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NO. 53255-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES CLARK,

Appellant.

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

The Honorable Suzan Clark, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Improper admission of unauthenticated text messages unfairly prejudiced the defense and denied appellant a fair trial.

2. The court's instructions relieved the State of its burden of proving an essential element of bail jumping and violated appellant's right to due process.

3. The exclusion of relevant evidence denied appellant his constitutional right to present a complete defense.

Issues pertaining to assignments of error

1. Appellant was charged with possession of methamphetamine with intent to deliver. The State offered text messages purportedly to and from appellant to establish intent. Where the State failed to authenticate the text messages as required under ER 901, did admission of the messages deny appellant a fair trial?

2. Appellant was charged with bail jumping after he failed to appear at the omnibus hearing. The court's to-convict instruction allowed the jury to find appellant guilty even if it did not find he was released with knowledge of the specific hearing he was alleged to have missed. Where the court's instruction relieved the State of proving this essential element of the offense, must appellant's conviction be reversed?

3. Appellant offered evidence that he appeared at a hearing subsequent to the omnibus hearing he was charged with missing, as circumstantial that he did not have knowledge of the omnibus hearing. Did exclusion of this relevant evidence deny appellant his right to present a complete defense?

B. STATEMENT OF THE CASE

On April 12, 2017, Vancouver police executed a search warrant at Appellant James Clark's home. RP 80. While the house was under surveillance prior to service of the warrant, Clark was seen driving away, and police conducted a traffic stop. RP 80. There were two other people in the car with Clark. Once everyone was removed from the car, police spotted a cell phone in the passenger seat. RP 83, 96, 101. Clark's son, who had been in the car when it was stopped, asked to retrieve the phone, but he was not permitted to. RP 97. Police obtained a warrant to search the car and the contents of the phone.

Clark was charged with possession of methamphetamine with intent to deliver based on evidence located in the residence and car, as well as text messages found in the phone on the passenger seat of the car.

CP 60; RP 134, 152, 176. After Clark failed to appear at the omnibus hearing, a charge of bail jumping was added. CP 60-61; RP 231-32.¹

Clark moved to exclude the text messages, arguing that the State could not authenticate them as required under ER 901. CP 18-21. The court denied the motion, ruling that the State could lay sufficient foundation for authentication, and the defense objection went to weight rather than admissibility. RP 75.

At trial, the State presented evidence that the phone contained links to multiple accounts in Clark's name. RP 263. Photos of numerous text messages on the phone were admitted at trial, and a police officer testified that the contents of several of these messages appeared to indicate drug transactions. RP 270-302; Exhibits 52-68. Police did not locate methamphetamine in the amounts discussed in the text messages when searching the car or house, however, nor did they locate the amount of money that would correspond with the transactions. RP 305.

The State also presented evidence that Clark was in court on April 19, 2018, when the court set dates for an omnibus hearing, a readiness hearing, and the jury trial. Clark signed a scheduling order form, and the dates were then added. RP 326. The May 15, 2018, omnibus date was included on the form. RP 325. Although the omnibus hearing was

¹ A charge of second degree possession of stolen property was dismissed when the jury failed to reach a verdict. RP 443.

chronologically the first required appearance, it was listed after the readiness hearing and jury trial on the scheduling order. RP 328. Clark did not appear at the omnibus hearing. RP 232.

The Court excluded evidence that Clark appeared at the readiness hearing on June 7, 2018, even though he had failed to appear at the omnibus hearing on May 15. RP 17. Defense counsel noted that the scheduling order did not list the required appearances in chronological order. Counsel argued that Clark's appearance at the readiness hearing was circumstantial evidence that Clark would have appeared at the omnibus hearing if he had knowledge of it, and given the way the hearing dates were presented, he did not have knowledge of the omnibus hearing. Exclusion of evidence that Clark appeared at the first listed hearing would deny Clark his right to present a complete defense. RP 14-17. The court ruled that Clark's subsequent appearance was irrelevant, but he could still get into the fact that scheduling order was confusing. RP 17.

C. ARGUMENT

1. THE COURT'S REFUSAL TO EXCLUDE UNAUTHENTICATED TEXT MESSAGES UNFAIRLY PREJUDICED THE DEFENSE AND DENIED CLARK A FAIR TRIAL.

Evidence may be presented to the jury only if it is properly identified and authenticated. "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.” ER 901(a). The proponent need not rule out all possibilities inconsistent with authenticity, but the offering party must present proof sufficient to permit a reasonable jury to find the evidence authentic. *In re Det. of H.N.*, 188 Wn. App. 744, 751, 355 P.3d 294 (2015). Authenticity is a preliminary determination, and the trial court is not bound by the rules of evidence in determining if the offered evidence is authentic. *State v. Bradford*, 175 Wn. App. 912, 928, 308 P.3d 736 (2013), *review denied*, 179 Wn.2d 1010 (2014). The court’s determination is reviewed for an abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

In this case, the State offered text messages it purported were sent and received by Clark. The defense objected, arguing that the State failed to establish authenticity as required under ER 901. CP 18-21. The court ruled the messages were properly authenticated, and they were admitted at trial. RP 75, 270-302.

