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No. 53953-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JOSHUA O'BRIAN KIMBROUGH,

Appellant.

On Appeal from the Thurston County Superior Court
Cause No. 19-1-00727-7 (19-1-00727-34)
The Honorable Carol Murphy, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Joshua Kimbrough's motion to arrest judgement on counts 1 and 3.
2. The State failed to present sufficient evidence to prove beyond a reasonable doubt all of the elements of the crime of taking a motor vehicle without permission.
3. The State failed to present sufficient evidence to prove beyond a reasonable doubt all of the elements of the crime of bail jumping.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Was there insufficient evidence to convict Joshua Kimbrough of taking a motor vehicle without permission where no evidence showed that Kimbrough knew he did not have permission to take his mother's vehicle? (Assignments of Error 1 & 2)
2. Was there insufficient evidence to convict Joshua Kimbrough of bail jumping where no evidence showed that he had been "released by court order or admitted to bail?" (Assignments of Error 1 & 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Joshua O'Brian Kimbrough by an amended Information with (1) one count of taking a motor vehicle without permission (RCW 9A.56.075), (2) one count of attempting to elude a pursuing police vehicle (RCW 46.61.024), and one count of bail jumping (RCW 9A.76.170). (CP 24-25)

Kimbrough moved to dismiss the taking a motor vehicle and bail jumping charges after the State rested its case, arguing that the State did not present evidence to establish all of the elements of those charges. (RP3 322-25)¹ The trial court denied the motion. (RP3 333) The jury subsequently convicted Kimbrough as charged. (RP4 444; CP 66-68) Kimbrough moved to arrest judgment on the taking a motor vehicle and bail jumping verdicts, again arguing that the State did not prove the crimes beyond a reasonable doubt. (10/15/19 RP 13-23) The trial court denied that motion as well. (10/15/19 RP 23-24)

Kimbrough stipulated to his offender score and standard ranges. (10/15/19 RP 29-30; CP 154) The trial court imposed a

¹ The transcripts containing the trial proceedings, labeled volumes 1 thru 4, will be referred to by their volume number (RP#). The remaining transcript will be referred to by the date of the proceeding.

standard range sentence totaling 22 months. (10/15/19 RP 32, CP 165, 167) Kimbrough filed a timely Notice of Appeal. (CP 153)

B. SUBSTANTIVE FACTS

Maria Kimbrough is the legal and registered owner of a white Toyota Camry. (Exh. 1; RP1 148, 149, 154) Her husband, Wilbert Kimbrough, testified that the car is “community property” and so it also belongs to him. (RP1 149) On April 10, 2019, Joshua Kimbrough, Maria and Wilbert’s son, came to their house and asked Wilbert if he could take the Camry.² (RP1 148, 149) Wilbert told him no, and Kimbrough left. (RP1 150)

When Wilbert got up the following morning, the Camry was gone. (RP1 150) Wilbert contacted the Lacey Police Department and reported the car stolen. (RP1 150) Wilbert also told Maria that he had made the police report. (RP1 150) Kimbrough returned briefly with the car and commented to Wilbert that he knew Wilbert had “turned me in.” (RP1 151) Then Kimbrough left again in the Camry. (RP1 151)

On April 12, 2019, City of Tumwater Police Officer Russ Mize responded to a report of a suspicious white Camry at a gas

² For the sake of clarity, Wilbert and Maria Kimbrough will be referred to by their first names.

station on Trosper Road near Interstate 5. (RP1 160, 161) As he approached the gas station, the Camry turned out of the parking lot and onto the roadway. (RP1 164) Officer Mize activated the lights and sirens on his marked patrol vehicle and began pursuing the Camry. (RP1 165) The Camry did not pull over, and instead drove at high speeds on I-5, struck a center guardrail on a surface street, and avoided spike strips set up to stop the Camry. (RP1 166, 168-69, 171; Exh. 2)

When the Camry finally stopped, the driver's door opened and Kimbrough jumped out. (RP1 174) Officer Mize's police K-9 chased Kimbrough and took him to the ground. (RP1 176) Kimbrough was severely injured by the dog, but was taken into custody. (RP1 176; RP2 213-14)

For about seven or eight months before the incident, Kimbrough had his own set of keys and sole possession of the Camry. (RP1 152) The plan was for Kimbrough to eventually purchase the car and Maria would sign over ownership. (RP1 152, 156) But after they lost touch with Kimbrough for a period of time, they took the car back from him. (RP1 153)

IV. ARGUMENT & AUTHORITIES

The State failed to meet its constitutional burden to prove all

of the elements of the crimes beyond a reasonable doubt. “Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvone*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); U.S. Const. amend. 14.

