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NO. 37023-2-III

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

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STATE OF WASHINGTON,

Respondent,

v.

ZACHARY BERGSTROM,
Appellant.

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

Spokane County Cause No. 17-1-03794-1 (32)

The Honorable Maryann C. Moreno, Judge

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# BRIEF OF APPELLANT

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## ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Bergstrom's Sixth and Fourteenth Amendment right to notice of the charges against him by instructing the jury on an uncharged alternative means of committing Count V.
2. The trial court violated Mr. Bergstrom's article I, section 22 right to notice of the charges against him by instructing the jury on an uncharged alternative means of committing Count V.

> **ISSUE 1:** A trial court violates the constitutional right to notice of the charges by instructing the jury on an uncharged alternative means of committing an offense. Did the court violate Mr. Bergstrom's right to notice by instructing the jury only on an alternative means of committing escape from community custody with which he was never charged?

3. The state presented insufficient evidence to convict Mr. Bergstrom of Count II.
4. The state presented insufficient evidence to convict Mr. Bergstrom of Count III.
5. The state presented insufficient evidence to convict Mr. Bergstrom of Count IV.

> **ISSUE 2:** In order to support a conviction for bail jumping, the state must prove beyond a reasonable doubt that the accused was given notice of the hearing at which s/he allegedly failed to appear. Did the state present insufficient evidence to convict Mr. Bergstrom of the bail jumping charges when the only evidence that he had been given notice of the hearings was a signature on the orders setting those hearings, which purported to belong to him, but which was not authenticated in any way at trial?

> **ISSUE 3:** In order to convict for bail jumping, the state must prove beyond a reasonable doubt that the accused person has 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." Did the state present insufficient evidence to convict Mr. Bergstrom of Count II when there was no evidence that he was aware of any future required court hearing at the time of his release?

**ISSUE 4:** In order to convict for bail jumping, the state must prove beyond a reasonable doubt that the accused was given notice of a required court date and later failed to appear on that date. Did the state present insufficient evidence to convict Mr. Bergstrom of Count III when the3 evidence showed only that a tentative hearing date had been set and that he would be advised of "the correct court time" later?

6. Ineffective assistance of counsel deprived Mr. Bergstrom of his Sixth and Fourteenth Amendment right to counsel.
7. Ineffective assistance of counsel deprived Mr. Bergstrom of his article I, section 22 right to counsel.
8. Defense counsel provided ineffective assistance by failing to propose a jury instruction on the affirmative statutory defense to bail jumping at RCW 9A.76.170(2).

**ISSUE 5:** Defense counsel provides ineffective assistance by failing to propose a jury instruction that is necessary to the defense. Did Mr. Bergstrom's attorney provide ineffective assistance by failing to propose an instruction on the statutory defense to bail jumping, leaving the jury with the impression that conviction for Count II was required even if Mr. Bergstrom had proved the required elements of the defense?

9. Defense counsel provided ineffective assistance failing to object to the admission of an unauthenticated signature on exhibit 3.
10. Defense counsel provided ineffective assistance failing to object to the admission of an unauthenticated signature on exhibit 7.
11. Defense counsel provided ineffective assistance failing to object to the admission of an unauthenticated signature on exhibit 8.

**ISSUE 6:** It is a long-standing rule that a signature is not admissible as substantive evidence of guilt of a crime unless it has been authenticated. Did Mr. Bergstrom's defense attorney provide ineffective assistance of counsel by failing to object to the admission of unauthenticated signatures, purporting to have been signed by Mr. Bergstrom, which comprised the state's only evidence that he had received notice of the hearings that he was alleged to have missed?

12. Defense counsel provided ineffective assistance of counsel by unreasonably failing to object to the admission of hearsay in Exhibit 4.
13. Defense counsel provided ineffective assistance of counsel by unreasonably failing to object to the admission of hearsay in Exhibit 5.
14. Defense counsel provided ineffective assistance of counsel by unreasonably failing to object to the admission of hearsay in Exhibit 9.
15. Defense counsel provided ineffective assistance of counsel by unreasonably failing to object to the admission of hearsay in Exhibit 10.
16. Defense counsel provided ineffective assistance of counsel by unreasonably failing to object to the admission of hearsay in Exhibit 11.

> **ISSUE 7:** A court record does not fall within the public records exception to the hearsay rule if it contains legal conclusions, rather than factual assertions. Did Mr. Bergstrom's attorney provide ineffective assistance of counsel by failing to object to the admission of the conclusion that he had failed to appear for three court hearings in three orders for the issuance of bench warrants when those conclusions constituted the state's only evidence that he had failed to appear?

17. The court's to-convict instructions for bail jumping violated Mr. Bergstrom's Fourteenth Amendment right to due process.
18. The court's to-convict instructions for bail jumping violated Mr. Bergstrom's Wash. Const. art. I, § 3 right to due process.
19. The court's to-convict instructions for bail jumping impermissibly relieved the state of its burden of proof.
20. The court's to-convict instructions for bail jumping erroneously omitted the element that Mr. Bergstrom had been given notice of the hearing he missed.
21. The court's to-convict instructions for bail jumping erroneously omitted the element that Mr. Bergstrom had failed to appear in court "as required."
22. The court erred by giving instruction number 14.
23. The court erred by giving instruction number 16.
24. The court erred by giving instruction number 18.

25. The violation of Mr. Bergstrom's due process rights constitutes manifest error affecting a constitutional right.

> **ISSUE 8:** An accused person has a due process right to have the jury instructed on each element of an offense. Did the court's to-convict instructions violate Mr. Bergstrom's due process rights by allowing conviction without proof that he had received notice of the hearing he missed or that his conduct met the statutory element that he had failed to appear in court "as required"?

26. The cumulative effect of the errors at Mr. Bergstrom's trial deprived him of his Sixth and Fourteenth Amendment right to a fair trial.

