

No. 34814-8-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

STEPHEN R. JACKSON, Appellant.

**RESPONSE AND REPLY BRIEF OF APPELLANT /
CROSS-RESPONDENT**

CURT L. LIEDKIE
Asotin County Deputy
Prosecuting Attorney
WSBA #30371

P. O. Box 220
Asotin, Washington 99402
(509) 243-2061

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. SUMMARY OF ISSUES	1
II. SUMMARY OF ARGUMENT	2
III. SUPPLEMENTAL STATEMENT OF THE CASE	3
IV. DISCUSSION	8
A. <u>ARGUMENTS PERTAINING TO MR. JACKSON'S APPEAL.</u>	9
1. <u>THIS COURT SHOULD DECLINE TO CONSIDER THE ISSUES RAISED BY MR. JACKSON WHERE HE FAILED TO OBJECT OR OTHERWISE RAISE THE ISSUE IN THE COURT BELOW.</u>	9
2. <u>THE COURT PROPERLY ENTERED A BOND ORDER AFTER ALLOWING MR. JACKSON TO PROCEED WITH HIS INITIAL BOND HEARING PRO SE WHEN HE DECLINED THE COURT'S OFFER OF COUNSEL.</u>	14
3. <u>MR. JACKSON CANNOT NOW ATTACK THE VALIDITY OF THE BOND ORDER WHERE THE COURT HAD JURISDICTION TO ENTER THE ORDER.</u>	19
B. <u>ARGUMENTS PERTAINING TO THE STATE'S APPEAL.</u>	20
1. <u>THIS COURT SHOULD CONSIDER THE ISSUE RAISED BY THE STATE WHERE THE ISSUE WAS CLEARLY IDENTIFIED IN THE STATE'S BRIEF ON APPEAL.</u>	20
2. <u>THE COURT ERRED IN GRANTING AN EXCEPTIONAL SENTENCE DOWNWARD.</u>	22
V. CONCLUSION	33

TABLE OF AUTHORITIES

U.S. Supreme Court Cases

Gernstein v. Pugh, 420 U.S. 103,
95 S. Ct. 854, 43 L.Ed.2d 54, 60 (1975) 10-11

Glasser v. United States, 315 U.S. 60,
86 L. Ed. 680, 62 S. Ct. 457 (1942) 15

Pointer v. Texas, 380 U.S. 400,
85 S. Ct. 1065, 13 L.Ed.2d 923 (1965) 11

Rothgery v. Gillespie County, 554 U.S. 191,
128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008) 10

State Supreme Court Cases

City of Bellevue v. Acrey, 103 Wn.2d 203,
691 P.2d 957 (1984) 16

State v. Alexander, 125 Wn.2d 717,
888 P.2d 1169 (1995) 25, 29

State v. Allert, 117 Wn.2d 156,
815 P.2d 752 (1991) 27

State v. Benn, 120 Wn.2d 631,
845 P.2d 289, 312 (1993) 27

State v. Coe, 101 Wn.2d 364,
679 P.2d 353 (1984) 19

State v. Gonzales, 103 Wn.2d 564,
693 P.2d 119 (1985) 18, 19

State v. Fowler, 145 Wn.2d 400,
38 P.3d 335 (2002) 22

State v. Gordon, 172 Wn.2d 671,
260 P.3d 884 (2011) 9, 10

State Supreme Court Cases (cont.'d)

State v. Jackson, 66 Wn.2d 24,
400 P.2d 774(1965) 10, 15

State v. Law, 154 Wn.2d 85,
110 P.3d 717 (2005) 23, 32

Mead School Dist. v. Mead Educ. Ass'n., 85 Wn.2d 278,
534 P.2d 561 (1975) 19

State v. Pascal, 108 Wn.2d 125,
736 P.2d 1065, 1072 (1987) 27

State v. Pennington, 112 Wn.2d 606,
772 P.2d 1009 (1989) 22, 25, 32

State v. O'Dell, 183 Wn.2d 680,
358 P.3d 359 (2015) 30-31

State v. O'Hara, 167 Wn.2d 91,
217 P.3d 756 (2009) 9-10

State v. Olsen, 54 Wn.2d 272,
340 P.2d 171 (1959) 20

State v. Olson, 126 Wn.2d 315,
893 P.2d 629 (1995). 21

In re Detention of Turay, 139 Wn.2d 379,
986 P.2d 790 (1999) 17

State Court of Appeals Cases

State v. Akin, 77 Wn.App. 575,
892 P.2d 774 (Div. I, 1995) 22

State v. Evans, 80 Wn.App. 806,
911 P.2d 1344 (Div. I, 1996) 29

In re Welfare of G.E., 116 Wn. App. 326,
65 P.3d 1219 (Div. II, 2003) 16

State Court of Appeals Cases (cont.'d)

State v. Hortman, 76 Wn.App. 454,
886 P.2d 234, 239 (Div. I, 1994) 28

State v. Lawrence, 166 Wn. App. 378,
271 P.3d 280 (Div. III, 2012) 15

State v. Le, No. 72166-6-I, 2015 Wn. App. LEXIS 2839
(Div. I, 2015)(Unpublished) 14

State v. Lynn, 67 Wn. App. 339,
835 P.2d 251 (Div. I, 1992) 10, 11

State v. Modica, 136 Wn. App. 434,
149 P.3d 446, 450 (Div. I, 2006) 16

State v. Murray, 128 Wn.App. 718,
116 P.3d 1072 (Div. III, 2005) 22, 27, 30

State v. Powers, 78 Wn.App. 264,
896 P.2d 754, 757 (Div III, 1995) 24

In re Personal Restraint of Sanchez, 197 Wn. App. 686,
391 P.3d 517 (Div. III, 2017) 18

