasons for increased electrical use" for that fact to establish that a crime has likely occurred. *State v. Huft*, 106 Wn.2d 206, 211, 720 P.2d 838 (1986).

The affidavit supporting the warrant to search Mr. Wolfe's house relied heavily on allegations of many visitors⁷ to the house, alleged "short-stay traffic," and the fact that the front door was sometimes left open. *See* CP 26, 28. That information is far too innocuous to establish probable cause that there was drug activity at the house. *See Neth*, 165 Wn.2d at 184; *Doughty*, 170 Wn.2d at 62–63. Like an individual's 2-minute visit to a suspected drug house or suddenly increased electrical usage, a house's openness to frequent visitors has innumerable innocent explanations.

Additionally, the affidavit does not provide any factual basis for the conclusion that the visits to Mr. Wolfe's house were typically of a "short-stay" nature. *See* CP 23-32. Calnan reported "short-stay" traffic to the detective but did not explain how "short" the stays were. CP 26. The detective describes seeing several people coming and going from the house within a ten-minute period but does not explain how long any of them stayed. CP 28. It is unclear from the affidavit whether a typical visitor to Mr. Wolfe's house stayed for a few minutes, half an hour, an hour, or more. *See* CP 23-32.

⁷ The affidavit's section regarding Haselow-Silva's presence outside the house is simply an example of the broader allegations regarding the house's frequent visitors and is not addressed separately. CP 30-31.

The affidavit also fails to clarify whether the individuals seen coming and going from the large home lived in the house or not. *See* CP 23-32.

The affidavit's allegations regarding "short-stay" traffic are insufficient to establish probable cause even with the affiant's claim that such traffic is "something [he] know[s] to be an indicator of possible narcotics dealing." CP 26. This is because an officer's generalized statements about training and experience are inadequate to meet the required showing of specific underlying circumstances establishing illegal activity. *Thein*, 138 Wn.2d at 147-48.

The allegations regarding frequent visitors to Mr. Wolfe's house cannot establish probable cause to justify the search warrant. *Id.*

E. The remaining allegations in the warrant affidavit are insufficient to establish probable cause.

The remaining allegations in the affidavit include: the presence of syringes on Calnan's property, Mr. Wolfe's non-drug-related criminal history, and the fact that an unnamed "black male adult on crutches" kept walking when he saw the detective and then later turned around and went back to the house. CP 25, 27, 30-31. These allegations are, similarly, insufficient to establish probable cause that criminal activity was taking place at Mr. Wolfe's house.

First, the syringes were located on Calnan's property, not Mr. Wolfe's. CP 27, 31. Additionally, the presence of needles and syringes is inadequate to establish probable cause of drug activity because they have "legitimate medical purposes." *See State v. Nimer*, 246 P.3d 1194, 1197 (Utah Ct. App. 2010); *See also Neth*, 165 Wn.2d at 185 ("innocuous objects that are equally consistent with lawful and unlawful conduct do not constitute probable cause to search"). There was no information in the warrant affidavit indicating that the syringes were of a type generally used for drugs or anything else creating a nexus between the syringes and suspected criminal activity at Mr. Wolfe's house. *See* CP 23-32.

Likewise, Mr. Wolfe's criminal history – none of which was related to drugs – was irrelevant to whether drug activity was occurring in his house. Indeed, even a history of crimes similar to the one under investigation is inadequate to establish probable cause because "[o]therwise, anyone convicted of a crime would constantly be subject to harassing and embarrassing police searches." *Neth*, 165 Wn.2d at 185-86 (internal quotation omitted).

Finally, the presence of an unnamed "black male adult on crutches," who kept walking when he saw the detective and then later went back to Mr. Wolfe's house, was irrelevant to suspected criminal activity. CP 31. The affidavit states that he walked to a corner store and

then went back to Mr. Wolfe's house. It is very likely that he simply wished to make a purchase.

Even if the man's route indicated reluctance to engage with the detective, that is not evidence of a crime. Even if he had made "furtive movements" (which he did not), such "movements" would have been inadequate to justify a *Terry* stop under the much lower reasonable suspicion standard. *See Weyand*, 188 Wn.2d at 815–16 (warning against the dangers of relying on "furtive movements" to justify a stop). The presence of the man on crutches is irrelevant to whether criminal activity was occurring at Mr. Wolfe's house.

The warrant affidavit in Mr. Wolfe's case – despite its length – fails to establish probable cause to believe that evidence of a crime would be found in the house. *Lyons*, 174 Wn.2d at 360; U.S. Const. Amend. IV; art. I, § 7. The trial court erred by denying Mr. Wolfe's motion to suppress. *Id.* Mr. Wolfe's convictions must be reversed. *Id.*

II. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. WOLFE OF BAIL JUMPING BECAUSE NO RATIONAL JURY COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT HE HAD RECEIVED NOTICE OF THE HEARING HE MISSED.

