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Court of Appeals
Division II
State of Washington
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NO. 53255-7-II

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

STATE OF WASHINGTON, Respondent

v.

JAMES WALTER CLARK, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-00798-6

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court did not abuse its discretion in determining that the state had properly authenticated text messages.**
- II. Any potential error in the to-convict instruction for the bail jump charge was harmless.**
- III. The trial court properly excluded irrelevant evidence from trial.**

STATEMENT OF THE CASE

The State charged James Clark (hereafter 'Clark') with Possession of a Controlled Substance-Methamphetamine, Possession of a Controlled Substance-Heroin, Possession of Stolen Property in the Second Degree, and Possession of Stolen Property in the Third Degree. CP 1-2. A charge of bail jumping was added after Clark failed to appear at a required court hearing. CP 7-8. The evidence at trial shows the following:

On April 12, 2017, Vancouver police executed a search warrant at Clark's residence. RP 80. Prior to the service of the warrant, while the police were surveilling the home, Clark was seen driving away in a sedan. RP 80. A few units followed Clark and conducted a traffic stop for speeding. RP 80. Part of the warrant allowed police to search Clark's person and was executed during the traffic stop. RP 80.

Clark was located in the driver's seat of the car and had two other passengers with him. RP 81. The passenger in the front seat was a female who lived with an acquaintance in the detached garage on Clark's property. RP 49. The other passenger in the vehicle was Clark's son, Zach. RP 97, 302. During the traffic stop, police found approximately 3.8 grams of methamphetamine in the driver's side door and a cellphone on the passenger seat where the female passenger had been. RP 98, 309. Police obtained a warrant to search the contents of the cellphone. RP 261. On the cellphone they found multiple accounts, such as Facebook, Google Drive, and Google Photo under the name of "James Clark." RP 263. They also found multiple text messages which were conversations apparently arranging transactions of drugs. RP 278. The messages addressed the owner of the phone as "Jim" or "Jimmy" which was a common nickname Clark used. RP 276, 277.

When police searched the house, they found digital scales and plastic baggies containing a crystal like substance in Clark's bedroom. RP 134. Inside the bedroom was also a safe that contained more crystal like substance and papers that had James Clark's name on them. RP 134, 145.

On April 19, 2018, Clark appeared in Clark County Superior Court. RP 324. As part of his release orders following this appearance, Clark was informed that there were three future court dates in which he'd

be required to appear. RP 323. If he did not appear, he was informed he could be charged with the crime of bail jump. RP 325. Clark failed to appear for his next court date, an omnibus hearing on May 15, 2018. RP 232.

After trial, a jury convicted Clark of Possession of Methamphetamine with Intent to Deliver and Bail Jumping. CP 171, 174. He was sentenced to a standard range sentence. CP 178. He timely appeals.

ARGUMENT

I. The trial court did not abuse its discretion in determining that the state had properly authenticated text messages.

Clark argues the text messages admitted at trial were not properly authenticated and should not have been admitted at trial. However, the text messages were sufficiently authenticated and the trial court did not abuse its discretion in admitting the messages. Clark's claim fails.

Evidence offered by a proponent needs to be authenticated before it can be admitted at trial. ER 901(a). This means that the proponent needs to establish that the evidence is what it purports to be. ER 901:1. The authentication requirement is met if there is a prima facie showing of authentication, meaning the proponent has established sufficient proof that

a reasonable trier of fact could find in favor of authentication. *State v. Danielson*, 37 Wash.App. 469, 471, 681 P.2d 260, 261 (1984).

Authenticity is a preliminary determination in which the court can consider evidence that might otherwise be objectionable under other evidentiary rules. *Rice v. Offshore Sys., Inc.*, 167 Wash.App. 77, 86, 272 P.3d 865 (2012). In making that preliminary determination, the court considers only the evidence offered by the proponent. *Id.* Evidence offered by the opponent to counter the authenticity is to be determined by the trier of fact. *In re Detention of H.N.*, 188 Wash.App. 744, 752, 355 P.3d 294, 298 (2015). The standard of review for admission of evidence is abuse of discretion. *State v. Bradford*, 175 Wash.App. 912, 927, 308 P.3d 736 (2013). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Magers*, 164 Wash.2d 174, 181, 189 P.3d 126 (2008).

The rules of evidence provide some illustrative examples of how a proponent might authenticate evidence. ER 901(b)(10) states,

Electronic Mail (E-mail). Testimony by a person with knowledge that (i) the e-mail purports to be authored or created by the particular sender or the sender's agent; (ii) the e-mail 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) was added after the Court's opinion in *Bradford, supra*, even though *Bradford* involved text messages. *State v. Young*, 192 Wash.App. 850, 855, 396 P.3d 205, 208 (2016). Electronic mail and text messages are very similar forms of communication and the Court in *H.N., supra*, relied on ER 901(b)(10) by analogy to determine the authenticity of text messages. *Id.* at 856

In *Bradford, supra*, the sender of certain text messages was not identifiable as a saved contact in the recipient's phone and did not identify himself in the text messages. *Bradford*, 175 Wash.App. at 921.