Statutes

RCW 10.21.060 10

RCW 9.94A.010 24, 26, 33

RCW 9.94A.510 22

RCW 9.94A.535. 22, 23

RCW 9.94A.585 23

RCW 71.09.050 17

Court Rules

CrR 3.1	10
RAP 1.2	21
RAP 2.5	9, 12-13, 20, 33
RAP 10.3	20-21

I. SUMMARY OF ISSUES

A. Summary of Issues Pertaining to Mr. Jackson's Appeal.

1. SHOULD THIS COURT CONSIDER THE ISSUE RAISED BY MR. JACKSON WHERE HE FAILED TO OBJECT OR OTHERWISE RAISE THE ISSUE IN THE COURT BELOW?
2. DID THE COURT ERR ENTERING A BOND ORDER AFTER ALLOWING MR. JACKSON TO PROCEED WITH HIS INITIAL BOND HEARING *PRO SE* WHEN HE REQUESTED TO DO SO?
3. CAN MR. JACKSON NOW ATTACK THE VALIDITY OF THE BOND ORDER WHERE THE COURT HAD JURISDICTION TO ENTER THE ORDER?

B. Summary of Issues Pertaining to the State's Appeal.

1. SHOULD THIS COURT CONSIDER THE ISSUE RAISED BY THE STATE WHERE THE STATE'S APPELLATE BRIEF FAILED TO PROVIDE A SECTION LABELED "ASSIGNMENT OF ERROR" BUT CLEARLY IDENTIFIED THE ERROR AND ISSUES RAISED THEREIN?
2. DID THE COURT ERR IN IMPOSING AN EXCEPTIONAL SENTENCE DOWNWARD?

II. SUMMARY OF ARGUMENT

A. Summary of Arguments Pertaining to Mr. Jackson's Appeal.

1. THIS COURT SHOULD DECLINE TO CONSIDER THE ISSUE RAISED BY MR. JACKSON WHERE HE FAILED TO OBJECT OR OTHERWISE RAISE THE ISSUE IN THE COURT BELOW.
2. THE COURT PROPERLY ENTERED A BOND ORDER AFTER ALLOWING MR. JACKSON TO PROCEED WITH HIS INITIAL BOND HEARING *PRO SE* WHEN HE DECLINED THE COURT'S OFFER OF COUNSEL.
3. MR. JACKSON CANNOT NOW ATTACK THE VALIDITY OF THE BOND ORDER WHERE THE COURT HAD JURISDICTION TO ENTER THE ORDER.

B. Summary of Issues Pertaining to the State's Appeal.

1. THIS COURT SHOULD CONSIDER THE ISSUE RAISED BY THE STATE WHERE THE ERROR AND ISSUE WERE CLEARLY IDENTIFIED IN THE STATE'S BRIEF ON APPEAL.
2. THE COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE DOWNWARD.

III. SUPPLEMENTAL STATEMENT OF THE CASE

The State would rely on the facts as set forth in the State's Brief of Appellant, and incorporates them herein as if set forth in full. The following additional facts are offered for this Court's consideration for the purpose of addressing the issues now raised by Mr. Jackson.

On November 30, 2015, Mr. Jackson appeared in custody for his bond hearing. Report of Proceedings (RP) 2-12. Based upon the affidavits provided, the court found probable cause to charge Mr. Jackson with Possession of Stolen Property in the Third Degree, Possession of a Controlled Substance (Methamphetamine), Assault in the Third Degree, Possession of Drug Paraphernalia, and Resisting Arrest. RP 5. The court then allowed Mr. Jackson to hear the State's recommendation for a twenty-five thousand dollar (\$25,000.00) cash or surety bond and the reasons in support thereof. RP 5-8. The court then advised Mr. Jackson that he had the right to representation of counsel for both the bond hearing and to defend against the charges once filed. RP 9. Mr. Jackson declined the court's offer of counsel, stating unequivocally. "No, sir." RP 9. He advised that he "didn't really need an attorney right now." RP 9. Mr. Jackson then effectively argued for lesser bond, and the court set bond, ordering his release on a fifteen thousand dollar (\$15,000.00) cash or surety bond with requirement that he make all subsequent appearances. RP 10, Clerk's Papers (CP) 15-16.

Mr. Jackson appeared for arraignment on December 17, 2015, and reaffirmed his request to proceed *pro se*. RP 13, 16. At that time, the court inquired of Mr. Jackson, whether he understood that he would be on his own and would have to know both the procedural and evidentiary rules. RP 17. He was further advised that he would be held to the same standards as an attorney. RP 17. Upon confirming that he understood, the court allowed Mr. Jackson to proceed on his own. RP 17.¹

On December 21, 2015, Mr. Jackson again appeared. RP 25-31. At that time, Mr. Jackson requested to meet with the prosecutor. RP 28. The State's attorney advised Mr. Jackson that his proposed resolution would not be agreeable to the State. RP 28. The deputy prosecutor suggested that Mr. Jackson might wish to revisit whether he would like counsel to assist him. RP 28. At that point, the court inquired whether he would like counsel appointed and Mr. Jackson advised that he would. RP 28-29. Counsel was appointed and Mr. Jackson was represented by counsel throughout the remainder of the proceedings, including the trial setting hearing on May 16, 2016, wherein the pretrial hearing of July 11, 2016 was scheduled and Mr. Jackson signed written promise to appear for that date. RP 30, 75, CP 17.

¹Thereafter, Mr. Jackson requested review of the bond. RP 19. The bond was affirmed, but the court did authorize a ten percent cash posting. RP 21-22.

