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NO. 52151-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

ALLEN HUMPHRIES,
Appellant.

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

Mason County Cause No. 16-1-00410-5

The Honorable Toni A. Sheldon, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. The state presented insufficient evidence to convict Mr. Humphries of Count II.
2. The state presented insufficient evidence to convict Mr. Humphries of Count III.
3. The state presented insufficient evidence to convict Mr. Humphries of Count IV.
4. No rational jury could have found beyond a reasonable doubt that Mr. Humphries had been given notice of the hearings that he was alleged to have missed, in order to convict him for bail jumping.

ISSUE 1: In order to support a conviction for bail jumping, the state must prove beyond a reasonable doubt that the accused was given notice of the hearing at which s/he allegedly failed to appear. Did the state present insufficient evidence to convict Mr. Humphries of the bail jumping charges when the only evidence that he had been given notice of the hearings was a signature on the orders setting those hearings, which purported to belong to him, but which was not authenticated in any way at trial?

5. Prosecutorial misconduct violated Mr. Humphries's Sixth and Fourteenth Amendment right to a fair trial.
6. Prosecutorial misconduct violated Mr. Humphries's Wash. Const. art. I, § 22 right to a fair trial.
7. The prosecutor committed misconduct by making an argument that minimized the state's burden of proof.
8. The prosecutor committed misconduct by making an argument that undermined the presumption of innocence.
9. Mr. Humphries was prejudiced by the prosecutor's misconduct.
10. The prosecutor's misconduct was flagrant and ill-intentioned.

ISSUE 2: A prosecutor commits misconduct by making arguments that minimize the state's burden of proof or undermine the presumption of innocence. Did the prosecutor commit misconduct by arguing to the jury that defense counsel's valid analogy, comparing the presumption of

innocence and the state's burden of proof to the "scales of justice," was actually an inaccurate defense tactic to make the state's burden appear higher than it should be?

11. Mr. Humphries was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
12. Mr. Humphries was deprived of his art. I, § 22 right to counsel.
13. Defense counsel provided ineffective assistance by unreasonably failing to object to the admission of unauthenticated signatures, which purported to belong to Mr. Humphries.

ISSUE 3: It is a long-standing rule that a signature is not admissible as substantive evidence of guilt of a crime unless it has been authenticated. Did Mr. Humphries's defense attorney provide ineffective assistance of counsel by failing to object to the admission of unauthenticated signatures, purporting to have been signed by Mr. Humphries, which comprised the state's only evidence that he had received notice of the hearings that he was alleged to have missed?

14. Defense counsel provided ineffective assistance of counsel by unreasonably failing to object to the admission of hearsay in Exhibit 4.
15. Defense counsel provided ineffective assistance of counsel by unreasonably failing to object to the admission of hearsay in Exhibit 6.
16. Defense counsel provided ineffective assistance of counsel by unreasonably failing to object to the admission of hearsay in Exhibit 9.

ISSUE 4: A court record does not fall within the public records exception to the hearsay rule if it contains legal conclusions, rather than factual assertions. Did Mr. Humphries's attorney provide ineffective assistance of counsel by failing to object to the admission of the conclusion that he had failed to appear for three court hearings in three orders for the issuance of bench warrants when those conclusions constituted the state's only evidence that he had failed to appear?

17. The court's to-convict instruction violated Mr. Humphries's Fourteenth Amendment right to due process.
18. The court's to-convict instruction violated Mr. Humphries's Wash. Const. art. I, § 3 right to due process.

19. The court's to-convict instruction impermissibly relieved the state of its burden of proof.
20. The court's to-convict instruction erroneously omitted the element that Mr. Humphries had failed to appear in court "as required."
21. The court erred by giving instruction number 14.
22. The court erred by giving instruction number 15.
23. The court erred by giving instruction number 16.
24. The violation of Mr. Humphries's due process rights constitutes manifest error affecting a constitutional right.

ISSUE 5: 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. Humphries's due process right by allowing conviction without proof that his conduct met the statutory element that he had failed to appear in court "as required"?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Mr. Humphries was charged with possession of a controlled substance, which actually belonged to the woman he was dating at the time. RP 229-30; CP 1-2.