The evidence rules provide a number of illustrations for methods of authentication. One way to authenticate evidence is through “distinctive characteristics, taken in conjunction with circumstances.” ER 901(4)(b). The Court in *Bradford* relied on this method in ruling that text messages

were sufficiently authenticated. In *Bradford*, a stalking case, the State offered text messages purported to be from the defendant. The Court found the circumstances and content of the messages sufficiently identified them as coming from Bradford. The messages were consistent with Bradford's desperate desire to communicate with the victim, the content of the texts in tandem with Bradford's corroborating behavior demonstrated he was the person who sent them, the timing of the texts was consistent with Bradford being the sender as there were no texts while he was in jail, and the victim and another witness testified they believed Bradford was the sender. Thus, the State established authenticity and the messages were properly admitted. *Bradford*, 175 Wn. App. at 929-30.

After *Bradford* was decided, a specific illustration was added to ER 901(b) describing ways to authenticate electronic mail:

Electronic Mail (E-mail). Testimony by a person with knowledge that (i) the email purports to be authored or created by the particular sender or the sender's agent; (ii) the email purports to be sent from an e-mail address associated with the particular sender or the sender's agent; and (iii) the appearance, contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is what the proponent claims.

ER 901(b)(10). This provision has been applied to text messages by analogy. *In re Det. of H.N.*, 188 Wn. App. 744, 355 P.3d 294 (2015), *review denied*, 185 Wn.2d 1005 (2016). In *H.N.*, the court held that

screenshots of text messages were properly admitted because H.N. had admitted sending the messages, identifying information was displayed at the top of each message, the contents of the messages suggested H.N. was the sender, the messages were consistent with certain events in H.N.'s life, and the timing of the messages was consistent with H.N.'s hospitalization. *H.N.*, 188 Wn. App. at 758-59.

This case is distinguishable from both *Bradford* and *H.N.* There was no witness who claimed knowledge that the texts were to and from Clark, no evidence that the phone number was registered to Clark, no admission from Clark that he sent the messages or that the phone belonged to him, and no distinguishing characteristics of the texts which identify Clark as the sender or recipient. While a few messages refer to Jim or Jimmy, there was no evidence Clark used those names. Moreover, the phone was not found on Clark's person but rather in the passenger seat where another person had been sitting while Clark drove. Without sufficient evidence establishing that Clark was the sender or recipient of the offered text messages, the messages were not properly authenticated, and they should have been excluded.

“The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined.” *State v. Wade*, 98 Wn.App. 328, 333, 989 P.2d 576 (1999). Evidentiary errors require reversal if, within

reasonable probabilities, the outcome of the trial would have differed had the error not occurred. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Here, the State relied heavily on the unauthenticated text messages to establish intent to deliver methamphetamine. A police officer testified that the contents of several of these messages appeared to indicate drug transactions. RP 270-302. But the search of the house and car failed to turn up methamphetamine in the amounts discussed in the text messages. Nor did police locate the amount of money that would correspond with the transactions. RP 305. There is a reasonable probability that without the improperly admitted text messages the jury would have a reasonable doubt as to Clark's guilt of the charged offense. His conviction must therefore be reversed and the case remanded for a new trial.

2. THE COURT'S INSTRUCTION ON BAIL JUMPING VIOLATED CLARK'S RIGHT TO DUE PROCESS BECAUSE IT RELIEVED THE STATE OF ITS BURDEN OF PROOF.

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). A defendant is denied a fair trial if the jury must guess at the meaning of an essential element of the crime or if the jury might assume an essential element need not be proven. *State v. O'Donnell*, 142 Wn. App. 314, 322, 174 P.3d 1205 (2007) (citing *State v. Davis*, 27 Wn. App. 498, 506, 618 P.2d 1034 (1980)). Thus, 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).

The to-convict instruction for bail jumping given in this case was constitutionally inadequate because it failed to provide the jury with an accurate yardstick of the requirements for conviction. While Clark did not object to the instruction below, the omission of an essential element from a to-convict instruction involves a manifest error affecting a constitutional right and thus may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). The adequacy of a challenged instruction is reviewed de novo. *Id.* at 7.

A person is guilty of bail jumping if he or she is released by court order with knowledge of the requirement of a subsequent personal appearance and fails to appear as required. RCW 9A.76.180(1).² The State

² “Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to

does not have to prove the defendant remembered the hearing in question and knowingly failed to appear, but it must prove that at the time the defendant was released, he or she had knowledge of the required personal appearance he or she is alleged to have missed. *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004) (not a defense to bail jumping that defendant forgot about the hearing after having been given notice of it). This knowledge is an essential element of the offense. *See State v. Bryant*, 89 Wn. App. 857, 950 P.2d 1004 (1998) (State must prove beyond a reasonable doubt defendant knew he was required to appear at the hearing he missed), *review denied*, 137 Wn.2d 1017 (1999).

