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Court of Appeals  
Division II  
State of Washington  
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NO. 53870-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DAMON BLANCHARD,

Appellant.

---

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

---

BRIEF OF APPELLANT

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## A. INTRODUCTION

Damon Blanchard was charged with possession of a stolen vehicle. He was ultimately vindicated on this charge at trial; the jury acquitted him. However, along the way, Mr. Blanchard missed a court date because he was incarcerated in another state. The prosecutor added a bail jumping charge.

The trial court denied Mr. Blanchard's proposed instruction on the "uncontrollable circumstances" affirmative defense to bail jumping. This would have properly instructed the jury that "uncontrollable circumstances" were not limited to the examples in the statute. The court did provide a more limited instruction for the defense, and Mr. Blanchard proved all three required elements of the affirmative defense by a preponderance of the evidence. His conviction was in error.

## B. ASSIGNMENTS OF ERROR

1. The court erred in refusing to provide Mr. Blanchard's proposed instruction on an affirmative defense to bail jumping. CP 12

2. The evidence was sufficient to prove the defense of uncontrollable circumstances.

### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth Amendments of the United States Constitution protect the right to present a defense. An accused person is entitled to have the jury fully instructed on his theory of the case, as long as the instructions accurately state the law, are not misleading, and are supported by sufficient evidence. Here, the trial court ruled Mr. Blanchard could argue to the jury that the law permitted the jury to find “uncontrollable circumstances” preventing a court appearance were not limited to the examples in the statutory defense. However, the court denied a proposed defense instruction explaining the law. Did the trial court err in not meaningfully instructing the jury in the defense theory of the case, when the proposed instruction correctly stated the law, was supported by the evidence, and was not misleading?

2. The due process clauses of the federal and state constitutions protect against improper conviction. No one who

can prove the affirmative defense of “uncontrollable circumstances” may be convicted of bail jumping. The defense is met when the preponderance of the evidence shows the accused was physically incapable of appearing in court due to “uncontrollable circumstances,” he did not recklessly contribute to the circumstances, and he appeared as soon as the circumstances allowed it. Mr. Blanchard proved these three elements by a preponderance of the evidence. Was his conviction improper?

#### D. STATEMENT OF THE CASE

Mr. Damon Blanchard was stopped on the highway for speeding. RP 105. The car he was driving, which he had purchased a few days before, had been previously reported stolen. RP 104, 106; Ex. 4. The prosecutor charged him with one count of possession of a stolen vehicle. CP 1-2.

While the case was pending, Mr. Blanchard was held in jail on the stolen vehicle charge. RP 170; Ex. 7. While in jail, he missed a court date in Oregon for a case that had begun before the charge in the instant case originated. RP 170, 182.

The Oregon court issued a warrant for his arrest, and once released on this charge, Mr. Blanchard was then held in jail in Oregon. RP 170; Ex. 7; Ex. 10. While jailed in Oregon, his next hearing date in this case arrived; he was unable to attend court for this charge, given his incarceration in Oregon. RP 170-71; Ex. 10.

Once released from the Oregon jail, Mr. Blanchard was transported back to Lewis County for this matter. RP 177, 183; CP 61. He was brought to court, in custody, the day after he arrived at the Lewis County Jail. CP 60, 61.

The prosecutor subsequently charged him with bail jumping for the missed court date in this case. CP 5-6.<sup>1</sup>

At trial, Mr. Blanchard requested an instruction setting out the elements of “uncontrollable circumstances,” the statutory defense to bail jumping. CP 12. The proposed language stated “uncontrollable circumstances” were not

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<sup>1</sup> Washington State recently decriminalized this behavior. *See* Laws of 2020, ch. 19 (E.S.H.B. 2231), amending RCW 9A.76.170. Under the new law, effective June 11, 2020, all first failures to appear in non-violent, non-sex cases are not criminal; subsequent failures to appear are gross or simple misdemeanors. *Id.*

limited to the examples in the instruction. *Id.* The trial court denied this instruction. RP 192. It ruled Mr. Blanchard could argue this piece of the law to the jury without an instruction. *Id.* However, the court also instructed the jury that the law was only that set forth in the instructions and not that argued by counsel. CP 27 (instruction 11).

Mr. Blanchard testified about his purchase of the vehicle, which he had not known was stolen until being so informed by the arresting officer. RP 162-68; 172-76. He also testified regarding the circumstances of missing court in both jurisdictions, resulting in successive incarcerations, successive warrants, and eventual transport back to Lewis County. RP 169-72; RP 177; RP 183.

The prosecutor argued in closing that Mr. Blanchard's having been incarcerated was not an uncontrollable circumstance. *See* RP 208.

The jury acquitted Mr. Blanchard of the stolen vehicle charge, but found him guilty of bail jumping. CP 47-48.