Nevertheless, the court ruled that the text messages were properly authenticated as being sent by the defendant because the content of the text messages indicated that the defendant had sent them. *Id.* at 929. The text messages were consistent with the defendant's desperate desire to communicate with the victim. The timing of the messages was consistent with the defendant being the sender because while the defendant was in jail the victim did not receive any messages. The statements in the messages juxtaposed to corroborating behavior established that the messages came from the defendant. The victim and another witness testified that they believed that the defendant had sent the messages. *Id.* at

929-30. This was sufficient to authenticate the text messages as being from the defendant. *See id.*

Similarly, in *H.N., supra*, the court authenticated text messages as coming from the defendant because H.N. admitted to sending the messages, her full name and number were at the top of the messages, the contents suggested H.N. was the sender, the messages were consistent with 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.

H.N., supra, and *Bradford, supra*, do not establish a clear rule on how to authenticate text messages, but the cases do offer some helpful illustrations of how certain facts can be used for authentication. Here, the trial court did not abuse its discretion when it found Clark's text messages were sufficiently authenticated for admission into evidence because there was enough evidence to establish sufficient proof that a reasonable trier of fact could rule in favor of authentication. The phone was found in Clark's car within reach of where he was sitting, Clark's son identified the phone as belonging to Clark (CP 29, 31), the Facebook, Google Drive, and Google Photo accounts on the phone were registered to "James Clark," there was an email address labeled "jamesclarkidahoappeal140016.2012@yahoo.com" (CP 31), several messages on the phone addressed the phone's owner as "Jim" or "Jimmy,"

Detective Ripp of the Vancouver Police Department testified at trial that Clark commonly used the nickname “Jim,” and the contents of the messages established meeting spots at locations near Clark’s residence. RP 277.

This evidence is more persuasive that the phone belonged to Clark than the evidence in *Bradford, supra*, because in *Bradford* there was nothing in the text messages that mentioned the defendant by name. Here, the phone was found within the vicinity of Clark, the messages addressed the owner of the phone by the name “Jim” which is a common name used by Clark. There were also many accounts that were linked to the name “James Clark” and the contents of the messages referenced locations near Clark’s residence. Therefore, it was reasonable for the trial court to find that the text messages were authenticated and it did not abuse its discretion when it admitted those messages into evidence.

II. Any potential error in the to-convict instruction for the bail jump charge was harmless.

Clark argues the trial court erred in its instruction on bail jumping, claiming that the trial court failed to instruct the jury as to every element of the crime of bail jumping, thus relieving the State of its burden of proof. Whether the jury instructions given, based on the pattern instruction for bail jumping, relieved the State of its burden of proof is not an issue this

Court must reach in deciding this case. There is overwhelming evidence of Clark's guilt as to the crime of bail jumping and this Court can be satisfied beyond a reasonable doubt that any potential error would have been harmless.

Constitutional error is presumed to be prejudicial and the State must prove the error was harmless beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). Not every misstatement or omission in a jury instruction relieves the State of its burden of proof. *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). A constitutional error is harmless when it appears beyond a reasonable doubt that the alleged error did not contribute to the verdict. *Id.* at 341 (citing *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). As applied to an omitted element in a jury instruction, an error is harmless if the element is supported by uncontroverted evidence. *Id.* at 347. In this case, there was overwhelming and uncontroverted evidence that Clark was informed of the May 15, 2018 court date and therefore that he had knowledge of that particular return date.

RCW 9A.76.170 defines bail jumping as occurring when "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... is guilty of bail

jumping.” RCW 9A.76.170(1). The State must prove the defendant knew of a hearing date and subsequently failed to appear at that hearing date. *See State v. Carver*, 122 Wn.App. 300, 306, 93 P.3d 947 (2004). In a bail jump charge, the knowledge requirement is met when the State proves that the defendant has been given notice of the required court date. *Id.* In Clark’s case, the State proved that Clark had knowledge of the May 15, 2018 court date and then failed to appear at that court date. Ms. Bryant testified that Clark appeared in court and was ordered to appear at a subsequent May 15, 2018 omnibus hearing date. RP 320-26. The judge told Clark the date out loud and it was written down on an order to appear. *Id.*; Ex. 71. Clark was given a copy of an order that included his next required court date of May 15, 2018, and he walked out of the courtroom with that copy of the order in his hand. *Id.* Based on this evidence, it is clear the State overwhelmingly proved Clark had notice and therefore knowledge of this May 15, 2018 court date. The State also proved Clark failed to appear at that court date. *See* RP 231-32; Ex. 72.