Clark was charged with bail jumping based on his failure to appear at the May 15, 2018, omnibus hearing. There was no dispute at trial that Clark failed to appear at that hearing. Under the statute, however, he is guilty of bail jumping only if the State proved he was released with knowledge that he had to appear at the May 15 hearing.

The to-convict instruction relieved the State of that burden. Instead of tying the knowledge element to the missed appearance as required by statute, the court instructed the jury as follows:

To convict the defendant of the crime of bail jumping, each of the following elements of the crime must be proved beyond a reasonable doubt:

appear or who fails to surrender for service of sentence as required is guilty of bail jumping.” RCW 9A.76.170(1).

(1) That on or about May 15, 2018, the defendant failed to appear before a court;

(2) That the defendant was charged with Possession of a Controlled Substance With Intent to Deliver—Methamphetamine...

(3) That the defendant had been released by a 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 163. Under this instruction, the jury could convict Clark if it found he failed to appear at the May 15 omnibus hearing and he had been released with knowledge of *any* required subsequent personal appearance. Because it relieved the State of its burden to prove an essential element of the offense, use of this instruction violated Clark's right to due process.

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).

In this case, there was evidence that when Clark was released, the court scheduled an omnibus hearing, a readiness hearing, and a jury trial, and Clark was required to appear at all three. RP 328. The scheduling

order did not list the three dates chronologically, however, and although the omnibus hearing was the first required appearance, it was listed last on the order. RP 328; Exhibit 71. The first hearing date listed was the readiness hearing, which was to be held after the omnibus hearing. The defense was that the scheduling order was confusing and did not give Clark adequate notice of the omnibus hearing. RP 327-30, 392-93. The jury could find from the evidence that Clark was not released with knowledge of any personal appearance prior to the readiness hearing, but under the to-convict instruction, it could nonetheless convict based on the fact that Clark failed to appear at the omnibus hearing. The State cannot prove that use of the erroneous instruction was harmless under the stringent test for constitutional error, and Clark's conviction of bail jumping must be reversed. *Watt*, 160 Wn.2d at 635.

3. EXCLUSION OF RELEVANT EVIDENCE DENIED CLARK HIS RIGHT TO PRESENT A COMPLETE DEFENSE.

Criminal defendants have the constitutional right to present a complete defense. *State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, § 22. Relevant, admissible evidence offered by the defense may be excluded only if the prosecution demonstrates a compelling state interest

in doing so. *State v. Hudlow*, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). Although a trial court has discretion to determine whether evidence is admissible, a decision which is manifestly unreasonable or based on untenable grounds must be reversed on appeal. *See State v. Crowder*, 103 Wn. App. 20, 25-26, 11 P.3d 828 (2000), *review denied*, 142 Wn.2d 1024, (2001).

Defense evidence need only be relevant to be admissible. *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence ... more probable or less probable than it would be without the evidence.” ER 401. If the defense evidence is relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. *Darden*, 145 Wn.2d at 622.

The trial court violated Clark’s right to present a complete defense by excluding proposed evidence that Clark appeared at the June 7, 2018, readiness hearing. The proposed testimony was relevant to Clark’s knowledge of required personal appearances, an essential element of the bail jumping charge, and the State failed to show that admission of the evidence would have disrupted the fairness of the fact-finding process.

Clark was charged with bail jumping because he failed to appear at the omnibus hearing on May 15, 2018. The State presented evidence that

Clark signed and received a copy of the scheduling order which included that hearing, to establish the statutorily required knowledge. RP 325-26. Clark's defense was that he did not understand from the scheduling order that he was required to appear in court prior to the readiness hearing on June 7, 2018, because that was the first date listed on the form. RP 14-17, 328, 393. Evidence that he appeared in court for the readiness hearing would provide circumstantial evidence as to his knowledge of required personal appearances. By excluding this relevant evidence, the court denied Clark the right to present a complete defense.

The denial of the right to present a complete defense is constitutional error. *Crane*, 476 U.S. at 690. Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless. *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). Constitutional error is harmless only if this Court is convinced beyond a reasonable doubt that any trier of fact would reach the same result absent the error and "the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

The State cannot overcome the presumption of prejudice here. While defense counsel attempted to highlight the inadequacies of the scheduling order through cross examination of the State's witness and

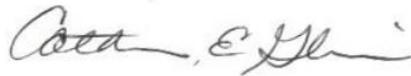
closing argument, the defense was not permitted to present evidence which would have supported the argument that Clark did not know he was required to appear prior to the readiness hearing. This evidence could have tipped the scales in the jury's determination of the bail jumping charge, and the court's error was not harmless. The bail jumping charge must be reversed.

D. CONCLUSION

For the reasons set forth above, this court should reverse Clark's convictions and remand for a new trial.

DATED September 4, 2019.

Respectfully submitted,



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Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant and Designation of Exhibit in *State v. James Clark*, Cause No. 53255-7-II as follows:

James Clark/DOC#413861
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Manchester, WA
September 4, 2019

GLINSKI LAW FIRM PLLC

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