Thereafter, on July 11, 2016, Mr. Jackson failed to appear for court and his trial date was stricken, giving rise to the charge of Bail Jumping. RP 79-80. The matter proceed to jury trial on the sole charge of Bail Jumping (C Felony) on October 6, 2016. RP 135-265. At trial, the State called McKenzie Kelley, the Clerk of the Superior Court for Asotin County. RP 158. Through her testimony, the State established that, at all times pertinent herein, the Defendant was charged with Assault in the Third Degree and Possession of a Controlled Substance (Methamphetamine), and had been released pursuant to the bond order. RP 161, 162-163. She further testified regarding the Defendant's requirement that he make all court appearances and that he was present on May 16, 2016 when the July 11, 2016 hearing date was set. RP 164-167. Ms Kelley testified that, on that date, the Defendant signed the written promise to appear for July 11, 2016. RP 167. Ms Kelley further testified that on July 11, 2016, the Defendant did not appear as required. RP 168-169. Mr. Jackson did not challenge the admissibility of the bond order, nor did he raise any objection concerning the circumstances of its entry. RP 163. Mr. Jackson testified on his own behalf, claiming a lack of memory of his court date or knowledge of having signed the written promise to appear. RP 187-209.

After hearing the testimony of Ms Kelley and Mr. Jackson, the jury returned a verdict of guilty on the charge of Bail Jumping (C Felony). RP 260-261, CP 57.

On October 7, 2016, a sentencing hearing was held. RP 269-291. At the hearing, the State presented documentation of the Defendant's prior criminal history, which included prior convictions for stolen property, aggravated battery, eluding police, controlled substance possessions and unlawful possession of a firearm, resulting in an offender score of eleven. RP 269-271, CP 80-81 Based upon the Defendant's high offender score and continued record of failing to appear² throughout the case, the State requested a sentence at the high end of the range. RP 271. The Defendant did not object to his offender score calculation. RP 273-274. While counsel for Mr. Jackson mused at his client's desire for downward departure, counsel recognized there was no basis for such an exceptional sentence. RP 274. Counsel requested a sentence at the low end of the standard range, or fifty-one months. RP 274.

Sua sponte, the court imposed an exceptional sentence downward of thirty months. RP 286, CP 58-66. In pronouncing sentence, the court expressed its dissatisfaction with the sentencing

²As more specifically described in the State's initial brief, Mr. Jackson had appeared late to several other court dates, after the court had authorized warrants for his arrest. RP 69-70, 74-75, 98.

grid and determination of the range for the offender score herein of nine or more. CP 282-283. The sentencing judge questioned the wisdom of the prescribed punishment for Bail Jumping (C or B Felony):

A 60-month, ah, sentence would be five years of a man's life for missing a pretrial. Now, that's the, ah -- that's the same sentence that would be imposed -- the same minimum sentence that would be imposed for someone who was convicted of the crime of assault in the first degree or assault of a child in the first degree or they used force or means likely to result in death or intended to kill the individual. To say that Mr. Jackson's missing a court date because of his lackadaisical attitude would put him on par with such an individual convicted of that crime to me is nonsensical. I can't -- I can't reconcile it in my mind.

CP 282-283. In supporting the exceptional sentence, the Court recited the stated policies listed in the Sentencing Reform Act (RCW 9.94A)(*hereinafter* SRA) and applied each to the case, thereby determining the appropriate punishment independent of the legislature's determination. RP 283-285. The State objected and pointed out that the legislature deemed it appropriate to establish Bail Jumping (C Felony) as a Level III offense on the sentencing grid. RP 286-287, preserving the issue for review. The court overruled the State's objections and imposed sentence as previously stated. RP 289.

The trial court subsequently entered written findings and conclusions regarding the imposition of the exceptional sentence. CP

106-110. The State filed notice of appeal, challenging the sentencing court's basis for imposing an exceptional sentence downward, and previously submitted briefing in that regard. Mr. Jackson cross-appealed. The State now addresses the issues raised by Mr. Jackson in his appeal and replies to the claims he makes concerning the State's issues on appeal.

IV. DISCUSSION

Addressing the issues raised by Mr. Jackson in his appeal, his claim was not preserved and is otherwise without merit. Mr. Jackson did not, at any point during the proceedings, challenge the validity of the bond order or the procedures resulting in its entry. He was offered counsel at the bond hearing and he declined to be represented. With regard to his claims concerning the State's appeal, the State adequately identified in its original brief, the error committed by the trial court in finding a basis for an exceptional sentence. The failure to specifically title a section "assignment of error" should not preclude review. It is clear from Mr. Jackson's briefing that the error claimed by the State and issues presented therein were sufficiently and clearly identified to allow for intelligent response and review by this Court. Finally, it is further clear from the record that trial court ignored the requirements of the SRA and effectively usurped the plenary authority of the legislature, in imposing a sentence below the punishment statutorily prescribed. Therefore, this Court should reject

the arguments of Mr. Jackson, affirm his conviction for Bail Jumping, and remand for resentencing within the standard range.

A. ARGUMENTS PERTAINING TO MR. JACKSON'S APPEAL.

1. THIS COURT SHOULD DECLINE TO CONSIDER THE ISSUES RAISED BY MR. JACKSON WHERE HE FAILED TO OBJECT OR OTHERWISE RAISE THE ISSUE IN THE COURT BELOW.

Mr. Jackson appeals his conviction for Bail Jumping, claiming that the bond order which authorized his release from custody and requiring future appearances was void. Brief of Respondent/Cross Appellant (Brief), p. 19. This argument is premised on a claim that he was denied counsel at the bond hearing. Brief, p. 19. As will be discussed more carefully below, this claim is without factual merit, and further, the remedy sought is not available. In addition to lacking factual or legal merit, this issue was not raised below. Because this claim was not raised below, this Court should decline to address it.

This Court ordinarily will not review a claim of error raised for the first time on review unless one of three exceptions exist. RAP 2.5(a). One exception is if the claim concerns a manifest error affecting a constitutional right. RAP 2.5(a)(3). Thereunder, an appellant must demonstrate both that the purported error is of constitutional magnitude and that the error is "manifest." State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). A "manifest" error is one that is "so obvious on the record that the error warrants

appellate review." State v. O'Hara, 167 Wn.2d 91, 100,217 P.3d 756 (2009). As stated in State v. Lynn, 67 Wn. App. 339, 835 P.2d 251 (Div. I, 1992):

[W]e conclude that the proper approach in analyzing alleged constitutional error raised for the first time on appeal involves four steps. First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

67 Wn.App. at 345. Once the defendant has identified such an error, it is for the State to establish that the error was harmless beyond a reasonable doubt. Gordon, 172 Wn.2d at 676 n.2.