The jury eventually hung on the possession charge. RP 495. But, in the meantime, Mr. Humphries missed three required court dates – one because he was too injured to walk; one because he believed he was required to be in municipal (rather than superior) court; and one because he misread the date on the order setting the hearing. RP 232-39. Each time, Mr. Humphries returned to court within a matter of days, explaining why he had not been present. RP 237. On the date when he was unable to walk, he called his then-appointed defense attorney before the scheduled hearing to explain that he would not be able to make it. RP 236.

Even so, the state charged him with three counts of bail jumping because he refused to plead guilty to the drug possession charge. CP 57-59; RP 240.

At trial, the state only called one witness in support of the bail jumping charges: a court clerk who had not been present when the allegedly-missed hearings were set or when they took place. RP 197-219.

The clerk testified that she did not know whether Mr. Humphries had missed any hearings or not. RP 219.

Instead, the state sought to prove that Mr. Humphries had been given notice of the allegedly-missed hearings by admitting the orders setting the hearing dates, which purported to have been signed by Mr. Humphries. *See ex. 3, 5, 7, 8.* But no witness who claimed to have seen Mr. Humphries sign the orders testified at trial. *See RP generally.* No other evidence was offered that showed even whether Mr. Humphries had been present in court when the orders were issued. *See RP generally.* Nor did the state offer an authenticated signature of Mr. Humphries, with which the jury could compare the signatures on the orders setting the hearings. *See RP generally.*

The state sought to prove that Mr. Humphries had missed the hearings only by admitting three orders directing issuance of a bench warrant, each of which contained boilerplate language indicating that he had failed to appear. *See ex. 4, 6, 9.* Again, no witness who had been present in court at the relevant times testified to say whether Mr. Humphries had been present. *See RP generally.* Nor were the clerk's minutes offered for those dates. *See RP generally.*

Defense counsel did not object to either the unauthenticated signatures or the language on the orders for the bench warrants. *See* RP 201-03.

During closing argument, Mr. Humphries's attorney explained the concepts of the presumption of innocence and the state's burden of proof by analogizing to a scale, which starts out tipped in favor of the defendant, and which must have its weight shifted wholly in favor of the prosecution in order to permit conviction:

I finally found something that sort of made sense to me ... it goes down to the scales of justice. And you've seen the lady holding the scales, right? And that's the way you can look at it, and it's a balancing act. Now in that balancing act, my client comes in -- in a civil matter there's the preponderance of the evidence. And so it -- you're on even keel. Two parties are on even keel and preponderance just barely tips the scale.

Now in a criminal matter the burden's upon the State to prove my client beyond a reasonable doubt -- and my client comes into this courtroom presumed innocent. So the scale is like this. My client is innocent. He's presumed innocent coming into this courtroom. When you walk into this court, it doesn't seem that way because he's sitting next to a criminal defense attorney. He's the one accused of a crime, so it certainly doesn't seem that way, but he is presumed innocent.

And then the burden's upon the State to prove beyond a reasonable doubt that he's guilty of these crimes.”
RP 475-76.

In rebuttal, the state argued that this analogy was inaccurate and that defense counsel was attempting to misrepresent the state's burden to meet his own purposes:

So [defense counsel] says that reasonable doubt means different things to different people. And [defense counsel] says well, you know, preponderance of the evidence is when you hold your — the scale straight out and it's like a little bit of a tilt. And reasonable doubt is all the way down. Now that sounds like something that the defense would want, obviously. 'Cause they want to set the bar for you beyond a reasonable doubt like this. Of course they do. They're the defense. That's what they want.

But is that really true? Reasonable doubt is a doubt which no reason exists — or for which a reason exists. You have to have — beyond a reasonable doubt means that you're — you're satisfied beyond a reasonable for — you know, then there are no doubts for which a reason exists, period. You believe to a moral certainty. Okay, fine. That's what beyond a reasonable doubt is. A reason — beyond a reason — a reasonable doubt isn't scales all the way down. No.”
RP 485.