27. The cumulative effect of the errors at trial requires reversal of Mr. Bergstrom's convictions

> **ISSUE 9:** The cumulative effect of errors during a trial can require reversal when, taken together, they deprive the accused of a fair trial. Does the doctrine of cumulative error require reversal of Mr. Bergstrom's convictions when, taken together, the errors led to the admission of extensive inadmissible evidence, deprived Mr. Bergstrom of a jury instruction critical to his defense, and instructed the jury in a manner requiring conviction even if the state had not proved each element of the charges beyond a reasonable doubt.

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Zachary Bergstrom was charged with possession of a controlled substance based on trace amounts of drugs found in a car in which he had been riding as a passenger. CP 1; RP[1] 102-12. A jury eventually acquitted Mr. Bergstrom of that charge. CP 162.

When Mr. Bergstrom refused to plead guilty to the drug possession charge, however, the state amended the Information to add three counts of bail jumping and one of escape from community custody – all felonies. *See* CP 19-24, 130-31.

The charging language for the escape from community custody charge alleged that Mr. Bergstrom had "willfully discontinue[d] making himself… available to the department for supervision by making his… whereabouts unknown." CP 131.

The bail jumping charges were based allegations that Mr. Bergstrom had missed required court hearings on 1/12/18, 4/18/18, and 5/4/18. CP 130-31.

Mr. Bergstrom missed the 1/12/18 hearing because he was hospitalized with pneumonia at the time. RP 237. He arranged to turn

[1] All citations to the Verbatim Report of Proceedings refer to the chronologically-paginated volume spanning 7/8/19 through 8/9/19.

himself in a few days later, as soon as he was healthy enough to do so. RP 238-39.

At trial, the state did not call any witness with personal knowledge that Mr. Bergstrom had been given notice of the hearings on 1/12/18, 4/18/18, or 5/4/18. *See* RP *generally*. Nor did any witness remember whether Mr. Bergstrom had attended those hearings. *See* RP *generally*. Instead, the state's case on the bail jumping charges relied exclusively on certified court documents. *See* Ex. 1-12.

First, the state offered an order holding Mr. Bergstrom in jail and setting his bail as well as the bail bond from when Mr. Bergstrom was able to bail out several weeks later. Ex. 1, 2. Neither of those exhibits indicates that Mr. Bergstrom had knowledge of any required subsequent court hearing at the time of his initial release. *See* Ex. 1, 2.

The state attempted to prove that Mr. Bergstrom had been given notice of the relevant court hearings by offering the orders setting those hearings as exhibits, which purported to have been signed by Mr. Bergstrom. *See* exhibits 3, 7, 8.

But no witness who remembered seeing Mr. Bergstrom sign those documents testified at trial. *See* RP *generally*. Likewise, no signature that was proved to have been made by Mr. Bergstrom was offered for the jury to compare to the signatures on the orders setting the hearing dates. *See*

RP *generally.* Nor did the state offer clerk's minutes or some other document establishing that Mr. Bergstrom had been present at the hearings when the orders were entered. *See* RP *generally*.

Mr. Bergstrom's defense attorney did not object to the admission of the unauthenticated signatures, purporting to belong to his client. *See* RP *generally*.

The order the state offered to show that Mr. Bergstrom had been required to appear in court on 4/18/18 set a hearing for that date but also included the following language:

> *** YOUR COURT TIME IS SUBJECT TO CHANGE, PIONEER WILL ASISGN YOU A CASEMANAGER (sic). PIONEER WILL ADVISE YOU OF THE CORRECT COURT TIME. *****
> Ex. 8, p. 2 (emphasis in original).

The state did not present any evidence regarding any "correct court time" that was later communicated to Mr. Bergstrom. *See* RP *generally*.

To show that Mr. Bergstrom had missed the three hearings, the state relied on motions for bench warrants and orders for bench warrants, containing conclusions by either the prosecutor or the court that Mr. Bergstrom had failed to appear. *See* Ex. 4, 5, 9, 10, 11.

Mr. Bergstrom's defense attorney did not object to that hearsay evidence. *See* RP *generally*.

The to-convict instructions for the bail jumping charges listed the elements for the jury as follows:

> (1) That on or about [date] the defendant failed to appear before a court;
> (2) That the defendant was charged with… a class C felony;
> (3) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and
> (4) That any of these acts occurred in the State of Washington.
> CP 148, 150, 152.

No other instruction informed the jury that the state had to prove that Mr. Bergstrom had been given notice of the hearings he was alleged to have missed (including notice that his attendance was required) or that the state had to prove that he had failed to appear "as required." *See* CP 132-61.

Mr. Bergstrom's defense attorney did not propose a jury instruction for the statutory defense to bail jumping applicable to situations in which an accused person misses a court hearing due to uncontrollable circumstances and then appears or surrenders as soon as the circumstances cease to exist. *See* RP *generally*. Accordingly, the court's instructions required the jury to convict Mr. Bergstrom for Count II even if they believed that he had been unable to attend the 1/12/18 hearing because of his hospitalization. *See* CP 132-61.

The court's to-convict jury instruction for the escape from community custody charge included only the means of committing that offense based on proof that Mr. Bergstrom had "fail[ed] to maintain contact with the department as directed by the community corrections officer." CP 156.

The jury convicted Mr. Bergstrom of escape from community custody and each of the three bail jumping counts. CP 163-66. This timely appeal follows. CP 218.

## ARGUMENT

### I. THE TRIAL COURT VIOLATED MR. BERGSTROM'S CONSTITUTIONAL RIGHT TO NOTICE OF THE CHARGES AGAINST HIM BY INSTRUCTING THE JURY ONLY ON AN ALTERNATIVE MEANS OF COMMITTING ESCAPE FROM COMMUNITY CUSTODY, WHICH WAS NOT CHARGED IN THE INFORMATION.