While Clark also had knowledge of other subsequent court dates, the State overwhelmingly proved that he had knowledge of the May 15, 2018 court date. Therefore, even if there was an error in the to-convict instruction, one which Clark never objected to, there was overwhelming evidence of his guilt and this Court can be satisfied beyond a reasonable

doubt that any error was harmless. In its closing argument, the State clearly told the jury that it had the burden to prove that Clark knew he had to be in court on May 15, 2018 and that he failed to appear on that date. *See* RP 410. The evidence that Clark was notified and therefore had knowledge of the May 15, 2018 hearing date was uncontroverted and is overwhelming. This Court can be satisfied beyond a reasonable doubt that any potential error in the jury instruction was harmless.

III. The trial court properly excluded irrelevant evidence from trial.

Clark argues that the trial court erred in excluding evidence that he appeared at a subsequent hearing date, after he failed to appear on the date that comprised the bail jump charge, because, as Clark argues, the evidence was relevant to his defense. The trial court did not abuse its discretion in its decision to exclude the irrelevant evidence and this decision did not deny Clark the right to present a defense. The trial court did not err and Clark's convictions should be affirmed.

This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). This Court will defer to a trial court's rulings unless "'no reasonable person would take the view adopted by the trial court.'" *Id.* (quoting *State v. Ellis*, 136 Wn.2d 498, 504, 963 P.2d 843 (1998)). A court abuses its

discretion when its decision is manifestly unreasonable or based on untenable grounds or made for untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997); *State v. Scherf*, 192 Wn.2d 350, 387, 429 P.3d 776 (2018). If a trial court excludes relevant defense evidence, this Court will determine as a matter of law whether the exclusion violated the defendant's right to present a defense. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). Even when a defendant raises a Sixth Amendment challenge to the exclusion of evidence, this Court reviews the exclusion of evidence for an abuse of discretion. *State v. Witthauer*, 9 Wn.App.2d 1061, 2019 WL 3202959 (Div. 2, 2019) (citing *State v. Lee*, 188 Wn.2d 473, 486-88, 396 P.3d 316 (2017) and *State v. Clark*, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017)).¹ Defendants have a right to present only relevant evidence, with no constitutional right to present irrelevant evidence. *State v. Gregory*, 158 Wn.2d 759, 786 n. 6, 147 P.3d 1201 (2006). Thus, while a defendant has a right to present evidence and to present a defense, a defendant has no right to present irrelevant evidence, or evidence that is unduly prejudicial, confusing or misleading.

¹ GR 14.1 allows citation to unpublished opinions of the Court of Appeals issued on or after March 1, 2013. This case is not binding precedent on this Court and may be given as much persuasive value as this Court chooses.

Here, the State charged Clark with Bail Jumping. This required the State prove that Clark had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before the court and that he failed to appear. RCW 9A.76.170(1). The State was not required to prove that Clark knew on the day he failed to appear that he was failing to appear at a court date; the statute only requires that the State prove Clark was given notice of his court date. *Carver*, 122 Wn.App. at 306. Therefore, it is not a defense to the crime that someone “forgot” about the court date or was mistaken about the court date. *See id.* The defenses to bail jumping would therefore include the statutory affirmative defense that uncontrollable circumstances prevented the person from appearing or surrendering, *see* RCW 9A.76.170(2), that the person was never given notice of the court date, that the person actually did appear at the court date, or some other procedural defect such as the person was not admitted to bail.

ER 402 provides that “[e]vidence which is not relevant is not admissible.” ER 402. “Relevant evidence” is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Additionally, relevant evidence may be excluded if its probative value is outweighed by the danger of unfair

prejudice or confusion of the issues, or if it is misleading to the jury. ER 403.

Clark wanted to admit evidence at trial that he appeared at a subsequent required court date, arguing that this would show he did not have knowledge of the prior court date he missed, in theory arguing that he misread the court document setting his next three court dates or failed to fully read it. This evidence and theory was in no way relevant to the crime of bail jumping or to any possible defenses to the crime of bail jumping. Accordingly, the trial court appropriately excluded evidence of Clark's "mistake" to prevent jury nullification and to prevent jury confusion.

The evidence Clark sought to admit would only have confused the issue or provided a basis for jury nullification. The bail jump conviction should be affirmed as the evidence Clark sought to introduce does not establish a defense or negate any of the elements of the crime. The trial court did not abuse its discretion and its decision should be affirmed.

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CONCLUSION

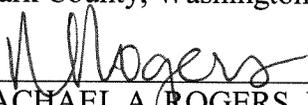
The trial court should be affirmed in all respects.

DATED this 2nd day of December, 2019.

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