The court's to-convict instructions for the three bail jumping charges listed the elements of the offenses as follows:

- (1) That on or about [date], the defendant failed to appear before a court;
 - (2) That the defendant was charged with Unlawful Possession of a Controlled Substance, a Class 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) That any of these acts occurred in the State of Washington.
- CP 76-78.

The instructions did not require the jury to find that Mr. Humphries had failed to appear “as required” in order to convict him of bail jumping. CP 76-78.

The jury found Mr. Humphries guilty of each of the three bail jumping charges. RP 496. This timely appeal follows. CP 119.

ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. HUMPHRIES OF ANY OF THE COUNTS OF BAIL JUMPING BECAUSE THERE WAS NO EVIDENCE THAT HE WAS THE ONE WHO HAD SIGNED THE NOTICES SETTING THE HEARING DATES.

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 proven beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013).

The bail jumping statute provides that:

Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state... and who fails to appear ... as required is guilty of bail jumping.

RCW 9A.76.170(1).

In order to support Mr. Humphries’s convictions for bail jumping, the state was required to prove beyond a reasonable doubt that he had been given notice of the required court dates. *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 orders setting those hearings as exhibits, which purported to have been signed by Mr. Humphries. *See* exhibits 3, 5, 7, 8.

But no witness who had seen Mr. Humphries sign those documents testified at trial. *See RP generally*. Likewise, no signature that was proved to have been made by Mr. Humphries was offered for the jury to compare to the signatures on the orders setting the hearing dates. *See RP generally*. Nor did the state offer clerk's minutes or some other document establishing that Mr. Humphries had even been present at the hearings when the orders were made. *See RP generally*.

As a result, no rational jury could have found beyond a reasonable doubt that the signatures actually belonged to Mr. Humphries. Since the state did not present any other evidence that Mr. Humphries was aware of the hearing dates, his bail jumping convictions must be reversed for insufficient evidence. *Chouinard*, 169 Wn. App. at 899.

Pursuant to ER 901(a), "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *State v. Bradford*, 175 Wn. App. 912, 928, 308 P.3d

736 (2013). This requirement is met “if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification.” *Id.* (internal quotations omitted). For example, authentication of a signature could be established by a witness with knowledge that the signature is what it is claimed to be, by non-expert opinion testimony from one who is familiar with the handwriting, or by comparing a signature with another specimen signature that has already been authenticated. *See* ER 901(b)(1)-(4).

As a threshold matter, Mr. Humphries does not contest the admissibility of the orders setting the hearings in his case, themselves. *See* exhibits 3, 5, 7, 8. However, because the state relied on the signatures on those documents to prove the knowledge elements of bail jumping, those signatures must have been authenticated as belonging to Mr. Humphries prior to their submission to the jury for comparison and review.

It is a long-standing rule that a person's signature cannot be authenticated by comparing one signature to another similar, yet likewise un-authenticated, signature. *See* ER 901(b)(3); *State v. McGuff*, 104 Wash. 501, 504-06, 177 P. 316 (1918).

In *McGuff*, a bank cashier was permitted to identify the signature of the appellant, even though he had never seen the appellant write his name, by comparing a signature that was on a card bearing McGuff's name

with a signature on a check that was alleged to have been forged by him. *McGuff*, 104 Wash. at 505. The supreme court reversed, holding that the cashier could not compare the signature at hand with another un-authenticated signature to prove that it belonged to *McGuff*. *Id.*

The un-authenticated signature in *McGuff* is distinguishable from a signature that is authenticated by comparing to a notarized document. *See e.g., State v. Fernandez*, 28 Wn. App. 944, 954-55, 628 P.2d 818 (1981). In *Fernandez*, a witness testified that his identification of a signature was based on a comparison with a previously authenticated signature on a notarized document. *Id.* In other words, the signature was proven. *Id.*

Here, Mr. Humphries's signature was never proven. No witness who had seen him sign the orders setting the hearing dates testified at trial. *See RP generally*. Indeed, there was not even any evidence that Mr. Humphries had been present in court when those dates were set. *See RP generally*. The state also failed to present any signature that had been authenticated for the jury to compare to those on the orders setting the hearing dates. *See RP generally*.