## E. ARGUMENT

### 1. **The court erred in denying Mr. Blanchard’s proposed instruction defining uncontrollable circumstances preventing court appearance.**

*a. Accused people have the right for the jury to be instructed about the defense theory of the case when it accurately states the law.*

The federal constitution “guarantees criminal defendants a meaningful opportunity to present a complete defense.” *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (internal quotation marks omitted); U.S. Const. amend. VI, XIV.

As part of this constitutional right, an accused person “is entitled to have the jury fully instructed on the defense theory of the case.” *State v. Henderson*, 192 Wn.2d 508, 512, 430 P.3d 637 (2018) (quoting *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994)); see *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). “Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of

the case.” *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003).

In assessing whether the evidence is sufficient to support a proposed instruction, this Court must “view the evidence in the light most favorable to the party that requested the instruction.” *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

*b. The affirmative defense of “uncontrollable circumstances” applies when a defendant is physically unable to appear in court.*

The affirmative defense to a charge of bail jumping is met, in part, when “uncontrollable circumstances prevented the person from appearing” RCW 9A.76.170(2).<sup>2</sup>

Mr. Blanchard had no ability to appear in court on the date that led to the bail jumping charge because he was incarcerated in a different state. RP 170-71; Ex. 10. He was incarcerated in that state only because the court in the instant case had previously held him in jail on the stolen

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<sup>2</sup> The statute also requires “that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.” RCW 9A.76.170(2).

vehicle charge, causing a warrant to issue in the other county.

RP 170-71; Ex. 10.

Mr. Blanchard proposed an instruction that provided:

It is a defense to a charge of bail jumping that:

- (1) uncontrollable circumstances prevented the defendant from personally appearing in court; and
- (2) the defendant did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear; and
- (3) the defendant appeared as soon as such circumstances ceased to exist.

For the purposes of this defense, an uncontrollable circumstance is an act that included but is not limited to any of the following, acts of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of man such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the

defendant has established this defense, it will be your duty to return a verdict of not guilty as to this charge.

CP 12.

This instruction derives from RCW 9A.76.010(4). Mr. Blanchard added language to explain “an uncontrollable circumstance is an act that included but is not limited to any of the following” examples. CP 12. The statute and the pattern instruction for the defense provide the same examples of “uncontrollable circumstances,” but by contrast, appear to improperly limit the defense, suggesting only the listed circumstances satisfy it. *See* RCW 9A.76.010(4); 11 Wash. Prac., Pattern Jury Instr. Crim. 19.17 (4th Ed).

The trial court denied the proposed instruction. RP 192; *see* CP 12. It instructed the jury using the pattern instruction. RP 192-93; CP 27 (instruction 11).

No opinions in Washington hold the statute provides an exclusive list of circumstances which constitute “uncontrollable circumstances.” Instead, this Court has ruled uncontrollable circumstances apply when they cause an

“inability to attend on the date” scheduled. *State v. Fredrick*, 123 Wn. App. 347, 353, 97 P.3d 47 (2004).

Appellate courts have considered unlisted circumstances in different fact patterns to determine whether those specific circumstances met the legal threshold of showing the person was actually unable to appear in court. *See, e.g., State v. Lundy*, 162 Wn. App. 865, 873, 256 P.3d 466 (2011) (scheduling conflict and confusion over multiple court dates); *State v. White*, 137 Wn. App. 227, 231, 232, 152 P.3d 364 (2007) (fear of back pain from jail bed); *Fredrick*, 123 Wn. App. at 353 (sick but not hospitalized or incapable of appearing); *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004) (forgot court date). While the facts in these cases did not constitute uncontrolled circumstances, these opinions show the court must consider the underlying circumstances, beyond the statutory list defining uncontrollable circumstances, to determine if the person had an “inability to attend on the date” scheduled. *Fredrick*, 123 Wn. App. at 353.

Mr. Blanchard was “entitled to have the jury fully instructed on [his] theory of the case.” *Henderson*, 192 Wn.2d at 512. He and the prosecutor both offered evidence showing he had no ability to appear in court for reasons beyond his control. RP 170-71; Ex. 10.

The proposed instruction represented “the applicable law, [was] not misleading,” and would have permitted Mr. Blanchard “the opportunity to argue [his] theory of the case.” *Redmond*, 150 Wn.2d at 493. The trial court’s refusal to provide the requested instruction in accordance with the law was error. *Id.*; *Henderson*, 192 Wn.2d at 512.

*c. The trial court’s error requires reversal.*

“Each party is entitled to have the jury provided with instructions necessary to its theory of the case if there is evidence to support it; [f]ailure to provide such instructions to [do so] constitutes prejudicial error.” *Redmond*, 150 Wn.2d at 495 (reversing with no explicit analysis of harm); *State v. Williams*, 132 Wn.2d 248, 260, 937 P.2d 1052 (1997) (when defense theory of the case is supported by evidence, “[f]ailure

to so instruct is reversible error”); *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983) (same).