The state charged Mr. Bergstrom with escape from community custody by alleging that he had "willfully discontinue[d] making himself… available to the department for supervision by making his… whereabouts unknown." CP 131.

But that is not the means of committing that offense on which the jury was instructed. Instead, the court instructed the jury that Mr. Bergstrom should be found guilty if the state proved that he had "fail[ed] to maintain contact with the department as directed by the community corrections officer." CP 156.

The court violated Mr. Bergstrom's constitutional right to notice of the charges against him by instructing the jury on an uncharged alternative means of committing escape from community custody. *State v. Brewczynski*, 173 Wn. App. 541, 548, 294 P.3d 825 (2013).

The constitutional requirement that an accused person be provided with notice of the charges against him/her requires the state to provide notice regarding the alternative means of committing an offense on which s/he will actually be tried. *Id.*; *In re Brockie*, 178 Wn.2d 532, 536, 309 P.3d 498 (2013); U.S. Const. amend. VI, XIV; Wash. Const. art. I, sec. 22.[2]

It is constitutional error "to instruct the jury on alternative means that are not contained in the charging document. *Brewczynski*, 173 Wn. App. at 549.

An alternative means offense is one "that provide[s] that the proscribed criminal conduct may be proved in a variety of ways." *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010). Theft is a common example of an alternative means crime because it can be committed by "(1) wrongfully obtaining or exerting control over another's property *or*

[2] Manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3). A claim that a jury was improperly instructed on an un-charged alternative means of committing an offense may be raised for the first time on appeal. *See Brockie*, 178 Wn.2d at 537.

(2) obtaining control over another's property through color or aid of deception." *Id.* (*citing State v. Linehan,* 147 Wash.2d 638, 644–45, 647, 56 P.3d 542 (2002)).

Escape from community custody is an alternative means offense. The statute sets forth the means of committing the crime as follows:

> An inmate in community custody who willfully discontinues making himself or herself available to the department for supervision *by making his or her whereabouts unknown* <u>*or*</u> *by failing to maintain contact with the department* as directed by the community corrections officer shall be deemed an escapee and fugitive from justice, and upon conviction shall be guilty of a class C felony

RCW 72.09.310 (emphasis added).

Like theft, the legislature has provided two separate types of criminal conduct that are criminalized under the statute for escape from community custody. A person can be found guilty of the offense because s/he *either* (1) made his/her whereabouts unknown *or* (2) failed to maintain contact with his/her DOC officer as s/he had been directed to do. RCW 72.09.310.

Mr. Bergstrom was charged with committing the offense through the first alternative means. CP 131. But the jury was only instructed only on the second means, with which he had never been charged. CP 156. This violated Mr. Bergstrom's constitutional right to notice of the charges against him because he was tried and convicted of committing an

alternative means of escape from community custody with which he was never given notice. *Brockie*, 178 Wn.2d at 536; *Brewczynski*, 173 Wn. App. at 549.

This constitutional error is presumed prejudicial and requires reversal unless the state can prove harmlessness beyond a reasonable doubt. *Brockie*, 178 Wn.2d at 536, 538-39. The state cannot meet that burden if none of the other jury instructions explicitly limit the jury to consideration of the alternative means of committing the offense of which the accused was given notice. *Brewczynski*, 173 Wn. App. at 549–50.

At Mr. Bergstrom's trial, the jury was not instructed on the alternative means of escape from community custody for which Mr. Bergstrom received notice at all. *See* CP 132-61. Accordingly, no instruction limited the jury to consideration of that alternative means. The state cannot overcome the presumption of prejudice resulting from the constitutional error in this case. *Id.*

The trial court violated Mr. Bergstrom's constitutional right to notice of the charges against him by instructing the jury only on an alternative means of committing escape from community custody with which he had never been given notice. *Id.*; *Brockie*, 178 Wn.2d at 536. Mr. Bergstrom's conviction for Count V must be reversed. *Id.*

## II. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. BERGSTROM OF ANY OF THE BAIL JUMPING CHARGES.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found each element of the charge proved beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied,* 176 Wn.2d 1003, 297 P.3d 67 (2013).

The bail jumping statute requires the state to prove beyond a reasonable doubt that:

> Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state… and who fails to appear … as required is guilty of bail jumping.

RCW 9A.76.170(1).

No rational jury could have found Mr. Bergstrom guilty beyond a reasonable doubt of any of the three bail jumping charges because (A) there was only equivocal evidence that he had been given notice of any of the hearings that he was alleged to have missed; (B) the state failed to present any evidence that he was released or admitted to bail "with knowledge of the requirement" of a subsequent court appearance before his alleged failure to appear for Count II; (C) there was no evidence that he was required to appear in court on the date charged in Count III or that he had notice of that requirement if it did exist.

Mr. Bergstrom's convictions for Counts II through IV must be reversed for insufficient evidence. *Chouinard*, 169 Wn. App. at 899.

A. No rational jury could have found beyond a reasonable doubt that Mr. Bergstrom had been given notice of any of the hearings that he was alleged to have missed.

In order to support Mr. Bergstrom's convictions for bail jumping, the state was required to prove beyond a reasonable doubt that he had been given notice of the required court dates that he was alleged to have later missed. *State v. Cardwell*, 155 Wn. App. 41, 47, 226 P.3d 243 (2010), *review granted, cause remanded on other grounds,* 172 Wn.2d 1003, 257 P.3d 1114 (2011). The prosecution attempted to prove notice in this case by offering the orders setting those hearings as exhibits, which purported to have been signed by Mr. Bergstrom. *See* exhibits 3, 7, 8.