As a starting point and the claimed error is not constitutional. The setting of bond at the first appearance is not a critical stage of the proceeding which means that a defendant is not entitled to an attorney to address bond. See, e.g., Rothgery v. Gillespie County, 554 U.S. 191, 195 and 212 (2008) (*preliminary bail determination combined with a probable cause determination does not render an initial appearance a critical stage*); Gernstein v. Pugh, 420 U.S. 103,

120-23 (1975); Pointer v. Texas, 380 U.S. 400, 402 (1965). *See also* State v. Jackson, 66 Wn.2d 24, 400 P.2d 774(1965).

Mr. Jackson cites to RCW 10.21.060(3), which provides for a statutory right to counsel, however, by its terms, that statute applies only to detention hearings in capital cases and crimes punishable by the possibility of life in prison as authorized in Article I, Section 20 of the Washington Constitution. *See* RCW 10.21.060(1). The Defendant further cites to CrR 3.1 as authority for a right to counsel at the bond hearing. Permitting whether either of these authorities require the assistance of counsel at a probable cause determination hearing, violation of the RCW or the court rule does not result in a constitutional error and therefore, such claim cannot be raised for the first time on appeal. He did not raise any concern regarding the deprivation of counsel at the bond hearing. His only objection lodged was to the amount and form of the bond which was addressed by the court at his arraignment. This attempt to challenge the bond hearing for the first time on appeal should not be entertained.

Even overlooking the lack of any claim of constitutional error, Mr. Jackson should not be heard on this issue. As stated in Lynn, Mr. Jackson must show that the “error had practical and identifiable consequences in the trial of the case.” 67 Wn.App. at 345. Had counsel been appointed over Mr. Jackson’s stated opposition and

preference, the court would have entered a bond order in any event. This further answers the question of “harmless error,” where again, a bond order would have, without any doubt, been entered authorizing his release and requiring subsequent appearance. The only potential prejudice that could possibly be shown would be regarding the amount of surety, but this was not argued nor can it be shown to have had any impact on the outcome of the case.³ In any event, Mr. Jackson failed to raise the issue below, or otherwise claim infirmity with the bond order or the procedures employed at the hearing where it was entered. He could have asked the trial court to set aside the bond order, which would have, at best, resulted in a new bond order being entered after appointment of counsel. Assuming the court rejected his contention, he could have then sought interlocutory appeal on that issue. He did neither of these things. Instead, he simply violated his conditions of release by failing to appear. This court should therefore decline to consider his novel, but still meritless issue now raised for the first time on appeal.

Two other exceptions to preclusion of consideration of issues not raised in the trial court under RAP 2.5 relate to the lack of jurisdiction by the court to act, and sufficiency of the evidence. RAP

³ Perhaps Mr. Jackson could argue that, had the court set bond in an amount higher than he could post, he would have been held in custody and would not have missed court. However, he should not be heard to complain concerning outcomes that were to his benefit.

2.5(a)(1) and (2). Mr. Jackson makes no claim that the court was without jurisdiction to enter the bond order, nor does he claim that the evidence produced at trial was insufficient to support conviction. While Appellant counsel argues that the bond order was infirm and therefore, there was insufficient evidence of an order releasing Mr. Jackson, this argument is a subterfuge and the genuine claim is that the procedures utilized at the bond hearing itself was infirm. Brief, p. 19. Appellant counsel acknowledges as much when anticipating a potential argument by the State that Ms Kelley's testimony was sufficient, in and of itself to support conviction, without the bond order. Brief, p. 19. Appellate counsel then clarifies that the issue lies with the bond hearing procedure and not with the bond order. Brief, p. 19. In point of fact, Ms Kelley's testimony did satisfy each and every element of the crime and was sufficient, standing alone to support conviction. This fact, and his anticipatory response lays bare the fallacy of Mr. Jackson's claim that the bond order itself is somehow void. Mr. Jackson attempts to perform a vanishing act with logic that infirmity with the procedures in the bond hearing warrant vacation of the bond order which results in the bond order no longer, at an point in time and space, existing. As will be discussed below in Section 3 of this brief, Mr. Jackson can be held accountable for violation of an order that, ultimately might be found infirm by procedural defect.

Further, his reliance on the unpublished opinion in State v. Le, No. 72166-6-I, 2015 Wn. App. LEXIS 2839 (Div. I, 2015), concerning sufficiency of the evidence is misplaced. Therein, the State offered no testimony or evidence concerning any order releasing the defendant. *Id.* Here, both the bond order and testimony from the clerk of the court established that Mr. Jackson was released by court order. For clarification, the State expressly does not cite this case as authority and only includes a discussion herein in response to Mr. Jackson's arguments and reliance therein. The State recognizes that unpublished opinions like State v. Le, have no precedential value and are not binding on any court. To the extent the State's reference to this case is considered to be "citing," it should be noted that it is only to establish the facts of that case to distinguish it from the case at bar. See GR 14.1

Mr. Jackson did not raise his claims concerning the bond order in the trial court. Any claimed error is a violation of court rule or statute and not a constitutional claim. Further, any such error was of no consequence and would have been easily remedied, presupposing that Mr. Jackson did not validly waive his rule-based right to counsel. The court had jurisdiction to enter a bond order and did so. This Court should decline to consider his unpreserved claim.

2. THE COURT PROPERLY ENTERED A BOND ORDER AFTER ALLOWING MR. JACKSON TO PROCEED

WITH HIS INITIAL BOND HEARING PRO SE WHEN HE DECLINED THE COURT'S OFFER OF COUNSEL.