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 each element of the charge proved 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).

An element has not been proved beyond a reasonable doubt if the state presents only equivocal evidence. *State v. Vasquez*, 178 Wn.2d 1, 14, 309 P.3d 318 (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).

In order to support Mr. Wolfe's conviction for bail jumping, the state was required to prove beyond a reasonable doubt that he had been given notice of the hearing that he later missed. *State v. Cardwell*, 155 Wn. App. 41, 47, 226 P.3d 243 (2010), *review granted, cause remanded on other grounds*, 172 Wn.2d 1003, 257 P.3d 1114 (2011). The prosecution attempted to do so in this case by offering the order setting that hearing and the transcript from the previous hearing as exhibits. *See* Ex. 61, 64.

But neither of those exhibits proves that Mr. Wolfe was given notice that the hearing had been officially set or notice that his appearance was required. *See* Ex. 61, 64.

The notice setting the hearing said that Mr. Wolfe's attendance was mandatory but there was no evidence that he was ever given a copy of that notice. Ex. 61. The state's witness did not know whether he had been given a copy or not. RP 343-44.

The half-page transcript of the previous hearing does not make up for this shortcoming. The court simply states that it "will grant" defense counsel's motion to continue, without actually ordering that the next hearing would occur on a specific date. *See* Ex. 64. More importantly, the court never informs Mr. Wolfe that he is required to attend the next hearing. *See* Ex. 64.

The prosecutor argued in closing that Mr. Wolfe admitted that he had received notice of the January 19th hearing because his attorney later stated that he called her as soon as he realized that he had missed court. RP 473. But that statement does not prove that Mr. Wolfe had notice of the hearing or of his required appearance *before* the hearing occurred. Rather, Mr. Wolfe could have found out about the hearing after the fact or could have known about the hearing but not known that he was required to attend.

The state's evidence regarding whether Mr. Wolfe had notice of the January 19th hearing – and that his presence at the hearing was

required – cannot establish proof beyond a reasonable doubt because it is “patently equivocal” *Vasquez*, 178 Wn.2d at 14.

No rational jury could have found beyond a reasonable doubt that Mr. Wolfe received notice that he was required to appear for a hearing on January 19th. *Chouinard*, 169 Wn. App. at 899. Mr. Wolfe’s conviction for bail jumping on that date must be reversed for insufficient evidence. *Id.*

III. THE COURT’S TO-CONVICT INSTRUCTION FOR BAIL JUMPING VIOLATED MR. WOLFE’S RIGHT TO DUE PROCESS BECAUSE IT RELIEVED THE STATE OF ITS BURDEN TO PROVE EACH ELEMENT OF THE CHARGE.

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) (Smith II). 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).⁸

In Mr. Wolfe’s case, the court’s to-convict instruction for bail jumping was constitutionally inadequate because it failed to provide the jury with an accurate yardstick of the requirements for conviction. *Id.*; CP 92. Specifically, the instruction failed to inform the jury that the state was required to prove that Mr. Wolfe had been given notice of the January 19th hearing and that he had later failed to appear “as required.” CP 92.

A. The court’s to-convict instructions for bail jumping failed to inform the jury of the state’s burden to prove that Mr. Wolfe received notice of the missed hearing and that he failed to appear for court “as required.”

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

⁸ 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). The error in the to-convict instruction in Mr. Wolfe’s case presents 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. *State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

required. *State v. Williams*, 162 Wn.2d 177, 184, 170 P.3d 30 (2007); RCW 9A.76.170(1).

In order to meet the knowledge requirement, the state must prove beyond a reasonable doubt that the accused received notice of the specific hearing he is alleged to have missed. *Cardwell*, 155 Wn. App. 47.

But the instruction given to the jury at Mr. Wolfe's trial listed the elements for bail jumping as follows:

- (5) That on or about January 19, 2018, the defendant failed to appear before a court;
 - (6) That the defendant was charged with a class B or C felony;
 - (7) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and
 - (8) These acts occurred in the State of Washington.
- CP 92.

The court's to-convict instruction for bail jumping did not make clear that the state had to prove that Mr. Wolfe had been given notice of the January 19th hearing (including notice that his attendance was required) or that the state had to prove that he had failed to appear "as required." CP 92.