In *Redmond*, the Court held a “trial court cannot allow the defendant to put forth a theory of self-defense, yet refuse to provide corresponding jury instructions that are supported by the evidence in the case.” *Redmond*, 150 Wn.2d at 495.

Here, the trial court permitted Mr. Blanchard to testify to and argue his theory, yet denied him his right to have the jury instructed in his lawful, supported theory. *See* RP 192-93.

Constitutional errors are “presumed to be prejudicial.” *State v. Finch*, 137 Wn.2d 792, 859, 975 P.2d 967 (1999). The prosecution bears the burden of proving this error is harmless beyond a reasonable doubt. *Id.* at 859.

The trial court’s denial of the proposed instruction permitted the prosecutor to make an argument that is unsupported in the law: “He missed his court date apparently because he was in jail elsewhere. That is not an excuse for bail jumping. He knew he was supposed to be here.” RP 208.

No evidence contradicted Mr. Blanchard's defense and the jurors found him to be a credible witness regarding the stolen vehicle charge, acquitting him. CP 33. Had it been clear incarceration could be an "uncontrollable circumstance," they likely would have reached a different verdict.

The prosecution cannot establish beyond a reasonable doubt that the error, bolstered by the prosecutor's argument, did not affect the jury's conclusion. Mr. Blanchard is entitled to a new trial.

**2. Mr. Blanchard proved his absence was due to uncontrollable circumstances.**

No one who proves their absence was due to uncontrollable circumstances may be convicted of bail jumping. Mr. Blanchard proved just that. As a matter of due process and fundamental fairness, this Court must reverse his conviction. *See* U.S. Const. amend. XIV; Const. art. I, § 3.

a. *“Uncontrollable circumstances” is a defense to bail jumping.*

To encourage people to attend their court hearings, the legislature criminalized bail jumping, but provided an affirmative defense to the charge. *See* RCW 9A.76.170(2).

An accused person must prove an affirmative defense by a preponderance of the evidence. *E.g., City of Spokane v. Beck*, 130 Wn. App. 481, 483, 123 P.3d 854 (2005). “Proof of a defense by a preponderance of the evidence merely means the greater weight of the evidence.” *Id.* at 486; *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 608, 260 P.3d 857 (2011) (“more likely than not” or “more than 50 percent”). A conviction may not stand where the defense adequately proves an affirmative defense. *See Beck*, 130 Wn. App. at 486.

While this Court reviews the sufficiency of an affirmative defense by considering the evidence in the light most favorable to the prosecution, this Court must reverse if no “rational trier of fact could have found that the accused failed to prove the defense by a preponderance of the

evidence.” *Id.* at 486 (citing *State v. Lively*, 130 Wn.2d 1, 17, 921 P.2d 1035 (1996)).

Sufficiency of the evidence to permit conviction is an issue of constitutional law reviewed *novo*. *State v. Mau*, 178 Wn.2d 308, 313, 308 P.3d 629 (2013).

The uncontrollable circumstances defense is met when:

- (1) “uncontrollable circumstances prevented the person from appearing,”
- (2) “the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear,” and
- (3) “the person appeared ... as soon as such circumstances ceased to exist.”

RCW 9A.76.170(2).

*b. Uncontrollable circumstances prevented Mr. Blanchard from appearing in court.*

Mr. Blanchard was being held in custody in Oregon when he missed court in Lewis County. RP 170-71; Ex. 10. The court clerk’s minutes recorded on that date note Mr. Blanchard was “in custody elsewhere.” Ex. 10. However, the prosecutor charged Mr. Blanchard with bail jumping. CP 5-6. The prosecutor herself provided the documentary evidence

showing Mr. Blanchard had been incarcerated, and she offered nothing to rebut her own evidence. *See Ex. 10.*

Uncontrollable circumstances refer to those causing a person's "inability to attend on the date" scheduled. *State v. Fredrick*, 123 Wn. App. 347, 353, 97 P.3d 47 (2004). People in custody are physically unable to lawfully attend court in a different jurisdiction unless they are transported by the jail.

This Court has never decided whether incarceration constitutes an uncontrollable circumstance, always disposing of the argument on other bases. *See State v. Livingston*, 197 Wn. App. 590, 600, 389 P.3d 753 (2017) (unpublished opinion not cited for precedence, pursuant to GR 14.1); *State v. O'Brien*, 164 Wn. App. 924, 931–32, 267 P.3d 422 (2011).