“In a criminal case, a defendant may challenge the sufficiency of the evidence (a) before trial, (b) at the end of the State’s case in chief, (c) at the end of all the evidence, (d) after verdict, and (e) on appeal.” *State v. Jackson*, 82 Wn. App. 594, 607-08, 918 P.2d 945 (1996) (footnote citations omitted). In each instance, the court takes the evidence and the reasonable inferences therefrom in the light most favorable to the State. *Jackson*, 82 Wn. App. at 608. Evidence is sufficient to support a conviction only if it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hardesty*, 129 Wn.2d 303, 309, 915

P.2d 1080 (1996); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Even when taken in a light most favorable to the State, the evidence here was insufficient to convict Kimbrough of taking a motor vehicle without permission and of bail jumping.

A. THE STATE FAILED TO PROVE ALL OF THE ELEMENTS OF THE CRIME OF TAKING A MOTOR VEHICLE WITHOUT PERMISSION.

No rational jury could have found beyond a reasonable doubt that Kimbrough had knowledge that he was taking the Camry without permission, as required to convict him for taking a motor vehicle without permission.

A person is guilty of taking a motor vehicle without permission if he or she, “without the permission of the owner or person entitled to possession, intentionally takes or drives away any automobile or motor vehicle ... that is the property of another, or he or she voluntarily rides in or upon the automobile or motor vehicle with knowledge of the fact that the automobile or motor vehicle was unlawfully taken.” RCW 9A.56.075(1).

The defendant’s knowledge that he or she is taking a motor vehicle without the permission of the owner is an element of the crime of taking a motor vehicle without permission. *State v. Toms*,

75 Wn. App. 55, 58, 876 P.2d 922, 924 (1994). Thus, to convict Kimbrough of taking a motor vehicle without permission, the State had to prove that Kimbrough did not have permission to take the Camry and that he knew he did not have permission to drive the Camry.

For the better part of a year, Kimbrough had possession and was the only person who drove the Camry. (RP1 152) Later, when the Camry was returned to Wilbert and Maria, Wilbert “occasionally” drove it. (RP1 149) Kimbrough did not take the Camry when Wilbert first told him not to. It was not until the next morning that Wilbert noticed the Camry was gone. (RP1 150) Maria never testified, so there is no evidence that she ever forbade Jason Kimbrough from driving the Camry. Furthermore, Maria was the legal and registered owner, and did not confirm that Wilbert had the authority to forbid Kimbrough from driving the Camry.

There was no evidence Wilbert had a superior possessory interest or superior authority over Jason Kimbrough when it came to driving the Camry. The State failed to establish the existence of any facts that would indicate that Kimbrough knew he did not have permission of the owner or person entitled to possession, or that he knew he himself was not entitled to possession of the Camry.

Without any evidence that Kimbrough knew he did not have permission or authority to drive the Camry, the State failed to meet its burden of proving beyond a reasonable doubt all the essential elements of taking a motor vehicle without permission.

B. THE STATE FAILED TO PROVE ALL OF THE ELEMENTS OF THE CRIME OF BAIL JUMPING.

No rational jury could have found beyond a reasonable doubt that Kimbrough had been “released by court order or admitted to bail,” as required to convict him for bail jumping.

A person is guilty of bail jumping if he or she “fails to appear” for a court appearance after “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.” RCW 9A.76.170(1). Thus, to prove the essential elements of bail jumping the state must establish beyond a reasonable doubt that the accused was “released by court order or admitted to bail.” RCW 9A.76.170(1); *State v. Williams*, 162 Wn.2d 177, 183, 170 P.3d 30 (2007).