But no witness who had seen Mr. Bergstrom sign those documents testified at trial. *See* RP *generally*. No authenticated signature of Mr. Bergstrom was offered for the jury to compare to the signatures on the exhibits. *See* RP *generally.* Nor did the state offer clerk's minutes or some other document establishing that Mr. Bergstrom had been present at the hearings when the orders were made – or even that the orders had been signed during a hearing, rather than *ex parte*. *See* RP *generally*.

As a result, no rational jury could have found beyond a reasonable doubt that the signatures on the exhibits actually belonged to Mr.

Bergstrom. Since the state did not present any other evidence that Mr. Bergstrom had been given notice of the hearing dates, his bail jumping convictions must be reversed for insufficient evidence. *Chouinard*, 169 Wn. App. at 899.

Pursuant to ER 901(a), "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *State v. Bradford,* 175 Wn. App. 912, 928, 308 P.3d 736 (2013). This requirement is met "if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification." *Id.* (internal quotations omitted). For example, authentication of a signature could be established by a witness with knowledge that the signature is what it is claimed to be, by non-expert opinion testimony from one who is familiar with the handwriting, or by comparing a signature with another specimen signature that has already been authenticated. *See* ER 901(b)(1)-(4).

As a threshold matter, Mr. Bergstrom does not contest the admissibility of the orders setting the hearings in his case, themselves. *See* exhibits 3, 7, 8. However, because the state relied on the signatures on those documents to prove the knowledge elements of bail jumping, the

state should have been required to authenticate those signatures as belonging to Mr. Bergstrom prior to their submission to the jury.

It is a long-standing rule that a person's signature cannot be authenticated by comparing one signature to another similar, yet likewise un-authenticated, signature. *See* ER 901(b)(3); *State v. McGuff,* 104 Wash. 501, 504-06, 177 P. 316 (1918).

In *McGuff,* a bank cashier was permitted to identify the signature of the appellant, even though he had never seen the appellant write his name, by comparing a signature that was on a card bearing McGuff's name with a signature on a check that was alleged to have been forged by him. *McGuff*, 104 Wash. at 505. The supreme court reversed, holding that the cashier could not compare the signature at hand with another un-authenticated signature to prove that it belonged to *McGuff. Id.*

The un-authenticated signature in *McGuff* is distinguishable from a signature that is authenticated by comparing to a notarized document. *See e.g., State v. Fernandez,* 28 Wn. App. 944, 954-55, 628 P.2d 818 (1981). In *Fernandez,* a witness testified that his identification of a signature was based on a comparison with a previously authenticated signature on a notarized document. *Id.* In other words, the signature was proven. *Id.*

Here, Mr. Bergstrom's signature was never proven. No witness who had seen him sign the orders setting the hearing dates testified at trial.

*See* RP *generally*. Indeed, there was not even any evidence that Mr. Bergstrom had been present in court when those dates were set – or that they had been set in open court at all. *See* RP *generally.* The state also failed to present any signature that had been authenticated for the jury to compare to those on the orders setting the hearing dates. *See* RP *generally.*

The only evidence presented at trial that Mr. Bergstrom had been given notice of the hearings at which he allegedly failed to appear was his purported signature on the orders setting those hearing dates. But, because there was no evidence that the signatures actually belonged to Mr. Bergstrom, no rational jury could have found beyond a reasonable doubt he had received notice of the hearings for which he was alleged to have failed to appear.

All three of Mr. Bergstrom's convictions for bail jumping must be reversed for insufficient evidence. *Chouinard*, 169 Wn. App. at 899.

B. No rational jury could have found beyond a reasonable doubt that Mr. Bergstrom was "released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance" before his alleged failure to appear in Count II.

In order to convict Mr. Bergstrom of bail jumping, the state was required to prove beyond a reasonable doubt that he had 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).

But the state failed to present any evidence that Mr. Bergstrom had knowledge of any subsequent court hearing – required or not – at the time of his release on bail, before his alleged failure to appear in Count II.

The state's only evidence regarding Mr. Bergstrom's release and admission to bail are exhibit 1, which is the order holding Mr. Bergstrom in jail and setting his bail, and exhibit 2, which is the bail bond from when Mr. Bergstrom bailed out several weeks later. Ex. 1, 2. Neither of those exhibits indicates that Mr. Bergstrom had knowledge of any required subsequent court hearing at the time. *See* Ex. 1, 2.

Exhibit 1 merely sets Mr. Bergstrom's bail at $2,500 and provides conditions of his release in the event that he is able to post that bail. Ex. 1, pp. 1-2. One of the conditions of release requires Mr. Bergstrom to "appear at all court dates." Ex. 1, p. 1. But no specific future hearing is listed. *See* Ex. 1. Exhibit 2 demonstrates that Mr. Bergstrom posted bond several weeks later. Ex. 2. Nothing in that exhibit mentions any requirement of a subsequent personal appearance in court. *See* Ex. 2.

In fact, there is no evidence that any hearings – required or otherwise -- were set in Mr. Bergstrom's case until several weeks after he

posted bond. *See* Ex. 3. Mr. Bergstrom was already out of custody at the time that order was entered. Ex. 3, p. 1.

This failure of proof was not overcome by the testimony presented by the state at trial. In support of the three bail jumping charges, the state called two employees of the clerk's office, neither of whom had any personal memory of Mr. Bergstrom's case. *See* RP 164-94. Exhibits 1 and 2 were admitted through the first of those witnesses, under the hearsay exception for certified court documents. RP 165-68. But that witness testified only that Mr. Bergstrom was given notice of the court date that was set several weeks *after* he had been released on bond. RP 169. The testimony presented at trial did nothing to cure the shortcoming in the state's exhibits on the issue of whether Mr. Bergstrom had knowledge of the requirement of a subsequent court appearance at the time of his release. RP 164-94.