Reaching the substance of Mr. Jackson's claim, his arguments still must fail. As discussed above, there is no constitutional right to assistance of counsel at a bond hearing. See Jackson, *supra*. Since there is no right to counsel, the validity of a bond order entered after hearing is unaffected by the lack of counsel. More significantly, the court did not deprive Mr. Jackson of the assistance of counsel. Instead, it honored his request to proceed without counsel. Mr. Jackson argues that the court failed to engage in a full colloquy to assure a knowing, intelligent, and voluntary waiver of his right to counsel. This is the standard that applies to waiver of the constitutional right to counsel. The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to representation of counsel at all critical stages. To this end, courts engage in a presumption against waiver of counsel. See State v. Lawrence, 166 Wn. App. 378, 390, 271 P.3d 280 (Div. III, 2012); Glasser v. United States, 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457 (1942)(*a court must indulge every reasonable presumption against waiver of fundamental rights*). This presumption against waiver attaches because of the importance of this constitutional right to counsel. See *id.* As such, a full colloquy on the record is the preferred method of confirming a knowing, intelligent, and voluntary

waiver of the right to counsel. See City of Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984).

It does not necessarily follow that the court should apply the presumption against waiver where there is no fundamental or constitutional right to counsel. Therefore, it does not follow that a full and thorough colloquy that occurs when waiving the constitutional right would be required. Further, while preferred, a full colloquy is not required. *Id.* See also State v. Modica, 136 Wn. App. 434, 441, 149 P.3d 446, 450 (Div. I, 2006).

Mr. Jackson cites to the statutory right to counsel in a dependency proceeding. He argues by analogy and supports his argument by citing In re Welfare of G.E., 116 Wn. App. 326, 65 P.3d 1219 (Div. II, 2003). Therein, the court held that the same standard for waiver of the constitutional right to counsel applied to waiver of the statutory right to counsel in dependency proceedings. 116 Wn.App. at 333-334. This case does not help Mr. Jackson. The Court therein specifically relied upon the language of the dependency statute which “mandates appointment of counsel when the child's indigent parent has appeared[.]” *Id.* at 333. Therein, the Court stated, “Because the statute presumes the appointment of counsel, this standard is similar to the waiver of counsel applicable in criminal proceedings. *Id.* at 333-334.

The sexually violent predator cases are likewise of little help where again, the statute provides the right to counsel at “*all* stages of the proceedings” and provides for appointment of counsel if indigent. RCW 71.09.050(1). Further, the Court in In re Detention of Turay, assumed without deciding that the applicable standard for waiver was that of the constitutional right. Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999). The peculiar circumstance of that case further militate against application herein. In Turay, the sexually violent predator appealed his commitment under the statute on the basis that he was deprived of his right to represent himself. Turay, at 395. Therein, the Court applied the presumption against waiver to affirm his commitment, finding that he had not made an unequivocal request for self-representation. *Id.* at 397.

Here, Mr. Jackson made an unequivocal request to represent himself at the bond hearing. He did so after the court advised him of his right to be represented. There is no assertion that he didn't understand that he had the right to an attorney. Mr. Jackson only complains that the court did not engage in an extended discussion with him regarding his right to counsel at the bond hearing. It is clear that, for the purposes of a bond hearing, Mr. Jackson understood that he had the right to an attorney and instead sought to offer his own arguments.

Even if this Court were to find that Mr. Jackson had a right to counsel, and that his waiver of counsel was ineffective, the remedy he seeks would not be available. He was subsequently appointed counsel and was represented when he failed to appear. See In re Personal Restraint of Sanchez, 197 Wn. App. 686, 703, 391 P.3d 517 (Div. III, 2017)(*Arraignment without counsel did not result in presumption of prejudice or structural error*). Thus, Mr. Jackson fails to demonstrate how allowing him to proceed *pro se* and entry of a bond order authorizing his release resulted in incurable prejudice. There is no link between the lack of counsel at his bond hearing and his subsequent failure to appear. As discussed earlier, had counsel been present at the time of his original bond hearing, the court would have entered a bond order releasing him from custody on conditions, including the requirement of future appearances. Appellate counsel's argument that a subsequent determination, such as a ruling from this Court, that the entry of the bond order was somehow erroneous, results in the bond order being void *ab initio* is without merit. By analogy, if Mr. Jackson were to escape from prison while this appeal is pending, and thereafter this court determined that, for some reason, his conviction must be reversed, and it vacated the Judgment and Sentence, he would still be guilty of Escape in the First Degree. See State v. Gonzales, 103 Wn.2d 564, 693 P.2d 119 (1985).

3. MR. JACKSON CANNOT NOW ATTACK THE VALIDITY OF THE BOND ORDER WHERE THE COURT HAD JURISDICTION TO ENTER THE ORDER.

Mr. Jackson may not now collaterally assail the bond order in this manner. In a collateral proceeding, he may only raise such challenge where the court lacked the jurisdiction to act. See State v. Gonzales, supra. His procedural complaints should have been dealt with through filing a motion with the trial court to set aside the bond order or an interlocutory appeal to this court challenging the order. See, e.g., State v. Coe, 101 Wn.2d 364, 369-70, 679 P.2d 353 (1984). This is referred to as the "collateral bar rule." In Coe, the court stated

Our "collateral bar" rule states that a court order cannot be collaterally attacked in contempt proceedings arising from its violation, since a contempt judgment will normally stand even if the order violated was erroneous or was later ruled invalid.

Id. at 369-370. The "collateral bar" is only waived when the order is void because the body that imposed the order exceeded its jurisdiction. See Mead School Dist. v. Mead Educ. Ass'n., 85 Wn.2d 278, 280, 534 P.2d 561 (1975). In Mead, the Court explained:

[W]here the court has jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the order, a party refusing to obey it, however erroneously made, is liable for contempt.

85 Wn.2d at 280 (*citations omitted*). "The test of the jurisdiction of a court is whether or not it had power to enter upon the inquiry, not whether its conclusion in the course of it was right or wrong." State v. Olsen, 54 Wn.2d 272, 274, 340 P.2d 171 (1959). Here, the court clearly had jurisdiction over Mr. Jackson and the subject matter to enter a bond order. He is precluded from challenging the order by disobeying its terms.