In *Livingston*, the defendant was taken into custody for failing to report to his community supervision officer, causing him to miss his court date. *Livingston*, 197 Wn. App. at 600 (unpublished opinion). The Court ruled that he had recklessly contributed to missing the court date, thus it did not reach the issue at hand. *Id.* In *O'Brien*, the Court declined to rule on

whether incarceration was an uncontrollable circumstance because the evidence showed the defendant did not appear immediately upon release and contributed to the delay through his actions. *O'Brien*, 164 Wn. App. 931–32.

Mr. Blanchard was in jail and incapable of appearing in court while in custody elsewhere. The clerk confirmed the reason for his absence and Mr. Blanchard reaffirmed it through his testimony. RP 170-71; Ex. 10. The prosecution conceded he was in jail in another jurisdiction in its closing argument. RP 208. The first prong of the defense was met by a preponderance of the evidence, even when viewing the evidence in the light most favorable to the prosecution.

*c. Mr. Blanchard did not recklessly contribute to the circumstances that made him miss court.*

Before missing court in Lewis County, Mr. Blanchard was held in jail on the underlying stolen vehicle charge. RP 169-70; Ex. 7. While in custody, he missed court in Oregon. RP 170. His Oregon case predated the Washington charge. RP 182. Missing court in Oregon triggered a warrant for his

arrest. RP 170. He was subsequently held in custody there, missing his Lewis County court date. *Id.*

Mr. Blanchard was acquitted of the underlying stolen vehicle charge. CP 33. The prosecutor contended the vehicle had been stolen and that the person Mr. Blanchard said he bought the car from had not signed the bill of sale. RP 126-32; 140-58; Ex. 4. Mr. Blanchard testified about how he had purchased the car. RP 162-68; 172-76. The prosecutor attempted to convince the jury Mr. Blanchard's explanation was not reasonable and that he must have known the vehicle was stolen. RP 210-14. However, the jury acquitted him of this charge, crediting his testimony. *See* CP 33 (verdict).

But for being held on the stolen vehicle charge, Mr. Blanchard would not have missed court in Oregon and consequently been unable to attend his Washington hearing. RP 169-71. Given that he was acquitted of the stolen vehicle charge, he did not act with "reckless disregard of the requirement to appear." RCW 9A.76.170(2); CP 33. But for

being held in Oregon, he would have appeared in court and the bail jumping charge would not exist. RP 170.<sup>3</sup>

The preponderance of the evidence establishes Mr. Blanchard was not at fault for missing court.

*d. Mr. Blanchard appeared in court the first day permitted by the jail transport and court calendars.*

Mr. Blanchard was transported to Lewis County when he was released in Oregon. RP 177, 183; CP 61. He was served with the warrant by a Lewis County sheriff's deputy five days after the missed court date. CP 5, 61. He was brought to court, in custody, the next day. CP 60, 61.

Mr. Blanchard was not in control of the release and transport decisions of the courts and the jails. He appeared as soon as the two counties' procedures permitted it.

*e. Mr. Blanchard proved the uncontrollable circumstances defense and reversal is required.*

No "rational trier of fact could have found [Mr. Blanchard] failed to prove the defense by a preponderance of

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<sup>3</sup> Under the new Washington law on bail jumping, this would not be a crime for a first warrant, or might be a gross misdemeanor for a subsequent warrant. Laws of 2020, ch. 19 (E.S.H.B. 2231), amending RCW 9A.76.170. It would not be a felony. *Id.*

the evidence.” *Beck*, 130 Wn. App. at 486. All the evidence presented at trial by both Mr. Blanchard and the prosecutor supported his affirmative defense. The undisputed evidence that Mr. Blanchard was in jail in another jurisdiction is a legal bar to his conviction for bail jumping. He was unable to appear in court, he did not recklessly contribute to the circumstances that kept him from appearing, and he appeared in court as soon as the two courts and the jail transport system permitted it.

Mr. Blanchard proved his defense by “a preponderance of the evidence,” which “merely means the greater weight of the evidence.” *Beck*, 130 Wn. App. at 486. The evidence was insufficient to support a conviction for bail jumping. The conviction should be reversed and dismissed. *Id.* at 488.

#### F. CONCLUSION

Mr. Blanchard proved by a preponderance of the evidence that the uncontrollable circumstances defense was met. Moreover, trial court erred by denying Mr. Blanchard his proposed instruction which was supported by the evidence

and was not misleading on the law. This Court must reverse  
the conviction.

Submitted this 24th day of March 2020.

A handwritten signature in black ink, appearing to read 'M. Falk', written in a cursive style.

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Attorney for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 53870-9-II
	)	
DAMON BLANCHARD,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

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**SIGNED IN SEATTLE, WASHINGTON THIS 24<sup>TH</sup> DAY OF MARCH, 2020.**

x \_\_\_\_\_ 

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# WASHINGTON APPELLATE PROJECT

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