Rather, the instruction required conviction even if Mr. Wolfe had not received notice of the January 19th hearing, so long as the jury found that he had knowledge of *any* "required subsequent personal appearance" at the time of his release. CP 92. Indeed, Mr. Wolfe did not dispute that he

was given notice of a required hearing at the time of his release. But that notice was for the hearing on December 19th, at which Mr. Wolfe appeared. *See* Ex. 58, 61. The relevant question for the jury, however, should have been whether he was given notice of the hearing he missed, on January 19th. *Cardwell*, 155 Wn. App. at 47.

Moreover, the court's to-convict instruction required conviction regardless of whether the Mr. Wolfe's attendance at the hearing was actually required, so long as he was aware of *some* required appearance when he was released. CP 92.

In effect, the instruction's language imposes strict liability for missing any court date after a person is released on bail, regardless of whether that person has been ordered to appear at the hearing and regardless of whether s/he has been given notice of the hearing. CP 92. The instruction violated Mr. Wolfe's right to due process because it was not available as an accurate "yardstick," and did not make the state's burden manifestly clear to the average juror. *Kyllo*, 166 Wn.2d at 864.

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). As outlined above, the state's evidence that Mr. Wolfe was given notice of the January 19th hearing was equivocal at best. The jury could have doubted whether

he was provided with notice of that hearing but still found him guilty because the to-convict instruction did not require proof of notice. CP 92.

Additionally, absent a showing that the accused failed to appear “as required,” the jury could have convicted Mr. Wolfe 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. CP 92.

The court’s to-conviction instruction for the bail jumping charge violated Mr. Wolfe’s right to due process by relieving the state of its burden to prove each element of the charge. *Aumick*, 126 Wn.2d at 429; *Lorenz*, 152 Wn.2d at 31. Mr. Wolfe’s bail jumping conviction must be reversed. *Id.*

B. This Court should decline to follow its prior decision on this issue 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. Wolfe’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 (emphasis in original).

But the reasoning in *Hart* is unavailing in cases (such as Mr. Wolfe’s) in which an accused person is released with knowledge of *some* required subsequent personal appearance but later charged with bail jumping for failing to appear at a hearing other than that of which s/he had notice at the time of release.

In this case, at the time of Mr. Wolfe’s release, he was given notice of his required presence in court on December 19, 2017. *See Ex. 58*, p. 2. And Mr. Wolfe was present for the December 19th hearing. *See Ex. 61*. But, when he appeared on that date, the hearing was continued until January 19th. *See Ex 61*, 64.

The relevant question for the jury should have been whether Mr. Wolfe was given notice of the hearing that he missed on January 19th. But the to-convict instruction told the jury only that the state was required to prove that he had notice of *any* required hearing when he was released. CP 92. Indeed, the instruction required conviction so long as the jury found that he was given notice of the December 19th hearing. CP 92.

Furthermore, the to-convict instruction given at Mr. Wolfe’s trial 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.

The *Hart* court’s reasoning is flawed because it approves of an instruction requiring conviction even if the state has failed to prove that the accused received notice of the actual hearing that s/he allegedly missed. The instruction approved in *Hart* also erroneously 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).

CONCLUSION

The warrant for the search of Mr. Wolfe's home was not supported by probable cause. All of the evidence seized from the home should have been suppressed. Mr. Wolfe's convictions must be reversed.

Additionally, the state presented insufficient evidence to convict Mr. Wolfe of bail jumping. The to-convict instruction for bail jumping also failed to inform the jury of each of the elements of the charge. Mr. Wolfe's bail jumping conviction must be reversed.

Respectfully submitted on February 6, 2019,



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:

Robert Wolfe/DOC#922112
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

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

Kitsap County Prosecuting Attorney
kcpa@co.kitsap.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 February 6, 2019.



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

LAW OFFICE OF SKYLAR BRETT

February 06, 2019 - 12:32 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52124-5
Appellate Court Case Title: State of Washington, Respondent v. Robert Alan Wolfe, Appellant
Superior Court Case Number: 17-1-01642-8

The following documents have been uploaded:

- 521245_Briefs_20190206123049D2776842_3984.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Wolfe Opening Brief.pdf
- 521245_Designation_of_Clerks_Papers_20190206123049D2776842_4847.pdf
This File Contains:
Designation of Clerks Papers - Modifier: Supplemental
The Original File Name was Wolfe Supplemental Designation of Clerks Papers.pdf

A copy of the uploaded files will be sent to:

- kcpa@co.kitsap.wa.us
- rsutton@co.kitsap.wa.us

Comments:

Sender Name: Valerie Greenup - Email: valerie.skylarbrett@gmail.com

Filing on Behalf of: Skylar Texas Brett - Email: skylarbrettlawoffice@gmail.com (Alternate Email: valerie.skylarbrett@gmail.com)

Address:
PO Box 18084
Seattle, WA, 98118
Phone: (206) 494-0098

Note: The Filing Id is 20190206123049D2776842