No rational jury could have found beyond a reasonable doubt that Mr. Bergstrom had 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," as required to convict him Count II. RCW 9A.76.170(1). Mr. Bergstrom's conviction for Count II must be reversed for insufficient evidence. *Chouinard*, 169 Wn. App. at 899.

C. No rational jury could have found beyond a reasonable doubt that Mr. Bergstrom was required to appear in court on 4/18/18 as required to convict him in Count III.

The state charged Mr. Bergstrom in Count III with missing a required court hearing on 4/18/18. In support of that charge, the state presented an order releasing Mr. Bergstrom for drug court observation, which tentatively required him to go to drug court on that date. Ex. 8, p. 2. But the order also informed Mr. Bergstrom that:

> *** YOUR COURT TIME IS SUBJECT TO CHANGE, PIONEER WILL ASSIGN YOU A CASEMANAGER. PIONEER WILL ADVISE YOU OF THE CORRECT COURT TIME. ***** Ex. 8, p. 2 (emphasis in original).

The state did not present any evidence regarding any "correct court time" that was later communicated to Mr. Bergstrom. *See* RP *generally*. Accordingly, the evidence that Mr. Bergstrom was required to appear in court on 4/18/18 – or that he was aware of any such requirement if it did exist – was equivocal at best and does not constitute proof beyond a reasonable doubt.

In order to support a conviction for bail jumping, the state is required to prove beyond a reasonable doubt that the accused was given notice of a required court date, which s/he is alleged to have missed. *State v. Cardwell*, 155 Wn. App. 41, 47, 226 P.3d 243 (2010), *review granted, cause remanded on other grounds,* 172 Wn.2d 1003, 257 P.3d 1114

(2011). An element has not been proved beyond a reasonable doubt if the state presents only equivocal evidence. *State v. Vasquez*, 178 Wn.2d 1, 14, 309 P.3d 318 (2013).

Here, the state presented evidence that a hearing was tentatively set for 4/18/18, but that Mr. Bergstrom was also told that the hearing was subject to change and that the "correct court time" would be communicated to him later. Ex. 8, p. 2. That information was emphasized by being printed in all capital letters with asterisks on either side. There is no evidence regarding any "correct court time" that was later communicated to Mr. Bergstrom. *See* RP *generally*. It is possible that the hearing remained set for 4/18/18, but it is also possible under the state's evidence that Mr. Bergstrom was later given a different time and date.

In short, it is not clear from the state's evidence whether Mr. Bergstrom was required to appear on 4/18/18 or not. It is also not clear whether it was ever confirmed to Mr. Bergstrom that the hearing would, in fact, take place on 4/18/18 if that was the case. The state's evidence is equivocal, at best, and does not constitute proof beyond a reasonable doubt. *Vasquez*, 178 Wn.2d at 14.

No rational jury could have found beyond a reasonable doubt that Mr. Bergstrom was required to appear in court or had been given notice of such a requirement if one existed. Mr. Bergstrom's conviction for Count

III must be reversed for insufficient evidence. *Chouinard*, 169 Wn. App. at 899.

## III. PERVASIVE ERRORS BY DEFENSE COUNSEL DEPRIVED MR. BERGSTROM OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV, art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).[3]

In order to demonstrate ineffective assistance of counsel, the accused must show deficient performance and prejudice. *Id.* Performance is deficient if it falls below an objective standard of reasonableness. *Id.* The accused is prejudiced by counsel's deficient performance if there is a reasonable probability[4] that counsel's mistakes affected the outcome of the proceedings. *Id.*

Any tactical decision by defense counsel must be reasonable in order to constitute effective assistance. *See In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (*citing State v. McNeal*, 145 Wn.2d 352, 362, 37

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[3] Ineffective assistance of counsel claims are reviewed *de novo*. *Jones*, 183 Wn.2d at 338.

[4] A "reasonable probability" under the prejudice standard is lower than the preponderance of the evidence standard. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Rather, "it is a probability sufficient to undermine confidence in the outcome." *Id.*; *see also Jones*, 183 Wn.2d at 339.

P.3d 280 (2002)). Even deliberate tactical choices can constitute ineffective assistance of counsel if they fall outside the range of "competent assistance." *Id.*

Here, Mr. Bergstrom's defense attorney provided ineffective assistance of counsel by (A) failing to propose a jury instruction on the affirmative statutory defense to bail jumping; (B) failing to object to un-authenticated signatures purporting to belong to his client; and (C) failing to object to the admission of hearsay evidence, which was not admissible under the public records exception to the hearsay rule. These extensive errors by defense counsel require reversal of Mr. Bergstrom's bail jumping convictions.

A. Mr. Bergstrom's defense attorney provided ineffective assistance by failing to propose a jury instruction on the statutory defense to bail jumping.

In Count II, the state alleged that Mr. Bergstrom had missed a required hearing on 1/12/18. CP 130. Mr. Bergstrom testified in his defense, explaining to the jury that he had been hospitalized with pneumonia at the time of that hearing. RP 237. He said that he contacted the bond company and his attorney to turn himself in a few days later, as soon as he was healthy enough to do so. RP 238-39.

The legislature has provided an affirmative statutory defense to bail jumping for exactly the type of circumstance that Mr. Bergstrom

described. RCW 9A.76.170(2). But Mr. Bergstrom's defense attorney failed to propose a jury instruction on that defense. *See* RP *generally*. Accordingly, the jury was left believing that they were required to convict Mr. Bergstrom for Count II, even they believed that he had been unable to attend the 1/12/18 hearing because of his hospitalization.

Ineffective assistance of counsel requires reversal of Mr. Bergstrom's conviction for Count II.

A criminal defense attorney provides deficient performance by failing to raise or argue an available defense when the facts of the case support the defense. *State v. Powell*, 150 Wn. App. 139, 155, 206 P.3d 703 (2009); *In re Hubert*, 138 Wn. App. 924, 929-30, 158 P.3d 1282 (2007).