The only evidence presented at trial that Mr. Humphries had been given notice of the hearings at which he allegedly failed to appear was his purported signature on the orders setting those hearing dates. But, because there was no evidence that the signatures actually belonged to Mr.

Humphries, no rational jury could have found beyond a reasonable doubt he had received notice of the hearings for which he was alleged to have failed to appear.

Mr. Humphries's convictions for bail jumping must be reversed for insufficient evidence. *Chouinard*, 169 Wn. App. at 899.

II. THE PROSECUTOR COMMITTED MISCONDUCT DURING MR. HUMPHRIES'S TRIAL BY MAKING ARGUMENTS MISCHARACTERIZING AND MINIMIZING THE STATE'S BURDEN OF PROOF AND THE PRESUMPTION OF INNOCENCE.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected.

Glasmann, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Even absent objection, reversal is required when misconduct is "so flagrant and ill-intentioned that an instruction would not have cured the prejudice." *Glasmann*, 175 Wn.2d at 704.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight “not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.” Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

A prosecutor commits misconduct by minimizing the state’s burden of proof to the jury. *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010) *review denied*, 171 Wn.2d 1013, 249 P.3d 1029 (2011). A prosecutor’s misstatement of the state’s burden of proof during argument to the jury “constitutes great prejudice because it reduces the state’s burden and undermines a defendant’s due process rights.” *Johnson*, 158 Wn. App. at 685-86.

A prosecutor also commits misconduct by making arguments designed to undermine the presumption of innocence. *Id.*; *State v. Evans*, 163 Wn. App. 635, 643–44, 260 P.3d 934 (2011); *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009); *State v. Venegas*, 155 Wn. App. 507, 523, 228 P.3d 813 (2010). The presumption of innocence is the “bedrock upon which the criminal justice system stands.” *Evans*, 163 Wn. App. at 643 (*quoting State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241

(2007)). The presumption persists throughout the proceeding and is only overcome if the state presents sufficient proof. *Id.*

A prosecutor commits misconduct by disparaging the role of defense counsel. *State v. Gonzales*, 111 Wn. App. 276, 282, 45 P.3d 205 (2002); *State v. Thierry*, 190 Wn. App. 680, 694, 360 P.3d 940 (2015), *review denied*, 185 Wn.2d 1015, 368 P.3d 171 (2016). Such an argument improperly attempts to “draw a cloak of righteousness” around the state’s case. *Id.* For example, it is improper for a prosecutor to argue that the defense theory involves “sleight of hand” and asks the jury to “look over here, but don’t pay attention to there.” *State v. Thorgerson*, 172 Wn.2d 438, 451, 258 P.3d 43 (2011).

At Mr. Humphries’s trial, defense counsel analogized the state’s burden of proof and the presumption of innocence to the “scales of justice.” RP 475-76. Counsel explained that the presumption of innocence means that those scales are weighed all the way down in Mr. Humphries’s favor at the beginning of deliberations. RP 476. He went on to describe the state’s burden as one requiring the state’s evidence to completely tip the weight of the scales away from the side of innocence and onto the side of guilt before conviction would be permitted. RP 476.

Defense counsel’s description of the burden of proof and of the presumption of innocence was apt. The presumption of innocence and the

beyond a reasonable doubt standard work in tandem to create a significant hurdle which must be overcome by the state's evidence. The jury must begin deliberations with the assumption that Mr. Humphries is innocent: with the scale tipped all the way in his direction. The jury may convict only if that presumption is rebutted by evidence that leaves no reasonable doubt that he is innocent: the state's evidence must transfer the balance completely to the other side of the scale.

But the prosecutor told the jury that defense counsel's analogy was wrong. RP 485. He said the analogy of the scales "sound[ed] like something that the defense would want" but that "a reasonable doubt isn't the scales all the way down. No." RP 485.