His challenge herein was not preserved pursuant to RAP 2.5, is contrary to the facts of the case, and is an improper procedural mechanism for challenging the bond order. This Court should therefore reject Mr. Jackson's challenge to the bond order and affirm his conviction for Bail Jumping.

B. ARGUMENTS PERTAINING TO THE STATE'S APPEAL.

1. THIS COURT SHOULD CONSIDER THE ISSUE RAISED BY THE STATE WHERE THE ISSUE WAS CLEARLY IDENTIFIED IN THE STATE'S BRIEF ON APPEAL.

With regard to the State's arguments raised in its direct appeal, Mr. Jackson asserts, that this Court should dismiss the State's appeal for failure to "assign error." This Court should reject Mr. Jackson's contention. The State has adequately identified the error claimed.

Mr. Jackson's complaints notwithstanding, the State did comply with RAP 10.3(a). RAP 10.3(a)(4) requires:

A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignment of error.

On page one of the State's opening brief, under the Section I entitled "SUMMARY OF ISSUES," the State assigned error and identified issue in the case: "DID THE COURT ERR IN GRANTING AN EXCEPTIONAL SENTENCE DOWNWARD?" In the next section entitled "SUMMARY OF ARGUMENT," the State clarified the issue:

THE COURT ERRED IN GRANTING A DOWNWARD DEPARTURE SENTENCE WHERE THE BASIS WAS THE COURT'S DISAGREEMENT WITH THE ESTABLISHED STANDARD RANGE AND THE FACTS OF THE CASE DO NOT ESTABLISH A BASIS FOR DEPARTURE.

This is a separate, concise statement of the specific error and the issue raised in the State's appeal. The fact that the State's brief did not specifically label these sections "Assignment of Error" should not preclude review. The State's brief makes clear the claim of error and the issue presented. Where the issues are clear and adequately briefed, and where there is no prejudice to Mr. Jackson, this Court should overlook any technical deficiency in the titling of a particular section and reach the issues presented. See RAP 1.2(a); State v. Olson, 126 Wn.2d 315, 318-24, 893 P.2d 629 (1995). Mr. Jackson had no difficulty identifying the error claimed by the State and the percipient issues raised therein. This Court should reach the issue raised in the State's appeal.

2. THE COURT ERRED IN GRANTING AN EXCEPTIONAL SENTENCE DOWNWARD.

The trial court erred in imposing an exceptional sentence below the standard range. Generally, a sentencing court must impose a sentence within the standard sentence range as established in RCW 9.94A.510. See State v. Fowler, 145 Wn.2d 400, 404, 38 P.3d 335 (2002). The sentencing court may impose a sentence above or below the standard range only where reasons exist that are "substantial and compelling." See *id.* The SRA provides a list of aggravating and mitigating factors which may be considered by the sentencing court for the purpose of determining the appropriateness of an exceptional sentence. RCW 9.94A.535. Specifically, that section contains a non-exclusive list of circumstances which might justify a mitigated exceptional sentence. RCW 9.94A.535(1). Any other justification for a downward departure must relate to the crime and make it more, or less, egregious. See State v. Akin, 77 Wn.App. 575, 584, 892 P.2d 774 (Div. I, 1995).

Generally, "[a]n exceptional sentence is appropriate only when the circumstances of the crime distinguish it from other crimes of the same statutory category."

State v. Murray, 128 Wn.App. 718, 722, 116 P.3d 1072 (Div. III, 2005)(quoting State v. Pennington, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989)).

The imposition of an exceptional sentence must be reversed by the appellate court where:

(a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4); Review of the sufficiency of the evidence to support the sentencing court's findings of fact are reviewed for abuse of discretion as is whether the sentence is clearly too lenient. See State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). Whether the facts cited by the sentencing court legally justify a sentence outside the standard range is reviewed *de novo*. See *id.* To clarify for this Court and Mr. Jackson, the State contends that the reasons justifying an exceptional sentence downward do not legally support deviation from the standard range. The trial court's analysis concerning of the best way to implement the stated policies of the SRA is not a proper legal basis to deviate from the standard range. Further, the particular peccadillos of Mr. Jackson and his ability or attitude toward keeping his court appearances is not a legal basis for departure. These are the claimed errors and these issues are reviewed *de novo*. See Law, *supra*. While disagreeing with the trial court's characterization of Mr. Jackson mental state as merely absent minded, the State is not basing this appeal on that issue. With regard to the length of the

sentence imposed, it is clearly too lenient because it is not an authorized departure from the standard sentencing range. The issues having now been sufficiently identified and finitely focused, based upon the law, the sentence imposed must be reversed.

At sentencing, the court expressed great dissatisfaction with legislatively prescribed standard range for Bail Jumping with an offender score of nine or more. CP 280. In reaching its decision, the court did not find any of the listed mitigating factors from RCW 9.94A.535(1) applicable. The court instead relied on the policies set forth in RCW 9.94A.010, which states as follows:

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) Make frugal use of the state's and local governments' resources; and

(7) Reduce the risk of reoffending by offenders in the community.

The sentencing judge expounded on each and his determination that there was a legal basis for departure was based entirely on the court's personal views on how those policies are best advanced in this case.

This was error. As stated by this Court previously:

The purposes of the SRA are not in and of themselves mitigating circumstances; rather, they may provide support for imposition of an exceptional sentence once a mitigating circumstance has been identified by the trial court.

State v. Powers, 78 Wn.App. 264, 270, 896 P.2d 754, 757 (Div III, 1995). The policy statements listed in RCW 9.94A.010 are not a basis for an exceptional sentence but rather, may assist the court in determining the appropriate determinate sentence, once the court is satisfied that a legal justification for departure exists. *See id.* *See also* State v. Alexander, 125 Wn.2d 717, 730, 888 P.2d 1169 (1995).