At Kimbrough’s arraignment on April 15, 2019, the trial court entered an Order on Conditions of Release. (CP 4-5; Exh. 6a) The court did not release Kimbrough on his personal recognizance.

(CP 4; Exh. 6a) Instead, the trial court checked the box for “Release on bail/bond” and set the cash/bond amount at \$3,500.00. (CP 4; Exh. 6a) Accordingly, Kimbrough was required to post bail or a security bond before he could be released from custody. (CP 4; Exh. 6a; RP2 263, 266) The box indicating that bail or bond had been posted was not checked. (CP 4; Exh. 6a; RP2 292)

The State did not present any documents showing that Kimbrough posted bail or bond or that he was released. The State did present an order showing that Kimbrough was notified of a mandatory hearing to be held on June 13, 2019, but he did not appear for the hearing. (CP 7; Exh. 7; RP2 280, 286-88) So the prosecutor sought and obtained a bench warrant. (Exh. 9; RP2 286-88)

The defense argued below that the State had not proved the elements of the crime because it had not proved that Kimbrough failed to appear after having been released. The defense argued that the phrase “admitted to bail” meant released on bail. (RP3 324; 10/15/19 RP 14; CP 70, 151-52) The State was therefore required to prove that Kimbrough was released after posting bail, but that it failed to meet this burden. (RP3 324; 10/15/19 RP 14; CP 70, 151-52) The State, on the other hand, argued that

“admitted to bail” meant given the option to post bail, but that it nevertheless proved Kimbrough was released. (10/15/19 RP 20-21; CP 148-50) The trial court agreed with the State. (10/15/19 RP 23-24) The State and the court were wrong on both counts.³

The phrase “admitted to bail” is not defined by statute. But when the rules of statutory interpretation are applied, it is clear that the phrase means that “that the defendant was released from custody pursuant to posted bail or bond.”⁴

When a statute does not define a term, the court must give the term “its plain and ordinary meaning unless a contrary legislative intent is indicated.” *State v. Jones*, 172 Wn.2d 236, 242, 257 P.3d 616 (2011) (quoting *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 920-21, 969 P.2d 75 (1998)). The court should derive this plain meaning from the “context of the entire act” as well as other related statutes. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014) (citing *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)).

³ Questions of statutory interpretation are reviewed de novo. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015).

⁴ See *State v. Colberg*, 2019 WL 1902753 at *1 (2019), where this definition was used to instruct the jury on the meaning of “admitted to bail.” *Colberg* is an unpublished opinion and therefore has no precedential value and is not binding on any court, but is cited only for such persuasive value as this Court deems appropriate. See GR 14.1; *Crosswhite v. Washington State Dep’t of Soc. & Health Servs.*, 197 Wn. App. 539, 544, 389 P.3d 731 (2017).

Courts may also use a dictionary to discern the plain meaning of an undefined statutory term. *Nissen v. Pierce County*, 183 Wn.2d 863, 881, 357 P.3d 45 (2015).

Black's Law Dictionary contains several definitions of the term "bail." Two of the definitions are: "The process by which a person is released from custody either on the undertaking of a surety or on his or her own recognizance[;]" and "Release of a criminal defendant on security for a future court appearance[.]" *Bail*, BLACK'S LAW DICTIONARY (11th ed. 2019). Webster's Dictionary defines "admit" as "permit" or "allow entry into (as to a place, membership, or privilege)" and defines "admitted" as "received as true or valid." *Admit, Admitted*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3rd Ed. 2002). Putting these definitions together, one can only conclude that "admitted to bail" means a defendant has been allowed to enter into a state of release after posting the required security.