The prosecutor's argument mischaracterized the state's burden of proof and undermined the presumption of Mr. Humphries's innocence. *Johnson*, 158 Wn. App. at 685-86; *Evans*, 163 Wn. App. at 643-44. It directly told the jury that an apt analogy for those difficult concepts was nothing but a defense tactic to mislead the jury and that, within the analogy, proof beyond a reasonable doubt would not actually require the scale to tilt all the way on the side of the prosecution. The prosecutor's argument also attempted to "draw a cloak of righteousness" around the state's case by painting the role of defense counsel as one of misleading

the jury. *Gonzales*, 111 Wn. App. at 282; *Thierry*, 190 Wn. App. at 694.

The argument was improper. *Id.*

Mr. Humphries was prejudiced by the prosecutor's improper argument. *Glasmann*, 175 Wn.2d at 704. The evidence against Mr. Humphries was not overwhelming. The state did not call any witnesses who had been present in court when he was alleged to have been given notice of the required hearings or when he was alleged to have failed to appear for those hearings. *See RP generally*. Nor did the state offer clerk's minutes or some other documentary evidence that he had been given notice of the allegedly missed court dates. In fact, the state's only witness in support of the bail jumping charges testified that she had no idea whether Mr. Humphries had been in court or not. RP 219. The jury could well have harbored a reasonable doubt regarding Mr. Humphries's guilt. But the prosecutor's improper argument encouraged the jury to convict even if it did not believe that the state's evidence had been sufficient to tip "scale" all the way on the side of the prosecution. RP 485. There is a substantial likelihood that the prosecutor's misconduct affected the outcome of Mr. Humphries's trial. *Id.*

Prosecutorial misconduct is flagrant and ill-intentioned if it violates case law and professional standards that were available to the prosecutor at the time of the argument. *Glasmann*, 175 Wn.2d at 707. The

prosecutor at Mr. Humphries's trial had access to long-standing caselaw prohibiting arguments undermining the state's burden or the presumption of innocence. *See e.g. Johnson*, 158 Wn. App. at 685-86; *Evans*, 163 Wn. App. at 643-44; *Anderson*, 153 Wn. App. at 431; *Venegas*, 155 Wn. App. at 523.

A prosecutorial argument improperly minimizing the state's burden of proof cannot be cured by an instruction. *Johnson*, 158 Wn. App. at 685 (*citing Venegas*, 155 Wn. App. at 523 n. 16). The prosecutor's improper arguments at Mr. Humphries's trial were flagrant and ill-intentioned. *Id.*

The prosecutor committed misconduct by making an extensive argument designed to undermine the state's burden of proof and the presumption of Mr. Humphries's innocence. *Id.* Mr. Humphries's convictions must be reversed. *Id.*

III. INEFFECTIVE ASSISTANCE OF COUNSEL DEPRIVED MR. HUMPHRIES OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL. MR. HUMPHRIES’S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY UNREASONABLY FAILING TO OBJECT TO EXTENSIVE, HIGHLY-PREJUDICIAL, INADMISSIBLE EVIDENCE.

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV, art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).¹

In order to demonstrate ineffective assistance of counsel, the accused must show deficient performance and prejudice. *Id.* Performance is deficient if it falls below an objective standard of reasonableness. *Id.* The accused is prejudiced by counsel’s deficient performance if there is a reasonable probability² that counsel’s mistakes affected the outcome of the proceedings. *Id.*

Defense counsel provides ineffective assistance by waiving objection to inadmissible evidence that prejudices his/her client, absent a valid tactical reason. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007), *aff’d*, 165 Wn.2d 474, 198 P.3d 1029 (2009).

¹ Ineffective assistance of counsel claims are reviewed *de novo*. *Jones*, 183 Wn.2d at 338.

² A “reasonable probability” under the prejudice standard is lower than the preponderance of the evidence standard. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Rather, “it is a probability sufficient to undermine confidence in the outcome.” *Id.*; *see also Jones*, 183 Wn.2d at 339.

Here, Mr. Humphries's defense attorney provided ineffective assistance of counsel by unreasonably failing to object to inadmissible evidence which comprised the entirety of the state's case for the bail jumping charges.

A. Defense counsel provided ineffective assistance by failing to object to unauthenticated signatures, purportedly those of Mr. Humphries, which constituted the only evidence that Mr. Humphries had been given notice of the hearings that he was alleged to have missed.