Defense counsel's neglect to familiarize him/herself with relevant defenses to a charge cannot be characterized as a legitimate trial tactic because it is not based on "reasoned decision-making." *Hubert*, 138 Wn. App. at 929-30; *see also State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

In fact, "[w]here defense counsel fails to identify and present the sole available defense to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial." *Hubert*, 138 Wn. App. at 932; *See also Powell*, 150 Wn. App. at 156.

The legislature has provided an affirmative statutory defense to bail jumping for circumstances in which:

> … uncontrollable circumstances prevented the person from appearing or surrendering, and 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).

This affirmative defense applied to Mr. Bergstrom's situation, in which he was unable to attend the 1/12/18 hearing because of his hospitalization but turned himself in as soon as he was healthy enough to do so. RP 237-39.

Competent counsel would have proposed a jury instruction on the statutory defense in Mr. Bergstrom's case. There was no valid tactical purpose for counsel's failure to do so here. Mr. Bergstrom's defense attorney provided deficient performance.

An accused person is prejudiced by defense counsel's unreasonable failure to propose a jury instruction on an applicable defense when the jury is left with "no way to understand the legal significance" of the evidence supporting that defense. *Hubert*, 138 Wn. App. at 932; *See also Powell*, 150 Wn. App. at 156-57.

The *Powell* court reversed for ineffective assistance of counsel based on the defense attorney's failure to request a jury instruction on the

"reasonable belief" defense to second-degree rape. *Powell*, 150 Wn. App. at 156-57. The Court found that the accused had been prejudiced by counsel's failure because:

> [w]ithout the "reasonable belief" instruction, the jury had (1) no way to recognize and to weigh the legal significance of Powell's testimony and portions of defense counsel's closing argument that it appeared to Powell that PLM had consented; and (2) no way of acquitting Powell even if it believed he had reasonably believed PLM was not mentally incapacitated or physically helpless. Instead, it would have appeared to the jury that it had no option but to convict Powell if it found beyond a reasonable doubt that PLM had been mentally incapacitated or physically helpless, regardless of whether it also found that Powell reasonably believed PLM had consented. The absence of this instruction essentially nullified Powell's defense.

*Id.*

Likewise, in Mr. Bergstrom's case the instructions left the jury with the impression that they were required to convict on Count II even if they believed that Mr. Bergstrom had been unable to attend the 1/12/18 hearing because he was in the hospital. The absence of the instruction "essentially nullified" Mr. Bergstrom's defense to Count. II. *Id.* There is a reasonable probability that counsel's deficient performance affected the outcome of Mr. Bergstrom's trial. *Jones*, 183 Wn.2d at 339.

Mr. Bergstrom's defense attorney provided ineffective assistance of counsel by failing to propose a jury instruction on the statutory affirmative defense to bail jumping. *Hubert*, 138 Wn. App. at 932; *Powell*,

150 Wn. App. at 156-57. Mr. Bergstrom's conviction for Count II must be reversed. *Id.*

B. Defense counsel provided ineffective assistance by failing to object to unauthenticated signatures, purporting to be those of Mr. Bergstrom, which constituted the only evidence that Mr. Bergstrom had been give notice of the hearings that he was alleged to have missed.

Defense counsel provides ineffective assistance by waiving objection to inadmissible evidence that prejudices his/her client, absent a valid tactical justification. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007), *aff'd,* 165 Wn.2d 474, 198 P.3d 1029 (2009).

As outlined extensively above (see section II(A) of this brief) the only evidence at trial that Mr. Bergstrom had been given notice of the hearings that he was alleged to have missed was in the form of orders setting the dates for those hearings, all of which purported to have been signed by Mr. Bergstrom. *See* Ex. 3, 7, 8. But, because those signatures were not authenticated in any way as truly belonging to Mr. Bergstrom, they were not admissible under ER 901(a). *Bradford,* 175 Wn. App. at 928; *McGuff,* 104 Wash. at 504-06.

Mr. Bergstrom's defense attorney should have objected to the admission of the purported signatures of his client on exhibits 3, 7, and 8. Counsel had no valid tactical reason for waiving objection to the state's only evidence that his client had been given notice of the hearings that he

was alleged to have missed. Counsel's conduct constituted deficient performance. *Hendrickson*, 138 Wn. App. at 833; *Jones*, 183 Wn.2d at 339.

Mr. Bergstrom was prejudiced by his attorney's deficient performance. A successful objection to the unauthenticated signatures would have left the state with no evidence that Mr. Bergstrom had received notice of the hearings. There is a reasonable probability that counsel's unreasonable failure to object affected the outcome of Mr. Bergstrom's trial. *Jones*, 183 Wn.2d at 339.[5]

Mr. Bergstrom's defense attorney provided ineffective assistance of counsel by failing to object to unauthenticated signatures, purportedly those of his client, which constituted the state's only evidence as to one of the elements of the bail jumping charges. *Id.*; *Hendrickson*, 138 Wn. App. at 833. Mr. Bergstrom's convictions must be reversed. *Id.*

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[5] Mr. Bergstrom provided testimony after the state rested, which could be construed as an admission that he received notice of the hearings that he was alleged to have missed on 1/12/18 and 4/18/18. *See* RP 236-41. But those admissions are not relevant to the prejudice analysis for Mr. Bergstrom's ineffective assistance claim. If defense counsel had successfully objected to the inadmissible signatures on the orders setting the hearings during the state's case-in-chief, the bail jumping charges would have been dismissed for insufficient evidence before Mr. Bergstrom ever testified.

C. Defense counsel provided ineffective assistance by failing to object to hearsay on the court's orders for the issuance of bench warrants, which was not admissible under the public records exception.