At the hearing below, the prosecutor relied on the definition of "admission to bail," which Black's defines as "[a]n order to release an accused person from custody after payment of bail or receipt of an adequate surety for the person's appearance for trial." *Admission to bail*, BLACK'S LAW DICTIONARY (11th ed. 2019). The

prosecutor argued that this limited definition meant that the phrase “admitted to bail,” as used in RCW 9A.76.170, meant that a defendant was “given access or permitted to bail”, not that a defendant was actually released after posting bail. (CP 148) But this interpretation completely ignores the context in which the phrase is used in the statute. The phrase “admitted to bail” is immediately preceded by the requirement that a defendant “be released by court order.” RCW 9A.76.170. This language indicates that “admitted to bail” is intended to connote an actual release on bail, not simply a setting of bail.

The prosecutor’s interpretation also would lead to absurd results. See *State v. Alvarado*, 164 Wn.2d 556, 562, 192 P.3d 345 (2008) (“we must interpret statutes to avoid absurd results”) (citing *Tingey v. Haisch*, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007)). Under the State’s rationale, anyone for whom bail is set, but not posted, could be found guilty of bail jumping despite the fact that their transport or other means of appearance is completely at the whim of that person’s jailers.

It is clear from context and logic that a necessary element of the crime of bail jumping is that the defendant was actually released, whether by court order on their personal recognizance or

after posting bail in the amount set by the court.⁵ But the State failed to prove that Kimbrough was released.

The order setting the terms of release does not indicate that Kimbrough posted bail or bond. (CP 4; Exh. 6a) In fact, the box that shows that bail or bond has been posted is not checked. (CP 4; Exh. 6a) A later order setting the trial schedule, entered on April 30, 2019, shows that Kimbrough was still in custody at that time. (CP7; Exh. 7; RP2 297-98) The State did not present any other documents to establish that Kimbrough actually posted bail or bond and was released after April 30, 2019.

The State's proof of release was instead completely based on assumptions. A bench warrant for failing to appear at a trial status hearing on June 13, 2019 was requested and signed. (Exh. 9, 11; RP2 286-88) The deputy prosecutor who applied for the warrant testified that he was not actually paying attention during the hearing, so he did not hear the judge call the case and did not know

⁵ A search for cases from Washington or other jurisdictions that interpreted the phrase "admitted to bail" was unsuccessful. But see *Heath v. Kiger*, 217 Ariz. 492, 176 P.3d 690, 692-95 (2008). While not directly on point for this case, it is notable that the Supreme Court of Arizona, when faced with interpreting the phrase "admitted to bail," assumed without question that it meant that a defendant had been released from custody. The only question the Court thought to decide was whether, in the context of Arizona's laws and constitution, a defendant who has been released on her own recognizance was also "admitted to bail." *Kiger*, 176 P.3d at 692-95.

whether the judge polled the courtroom or hallway for Kimbrough. (RP2 302-03) The prosecutor simply assumed, based on another prosecutor's body language, that Kimbrough was not present, so he proceeded to fill out the application for a bench warrant. (RP2 302-03) The deputy prosecutor also testified that "there is an ability to have that [defendant] appear before the court on video screen" from the jail when a defendant is in custody. (RP2 268)

It is possible, based on this scenario, that Kimbrough was released. But this possibility does not meet the high standard of proof beyond a reasonable doubt that Kimbrough was in fact released. It is also entirely possible that, due to a mix-up or technical snafu, the jail might fail to present an in-custody defendant for a video hearing, and that failure would result in a bench warrant being issued. Without any documentary or testimonial evidence that Kimbrough actually posted bail or bond and was released before June 13, 2019, the State failed to meet its burden of proving beyond a reasonable doubt all the essential elements of bail jumping.

V. CONCLUSION

The State failed to prove that Kimbrough knew he was taking the Camry without permission of its owner or a person entitled to its

possession. The State also failed to prove that Kimbrough had been released by court order or admitted to bail. These two convictions must be vacated and dismissed with prejudice.

DATED: March 11, 2020



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Attorney for Joshua O. Kimbrough

CERTIFICATE OF MAILING

I certify that on 03/11/2020, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Joshua O. Kimbrough, DOC# 322040, Larch Corrections Center, 15314 N.E. Dole Valley Road, Yacolt, Washington 98675-9531.



STEPHANIE C. CUNNINGHAM, WSBA #26436

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