As outlined extensively above (see section I of this brief) the only evidence at trial that Mr. Humphries had been given notice of the hearings that he was alleged to have missed was in the form of orders setting the dates for those hearings, all of which purported to have been signed by Mr. Humphries. *See* Ex. 3, 5, 7, 8. But, because those signatures were not authenticated in any way as truly belonging to Mr. Humphries, they were not admissible under ER 901(a). *Bradford*, 175 Wn. App. at 928; *McGuff*, 104 Wash. at 504-06.

Mr. Humphries's defense attorney should have objected to the admission of the purported signatures of his client on exhibits 3, 5, 7, and 8. Counsel had no valid tactical reason for waiving objection to the state's only evidence that his client had been given notice of the hearings that he was alleged to have missed. Counsel's conduct constituted deficient

performance. *Hendrickson*, 138 Wn. App. at 833; *Jones*, 183 Wn.2d at 339.

Mr. Humphries was prejudiced by his attorney's deficient performance. A successful objection to the unauthenticated signatures would have left the state with no evidence that Mr. Humphries had received notice of the hearings. There is a reasonable probability that counsel's unreasonable failure to object affected the outcome of Mr. Humphries's trial. *Jones*, 183 Wn.2d at 339.³

Mr. Humphries's defense attorney provided ineffective assistance of counsel by failing to object to unauthenticated signatures, purportedly those of his client, which constituted the state's only evidence as to one of the elements of the bail jumping charges. *Id.*; *Hendrickson*, 138 Wn. App. at 833. Mr. Humphries's convictions must be reversed. *Id.*

B. Defense counsel provided ineffective assistance by failing to object to inadmissible hearsay on the court's orders for the issuance of

³ Mr. Humphries provided testimony after the state rested, which could be construed as an admission that he received notice of the hearings that he was alleged to have missed. *See* RP 232-39. But those admissions are not relevant to the prejudice analysis for Mr. Humphries's ineffective assistance claim. If defense counsel had successfully objected to the inadmissible signatures on the orders setting the hearings during the state's case-in-chief, the bail jumping charges would have been dismissed for insufficient evidence before Mr. Humphries ever testified.

bench warrants, which constituted the only evidence that Mr. Humphries had failed to appear for any required hearings.

The only evidence demonstrating that Mr. Humphries had not been present for any court hearing came in the form of boilerplate language on the court's orders for the issuance of bench warrants, claiming that he had failed to appear. *See* Ex. 4, 6, 9. Because those assertions constituted inadmissible hearsay, defense counsel should have objected to their admission.

Court records can fall within the public records exception to the hearsay rule, but only if they meet the four requirements of that exception. *State v. James*, 104 Wn. App. 25, 32, 15 P.3d 1041 (2000); RCS 5.44.040; ER 803(a)(8). In order to be admissible as a public record, a document must:

“(1) contain facts rather than conclusions that involve independent judgment, discretion, or the expression of opinion; (2) relate to facts that are of a public nature; (3) be retained for public benefit; and (4) be authorized by statute. *Monson*, 113 Wash.2d at 839, 784 P.2d 485 (citing *Steel*, 9 Wash.2d at 358, 115 P.2d 145).

James, 104 Wn. App. at 32 (citing *State v. Monson*, 113 Wn.2d 833, 839, 784 P.2d 485 (1989)).

The *James* court held that a prosecutor's declaration in support of an application for a bench warrant did not fall within the public records exception because the claim that the accused had failed to appear

constituted a legal conclusion. *Id.* at 33.⁴ The court's assertions in exhibits 4, 6, and 9 that Mr. Humphries had failed to appear for the three hearings at issue, likewise, constituted legal conclusions rather than factual assertions. *Id.* Accordingly, they were not admissible under the public records exception to the hearsay rule. *Id.*

Mr. Humphries's defense attorney had no valid tactical reason for waiving objection to the inadmissible legal conclusions in the orders for bench warrants. Counsel's failure to object constituted deficient performance. *Jones*, 183 Wn.2d at 339.