In order to convict Mr. Bergstrom of the three bail jumping charges, the state was required to prove beyond a reasonable doubt that he had failed to appear at a court hearing on the relevant dates.

But the state did not present evidence from any witness with personal knowledge that he had missed those hearings. Nor did the state offer any transcript or recording – or even the clerk's minutes -- of those hearings to the jury. *See* RP *generally*.

Instead, the only evidence that Mr. Bergstrom had been absent from those hearings was in the form of hearsay statements from non-testifying witnesses in motions and orders for bench warrants. *See* Ex. 4, 5, 9, 10, 11. Because those assertions constituted inadmissible hearsay, defense counsel should have objected to their admission and provided ineffective assistance of counsel by failing to do so.

Court records can fall within the public records exception to the hearsay rule, but only if the meet the four requirements of that exception. *State v. James*, 104 Wn. App. 25, 32, 15 P.3d 1041 (2000); ER 803(a)(8). In order to be admissible as a public record, a document must:

> "(1) contain facts rather than conclusions that involve independent judgment, discretion, or the expression of opinion; (2) relate to facts that are of a public nature; (3) be retained for public benefit;

> and (4) be authorized by statute. *Monson,* 113 Wash.2d at 839, 784 P.2d 485 (citing *Steel,* 9 Wash.2d at 358, 115 P.2d 145).

*James*, 104 Wn. App. at 32 (*citing State v. Monson*, 113 Wn.2d 833, 839, 784 P.2d 485 (1989)).

The *James* court held that a prosecutor's declaration in support of an application for a bench warrant did not fall within the public records exception because the claim that the accused had failed to appear constituted a legal conclusion. *Id.* at 33. The prosecutor and court's assertions in exhibits 4, 5, 9, 10, and 11 that Mr. Bergstrom had failed to appear for the three hearings at issue, likewise, constituted legal conclusions rather than factual assertions. *Id.* Accordingly, they were not admissible under the public records exception to the hearsay rule. *Id.*

Mr. Bergstrom's defense attorney had no valid tactical reason for waiving objection to the inadmissible legal conclusions in the orders for bench warrants. Counsel's failure to object constituted deficient performance. *Jones*, 183 Wn.2d at 339.

Mr. Bergstrom was prejudiced by his attorney's deficient performance. Again, the hearsay statements in the motions and orders for issuance of bench warrants constituted the state's only evidence that Mr. Bergstrom had failed to appear for the three hearings. There is a reasonable probability that counsel's unreasonable failure to object to the

inadmissible hearsay in exhibits 4, 5, 9, 10, and 11 affected the outcome of Mr. Bergstrom's trial. *Id.*

Mr. Bergstrom's defense attorney provided ineffective assistance of counsel by unreasonably failing to object to inadmissible hearsay, which constituted the state's only evidence of the *actus reus* of the bail jumping charges. *Id.* Mr. Bergstrom's convictions must be reversed. *Id.*

## IV. THE COURT'S TO-CONVICT INSTRUCTION FOR BAIL JUMPING VIOLATED MR. BERGSTROM'S RIGHT TO DUE PROCESS BECAUSE IT RELIEVED THE STATE OF ITS BURDEN TO PROVE EACH ELEMENT OF THE CHARGES.

A trial court's failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). A "to convict" instruction must contain all the elements of the crime, because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004).

Jurors have the right to regard the court's elements instruction as a complete statement of the law. Any conviction based on an incomplete "to convict" instruction must be reversed. *State v. Smith,* 131 Wn.2d 258, 263, 930 P.2d 917 (1997). This is so even if the missing element is supplied by

other instructions. *Id; Lorenz,* 152 Wn.2d at 31; *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).[6]

In Mr. Bergstrom'ns case, the court's to-convict instructions for bail jumping were constitutionally inadequate because they failed to provide the jury with an accurate yardstick of the requirements for conviction. *Id.;* CP 148, 150, 152. Specifically, the instructions failed to inform the jury that the state was required to prove that Mr. Bergstrom had been given notice of the hearings he was alleged to have missed and that he had later failed to appear "as required." CP 148, 150, 152.

A. The court's to-convict instructions for bail jumping failed to inform the jury of the state's burden to prove that Mr. Bergstrom failed to appear for court "as required."

In order to convict a person for bail jumping, the state must prove that s/he: (1) was held for, charged with, or convicted of a particular crime; (2) was released by court order or admitted to bail with knowledge of a required subsequent personal appearance; and (3) failed to appear as

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[6] Alleged constitutional violations are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3). The to-convict instructions for bail jumping in Mr. Bergstrom's case present manifest error affecting a constitutional right, and thus may be reviewed for the first time on appeal. RAP 2.5(a)(3).

Jury instructions are also reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

required. *State v. Williams*, 162 Wn.2d 177, 184, 170 P.3d 30 (2007); RCW 9A.76.170(1).

In order to meet the knowledge requirement, the state must prove beyond a reasonable doubt that the accused received notice of the specific hearing he is alleged to have missed. *Cardwell*, 155 Wn. App. 47.

But the instructions given to the jury at Mr. Bergstrom's trial listed the elements for bail jumping as follows:

> (5) That on or about [date] the defendant failed to appear before a court;
> (6) That the defendant was charged with… a class C felony;
> (7) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and
> (8) That any of these acts occurred in the State of Washington.
> CP 148, 150, 152.

The court's to-convict instructions for bail jumping did not make clear that the state had to prove that Mr. Bergstrom had been given notice of the hearings he was alleged to have missed (including notice that his attendance was required) or that the state had to prove that he had failed to appear "as required." CP 148, 150, 152.

Rather, the instruction required conviction even if Mr. Bergstrom had not received notice of the hearings, so long as the jury found that he had knowledge of *any* "required subsequent personal appearance" at the time of his release. CP 148, 150, 152.