A proper, non-statutory basis for downward departure exists when the circumstances of the crime distinguish it from other crimes of the same statutory category. *See* Pennington, 112 Wn.2d at 610. Mr. Jackson's argues that the court based its sentence on facts that differentiated the crime from other bail jumping cases. This argument ignores the written findings entered by the court and the reasons stated orally on the record for departure in this case. The trial judge began his analysis with his subjective disagreement with the

Legislature's determination of the seriousness level of the crime of Bail Jumping (C Felony). RP 280. Mr. Jackson claims that the court based his sentence upon the specific facts of the case. This is belied by the judge's statement at the outset of his ruling:

The charge and the offender score result in a presumptive range of 51 to 60 months. And based on the ***nature of the offense*** in this case, I just cannot get there.

RP 280. (*Emphasis added*). The court did not say "the facts of this case." The court's further pronouncement makes clear he was not basing the sentence on the peculiar facts of this case, but on his disagreement with the legislature concerning the proper prescribed punishment for bail jumping with an offender score of nine or more.

Later on the judge further elucidated:

A 60-month, ah, sentence would be five years of a man's life for missing a pretrial. Now, that's the, ah -- that's the same sentence that would be imposed -- the **same** minimum sentence that would be imposed for someone who was convicted of the crime of assault in the first degree or assault of a child in the first degree or they used force or means likely to result in death or intended to kill the individual.

RP 281-282. The court was clearly dissatisfied with the prescribed punishment for missing court after release on promise to appear. The court then went looking for a basis for reduction of the sentence, relying upon the RCW 9.94A.010 factors to justify departure.

As declared by the Supreme Court:

The power of the Legislature over sentencing is plenary; the fixing of legal punishments for criminal offenses is part of the acknowledged power of the legislature to provide a minimum and maximum term within which the trial court may exercise its discretion in fixing sentence.

State v. Benn, 120 Wn.2d 631, 670, 845 P.2d 289, 312 (1993)(*internal quotations and citations omitted*). Even if a departure from a standard range sentence may promote or preserve one or more of the SRA's goals, the court's subjective belief that the range prescribed is inappropriate, or that it does not adequately advance the above goals, is not a substantial and compelling reason justifying a departure. State v. Pascal, 108 Wn.2d 125, 137-38, 736 P.2d 1065, 1072 (1987); *see also* State v. Allert, 117 Wn.2d 156, 169, 815 P.2d 752, 759 (1991); State v. Murray, 128 Wn.App. at 724-25. As stated in Pascal:

The Legislature has stated that the sentencing reform act was designed to promote several significant interests, including protection of the public, the need for rehabilitation, and the need to make frugal use of state resources. The presumptive sentence ranges established for each crime represent the legislative judgment as to how these interests shall best be accommodated. The trial court's subjective determination that these ranges are unwise, or that they do not adequately advance the above goals, is not a substantial and compelling reason justifying a departure.

Pascal, at 137-38. The court's improper usurpation of the legislative role is further demonstrated by the written findings entered herein. CP 106-110. Therein, the Court found in paragraph 2.4:

This Court assesses the appropriateness of a standard range sentence pursuant to RCW 9.94.A.010, including the seven factors listed therein.

CP 106-110. The assessment of the appropriateness of a standard range for a particular crime is properly a legislative function.

Whether a given presumptive sentence is clearly excessive in light of the purposes of the SRA is not a subjective determination dependent upon the individual sentencing philosophy of a given judge. Rather, it is an objective inquiry based on the Legislature's own stated purposes for the act. See RCW 9.94A.010 (setting forth the purposes of the SRA).

State v. Hortman, 76 Wn.App. 454, 463, 886 P.2d 234, 239 (Div. I, 1994).

The only specific facts of the case that the court cited to support its ruling is the lack of malice on the part of Mr. Jackson. Even assuming that this constituted a “fact specific” application in this case, the argument fails. The sentencing court characterized Mr. Jackson’s conduct as “lackadaisical” and that his non-appearance appeared to not be intentional. RP 281. The court seemed to dismiss the fact that Mr. Jackson missed court, and that this occurred after he had appeared late on two separate prior occasions, and after the court had authorized the issuance of a bench warrant. RP 62-63, 69-70, 74, 75, 79-80. He was warned regarding being late and failed to appear on July 11, 2016 despite this admonition. Even after being given yet another opportunity, he yet again showed up late and was

taken into custody at that time. RP 98. This certainly suggested he was substantially more than merely "lackadaisical" in missing court. RP 281.

Regardless, Mr. Jackson's lackadaisical nature is not a legal basis for an exceptional sentence. Mr. Jackson's lack of malice is of not a basis for an exceptional sentence below the standard range. The lack of a "bad" motive is an improper mitigating circumstance in support of an exceptional sentence. See State v. Evans, 80 Wn.App. 806, 815, 911 P.2d 1344, 1349 (Div. I, 1996). The fact that Mr. Jackson did not flee the jurisdiction is likewise evidence of a lack of an aggravating circumstance. While the court characterized these facts as mitigating, the court's statement is merely a recognition that there were no aggravating circumstances. "[T]he lack of an aggravating circumstance does not create a mitigating circumstance'." Evans, at 815, (quoting State v. Alexander, 125 Wn.2d at 724.

Mr. Jackson seems to suggest that the nature of his prior convictions somehow support his exceptional sentence, characterizing his history as mostly drug and alcohol related offense, but concedes that this is an inappropriate consideration. State v. Fowler, 145 Wn.2d at 406. ("Saying that the defendant had no history of violent behavior and no pertinent criminal history is essentially equivalent to saying that he has no criminal record.") Just as the lack

of prior convictions is irrelevant, so to is the nature and genesis of prior convictions.