Mr. Humphries was prejudiced by his attorney's deficient performance. Again, the hearsay statements in the orders for issuance of bench warrants constituted the state's only evidence that Mr. Humphries had failed to appear for the three hearings. There is a reasonable probability that counsel's unreasonable failure to object to the inadmissible hearsay in the orders for issuance of bench warrants affected the outcome of Mr. Humphries's trial. *Id.*

⁴ The *James* court also noted that the prosecutor's role is as an advocate, not as a neutral public official. *James*, 104 Wn. App. at 33. While that reasoning does not apply to the court order in Mr. Humphries's case, a hearsay statement must meet *all* of the four requirements to be admissible as under the public records exception. *Id.* at 32. Accordingly, the fact that the court order – like the declaration in *James* – contains a legal conclusion means that the public records exception does not apply regardless of who the declarant was. *Id.*

Mr. Humphries’s defense attorney provided ineffective assistance of counsel by unreasonably failing to object to inadmissible hearsay, which constituted the state’s only evidence of the *actus reus* of the bail jumping charges. *Id.* Mr. Humphries’s convictions must be reversed. *Id.*

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

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

Jurors have the right to regard the court’s elements instruction as a complete statement of the law. Any conviction based on an incomplete “to convict” instruction must be reversed. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). This is so even if the missing element is supplied by other instructions. *Id.*; *Lorenz*, 152 Wn.2d at 31; *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).⁵

⁵ 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
(Continued)

In Mr. Humphries’s case, the court’s to-convict instructions for bail jumping was constitutionally inadequate because they failed to provide the jury with an accurate yardstick of the requirements for conviction. *Id.*; CP 76-78.

- A. The court’s to-convict instructions for bail jumping failed to inform the jury of the state’s burden to prove that Mr. Humphries 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 required. *State v. Williams*, 162 Wn.2d 177, 184, 170 P.3d 30 (2007); RCW 9A.76.170(1).

The court’s to-convict instruction permitted conviction even if Mr. Humphries had not failed to appear “as required.” CP 76-78. The instruction was not available as an accurate “yardstick,” and thus did not make the state’s burden manifestly clear to the average juror. *Kyllo*, 166 Wn.2d at 864.

the first time on review. RAP 2.5(a)(3). Instruction No. 16 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. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

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

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

The error here is presumed prejudicial, and the state cannot prove harmless error under the stringent test for constitutional error. *Watt*, 160 Wn.2d at 635. Accordingly, Mr. Humphries’s bail jumping convictions 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. Humphries’s case was constitutionally adequate. *See State v. Hart*, 195 Wn. App. 449, 456, 381 P.3d 142 (2016), *review denied*, 187 Wn.2d 1011, 388 P.3d 480 (2017).

The *Hart* court upheld the instruction because it “required the State to prove beyond a reasonable doubt that Hart ‘had been released by court order or admitted to bail with knowledge *of the requirement* of a subsequent personal appearance before that court.’” *Id.* at 456.

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

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

Mr. Humphries does not challenge the court’s instruction regarding the element that he was aware of a required appearance in court. Rather,

the court did nothing to inform the jury that it had to also find that he – at some later date – actually failed to appear as he had been ordered to do.

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

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

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

CONCLUSION

No rational jury could have found Mr. Humphries guilty of bail jumping beyond a reasonable doubt. Mr. Humphries’s defense attorney

provided ineffective assistance of counsel by failing to object to inadmissible evidence, which comprised the entirety of the state's case for the bail jumping charges. The prosecutor committed misconduct by making an argument that minimized and mischaracterized the presumption of innocence and the state's burden of proof. The court's to-convict instructions for bail jumping violated Mr. Humphries's right to due process by omitting one of the elements. Mr. Humphries's convictions must be reversed.

Respectfully submitted on September 28, 2018,



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CERTIFICATE OF SERVICE

I certify that on today's date:

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

Allen Humphries/DOC#902226
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

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

Mason County Prosecuting Attorney
timw@co.mason.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 September 28, 2018.



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LAW OFFICE OF SKYLAR BRETT

September 28, 2018 - 9:48 AM

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