Moreover, the court's to-convict instruction required conviction regardless of whether the Mr. Bergstrom's attendance at the hearing was actually required, so long as he was aware of *some* required appearance when he was released. CP 148, 150, 152.

In effect, the instructions' language imposes strict liability for missing any court date after a person is released on bail, regardless of whether that person has been ordered to appear at the hearing and regardless of whether s/he has been given notice of the hearing. CP 148, 150, 152.. The instructions violated Mr. Bergstrom's right to due process because they were not available as an accurate "yardstick," and did not make the state's burden manifestly clear to the average juror. *Kyllo*, 166 Wn.2d at 864.

Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). As outlined above, the state's evidence that Mr. Bergstrom was given notice of the hearings was equivocal at best. The jury could have doubted whether he was provided with notice of that hearing but still found him guilty because the to-convict instructions did not require proof of notice. CP 148, 150, 152.

Additionally, absent an instruction requiring the jury to find that that he had failed to appear "as required," the jury could have convicted Mr. Bergstrom for activity that is not illegal: such as missing a non-mandatory hearing or simply failing to be in the courthouse on a random day on which no hearing is held. CP 148, 150, 152.

The court's to-conviction instructions for the bail jumping charges violated Mr. Bergstrom's right to due process by relieving the state of its burden to prove each element of the charge. *Aumick*, 126 Wn.2d at 429; *Lorenz*, 152 Wn.2d at 31. Mr. Bergstrom's bail jumping convictions must be reversed. *Id.*

B. This Court should decline to follow Division II's decision on this issue in *Hart* because that decision was wrongly-decided and is harmful.

Division II of the Court of Appeals has decided that a to-convict instruction similar to the one given in Mr. Bergstrom's case was constitutionally adequate. *See State v. Hart*, 195 Wn. App. 449, 456, 381 P.3d 142 (2016), *review denied,* 187 Wn.2d 1011, 388 P.3d 480 (2017).

The *Hart* court upheld the instruction because it "required the State to prove beyond a reasonable doubt that Hart 'had been released by court order or admitted to bail with knowledge *of the requirement* of a subsequent personal appearance before that court.'" *Id.* at 456.

But the reasoning in *Hart* is unavailing because it conflates two elements of bail jumping. The statutory element of bail jumping requiring proof that the accused failed to appear in court "as required" is textually and logically distinct from the element requiring proof that the court ordered a hearing, which the accused was required to attend. The first is proved through evidence that the hearing was held on the appointed date and time and that the accused was not present. The latter is proved through evidence that the court – on some previous date – scheduled the hearing and required the presence of the accused.

Indeed, the evidence establishing the two elements necessarily occurs at different times through the actions of different parties. Even so, *Hart* holds that the element that of failure to appear "as required" was established through the state's proof that he "had been released by court order or admitted to bail with the knowledge of the requirement of a subsequent personal appearance before the court." *Id.* at 456.

Mr. Bergstrom does not challenge the court's instruction regarding the element that he was aware of a required appearance in court. Rather, the court did nothing to inform the jury that it had to also find that he – at some later date – actually failed to appear as he had been ordered to do.

Division II's reasoning in *Hart* is flawed because it approves of an instruction requiring conviction even if the state has failed to prove that

the accused received notice of the actual hearing that s/he allegedly missed. The instruction approved in *Hart* also erroneously renders superfluous the language of the bail jumping statute requiring proof that the accuses failed to appear "as required" by equating it with the language requiring proof that s/he was released by the court "with knowledge of the requirement of a subsequent court appearance." *See* RCW 9A.76.170(1); *State v. LaPointe*, 1 Wn. App. 2d 261, 269, 404 P.3d 610 (2017) (statutes should not be construed in a manner rendering any of the language meaningless or superfluous).

This court should decline to follow Division II's decision in *Hart* because it is incorrect and harmful. *State v. W.R., Jr.*, 181 Wn.2d 757, 760, 336 P.3d 1134 (2014).

The court's to-convict instructions for bail jumping violated Mr. Bergstrom's right to due process by relieving the state of its burden of proof. *Lorenz*, 152 Wn.2d at 31. His convictions for bail jumping must be reversed. *Id.*

## V. THE CUMULATIVE EFFECT OF THE ERRORS AT MR. BERGSTROM'S TRIAL DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Under the doctrine of cumulative error, an appellate court may reverse a conviction when "the combined effect of errors during trial effectively denied the defendant [his/]her right to a fair trial even if each

error standing alone would be harmless." *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010); U.S. Const. Amends. VI, XIV.

In Mr. Bergstrom's case, the cumulative effect of the errors at trial requires reversal of his conviction. Taken together, the errors led to the admission of extensive inadmissible evidence, deprived Mr. Bergstrom of a jury instruction critical to his defense, and instructed the jury in a manner requiring conviction even if the state had not proved each element of the charges beyond a reasonable doubt. The cumulative effect of the errors at Mr. Bergstrom's trial deprived him of a fair trial and requires reversal of his convictions. *Id.*

## CONCLUSION

The trial court violated Mr. Bergstrom's constitutional rights by instructing the jury on an alternative means of committing escape from community custody with which he was never charged. The state presented insufficient evidence to support any of Mr. Bergstrom's bail jumping convictions. Defense counsel provided ineffective assistance of counsel throughout trial. The court's to-convict instructions relieved the state of its burden to prove each element of the bail jumping charges.

Whether considered individually or in the aggregate, these errors require reversal of each of Mr. Bergstrom's convictions.

Respectfully submitted on February 21, 2020,

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Zachary Bergstrom/DOC# 398577
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Spokane County Prosecuting Attorney
SCPAappeals@spokanecounty.org

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on February 21, 2020.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

## LAW OFFICE OF SKYLAR BRETT

## February 21, 2020 - 2:31 PM

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