Mr. Jackson further suggests that his peculiar and carefree nature somehow reduced his culpability, thereby justifying a downward departure. However, the particular characteristics of an offender are not a proper basis for an exceptional sentence downward. State v. Murray, 128 Wn. App. at 724-725. Mr. Jackson suggests that a recent case may have changed this rule and in support of this argument he cites to State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015), suggesting that the court properly considered his mental status. Mr. Jackson misreads and overextends O'Dell. In O'Dell, the Supreme Court considered whether a sentencing court can consider age as a mitigating factor. *Id.* at 683. In that case, the offender was ten days past his eighteenth birthday when he committed his offense. *Id.* Therein, the Court held that a sentencing court may consider age, but further clarified that age alone is not sufficient. *Id.* at 695. The Court found that consideration of age is appropriate, but only as it relates to a potential "decreased moral culpability for criminal conduct." *Id.* Therein, the Court stated:

It remains true that age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence.

O'Dell, 183 Wn.2d at 695. The Court has therefore allowed "youth" to be considered where there is evidence that, due to age, the

defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform it to the requirements of the law were impaired, resulting in mitigated culpability. *Id.* at 694-695. Mr. Jackson was approximately forty-one years old when he committed the current offense of Bail Jumping. CP 12. He was neither youthful, nor aged. There was no evidence of any cognitive impairment, such as head injury or developmental disability that impaired his ability to remember court dates or understand the importance of following the conditions of his bond order. There is therefore no evidence of diminished culpability, even were this an appropriate consideration.

Appellate counsel relies on trial counsel's failure to contact Mr. Jackson, but the bond order requires him to maintain weekly contact with his attorney, not *visa versa*. This is not a cognizable excuse. Mr. Jackson had but one case in the Asotin County Superior Court. The onus was placed upon him to be aware of his court dates. To this end, the court took the additional precaution of having him sign a written promise to appear, reminding him of his court dates and his obligations pursuant to the bond order. CP 17. Mr. Jackson now blames trial counsel for not calling him to remind him of court dates. Trial counsel was not required to provide Mr. Jackson with periodic reminders of his court dates. Counsel's failure to handhold his client does not mitigate Mr. Jackson's culpability nor create a legal basis for an exceptional sentence.

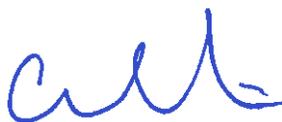
There were no circumstances justifying deviation from the standard range. There were no facts which differentiated Mr. Jackson's crime from other crimes of the same statutory category. See Pennington, *supra*. After being late on two prior occasions, after admonition, and after signing a written notification of and promise to appear at his next court date and time, Mr. Jackson simply didn't appear. That Mr. Jackson didn't flee the jurisdiction and go on a crime spree is of no consequence. His lack of intent to incur the contempt of the trial court is not an exceptional circumstance. Just as many defendants claim chemical dependency led them to commit the offense, nearly every person charged with Bail Jumping claims that they didn't mean to miss court and merely forgot about their court date. See Pennington, 112 Wn.2d at 610. (*"The fact that the defendant had a drug problem is not exceptional."*) There simply were not "substantial and compelling reasons justifying an exceptional sentence" in this case. The sentencing court erred in finding the existence thereof and in sentencing the Defendant below the legislatively prescribed incarceration period. The State would request this Court vacate the sentence imposed herein and remand for imposition of a standard range sentence pursuant to State v. Law, 154 Wn.2d 85, 108 n.21, 110 P.3d 717 (2005).

V. CONCLUSION

The bond order was properly entered herein. Mr. Jackson was advised of the right to counsel and waived his right for the purpose of the bond hearing. His failure to object in the trial court precludes review under RAP 2.5(a), as well as under the “collateral bar” rule. Vacation of the bond order and elimination of that order from the trial record would be improper. The sentencing court erred in finding a basis to deviate from the standard range where none existed. Its reliance upon the factors recited in RCW 9.94A.010 as a basis for creating an exceptional circumstance was misplaced as these factors were aptly and adequately considered by the legislature as is its prerogative. None of the facts relied on by the court were legally sufficient to merit downward departure. The State respectfully requests this Court vacate the sentence and remand for imposition of a standard range sentence.

Dated this 7th day of July, 2017.

Respectfully submitted,



CURT L. LIEDKIE, WSBA #30371
Attorney for Respondent
Deputy Prosecuting Attorney for Asotin County
P.O. Box 220
Asotin, Washington 99402
(509) 243-2061

**COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III**

THE STATE OF WASHINGTON,

Respondent,

v.

STEPHEN R. JACKSON,

Appellant.

Court of Appeals No: 34814-8-III

DECLARATION OF SERVICE

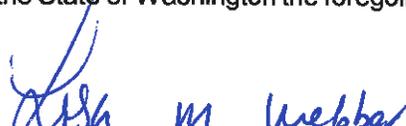
DECLARATION

On July 7, 2017 I electronically mailed, with prior approval from Mr. Nielsen, a copy of the RESPONSE AND REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT in this matter to:

ERIC J. NIELSEN
sloanej@nwattorney.net

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on July 7, 2017.



LISA M. WEBBER
Office Manager

ASOTIN COUNTY PROSECUTOR'S OFFICE

July 07, 2017 - 1:27 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34814-8
Appellate Court Case Title: State of Washington v. Stephen R. Jackson
Superior Court Case Number: 15-1-00189-4

The following documents have been uploaded:

- 348148_Answer_Reply_to_Motion_Plus_20170707132704D3250424_7411.pdf
This File Contains:
Affidavit/Declaration - Service
Answer/Reply to Motion - Reply to Response
The Original File Name was Response and Reply Brief.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- bnichols@co.asotin.wa.us
- nielsene@nwattorney.net
- swiftm@nwattorney.net

Comments:

Sender Name: Lisa Webber - Email: lwebber@co.asotin.wa.us

Filing on Behalf of: Curtis Lane Liedkie - Email: cliedkie@co.asotin.wa.us (Alternate Email:)

Address:
135 2nd Street
P.O. Box 220
Asotin, WA, 99402
Phone: (509) 243-2061

Note: The Filing Id is 20170707132704D3250424