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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

ZACHARY BERGSTROM, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S 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.
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.
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).
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.
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.
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 Washington Constitution article I, section 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.
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.

## **II. ISSUES PRESENTED**

1. Does Mr. Bergstrom demonstrate escape from community custody is an alternative means crime when he simply analyzes whether the statute contains disjunctive language, an approach rejected by the Washington Supreme Court?
2. Is escape from community custody an alternative means crime where the statute describes different facets of the same criminal conduct?
3. May Mr. Bergstrom raise an unpreserved evidentiary challenge to the authentication of his signature under the guise of a sufficiency of the evidence challenge, particularly when the signature appears on self-authenticating certified copies of public documents?
4. Did the State provide sufficient evidence to sustain Mr. Bergstrom's three convictions for bail jumping?
5. Did Mr. Bergstrom receive ineffective assistance of counsel where counsel did not seek an instruction on an affirmative defense, when the evidence did not support the affirmative defense?
6. Did Mr. Bergstrom receive ineffective assistance of counsel where counsel did not object to the authentication of his signature, even though those signatures were contained within self-authenticating documents?
7. Did Mr. Bergstrom receive ineffective assistance of counsel where counsel did not object to hearsay contained in certified copies of court documents, even though several of the documents fall within

the hearsay exception for certified public records, and hearsay in prosecutor's motions is merely cumulative with the properly admitted records?

8. Does Mr. Bergstrom demonstrate his unpreserved argument regarding the to-convict instructions for bail jumping is manifest constitutional error where the instructions are based on the pattern jury instruction and a published case from another division rejects identical arguments? If the claimed error is manifest, are the instructions erroneous even though they adequately described the elements of the crime?
9. Does the cumulative error doctrine apply where Mr. Bergstrom establishes no or few errors?

### **III. STATEMENT OF THE CASE**

Zachary Bergstrom appeals from his convictions for three counts of bail jumping and one count of escape from community custody. CP 163-66.

Deputy Michael Keys arrested Mr. Bergstrom for possession of a controlled substance. RP 102.<sup>1</sup> Mr. Bergstrom was transported to the Spokane County jail. RP 116. At Mr. Bergstrom's first appearance after his arrest, the trial court required Mr. Bergstrom to post bail in order to be released and ordered him to appear at all courts dates in the event he did post bail. RP 165; Ex. 1. The court reviewed this release condition with Mr. Bergstrom. RP 165-66. A few months later, Mr. Bergstrom posted bail

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<sup>1</sup> The jury acquitted Mr. Bergstrom of this charge, so the related facts are not necessary to resolve the issues on appeal. CP 167.

and was released from custody. Ex. 2. Mr. Bergstrom failed to appear at several court dates, discussed in further detail below. Exs. 3-12.

The State amended the information to charge Mr. Bergstrom with one count of possession of a controlled substance, three counts of bail jumping, and one count of escape from community custody. CP 130-31; RP 137-39. Mr. Bergstrom did not raise any issue with the charging language. RP 137-39.

*Counts 2, 4 – Bail jumping on January 12, 2018, and May 4, 2018.*

At trial, Spokane County Deputy Clerk Samantha Foote explained that deputy clerks personally attend their assigned courtrooms, record docket notes, record statistics, and assist the court as necessary. RP 164-65. A deputy clerk tracks whether a person fails to appear for a hearing. RP 164. Ms. Foote also explained that she keeps accurate notes, and that trial courts do not issue failure to appear bench warrants for defendants who appear in court. RP 180-81.

Ms. Foote worked in Judge James Triplet's courtroom on January 12, 2018. RP 173. She recorded that Mr. Bergstrom did not appear for court that day even though he had previously been scheduled to appear for a pretrial hearing on that day. RP 173; Ex. 3. The scheduling order, filed on November 3, 2017, ordered Mr. Bergstrom to appear for court on January 12, 2018, at 10:30 a.m. and that order bore his signature. Ex. 3.

Because Mr. Bergstrom did not appear as ordered, the court authorized a bench warrant for his failure to appear. Exs. 4-6.

Ms. Foote was also working as a deputy clerk in Judge Triplet's courtroom on May 4, 2018. RP 177. Mr. Bergstrom did not appear in court that day. RP 178. Mr. Bergstrom had been previously ordered to appear for a pretrial on May 4, 2018, at 9:00 a.m. after he had failed to attend an observation period for therapeutic drug court. RP 178-79; Exs. 7, 10-12. The court authorized a warrant for Mr. Bergstrom's arrest for his failure to appear. Exs. 10-12.

*Count 3 – Bail jumping on April 18, 2018.*

Deputy Clerk Stefanie Kavadias generally performed the same duties as Ms. Foote. RP 182-83. On April 18, 2018, she was working for Judge Harold Clarke in therapeutic drug court. RP 183-84; Ex. 8. Mr. Bergstrom had been released from custody and ordered to appear in court on April 18, 2018, at 3:00 p.m. RP 184; Ex. 8. The order warned defendants a warrant could issue for their failure to appear, and the therapeutic court agreement additionally informed defendants of the need to attend the hearing in order to be admitted to drug court. RP 185. Ms. Kavadias also testified the trial court judge "always" informed a defendant of the requirement to appear when ordering their release from custody. RP 185. She recorded Mr. Bergstrom did not appear at 3:00 p.m.

as ordered and did not arrive later that day. RP 186. For drug court hearings, if a defendant showed up late, the trial court would typically have reset the hearing date instead of issuing a warrant. RP 190-92.

*Count 5 – Escape from community custody.*

Community Custody Officer Jeremy Wilson was Mr. Bergstrom's community custody officer, and Mr. Bergstrom had been supervised for at least the past 18 months. RP 194-97. He noted that defendants on community custody were ordered to report in person as directed. RP 195-96. Officer Wilson ordered Mr. Bergstrom to report to him on April 17, 2018. RP 198. Mr. Bergstrom failed to report as ordered and did not report in person in April or May. RP 198-201. Mr. Bergstrom called Officer Wilson several times during this period; Officer Wilson reminded Mr. Bergstrom that he was ordered to report in person, yet Mr. Bergstrom continued to fail to report in person as required. RP 199-200. Mr. Bergstrom was eventually arrested on unrelated charges. RP 200-01.

*Admission of exhibits.*

The State introduced several exhibits to establish that Mr. Bergstrom failed to appear for the various hearings as the witnesses described. Exs. 1-12. All exhibits were certified copies of public court records. Exs. 1-12. All exhibits bore the same cause number, and the same

court caption, *State of Washington v. Zachary Bergstrom*. RP 187; Exs. 1-12.

Mr. Bergstrom only objected to “the form” of the exhibits, apparently a reference to the fact that the State had placed them into a book or binder after showing them individually to defense counsel. RP 167-85. Mr. Bergstrom objected to every exhibit under this same basis. RP 166-80, 184-85. The court admitted all exhibits over Mr. Bergstrom’s objection as to the form. *See* RP 168.

Ms. Foote and Ms. Kavadias testified that judges orally advise defendants of the relevant language on the court documents, such as an obligation to return to court. Ex. 3; RP 169, 185. Mr. Bergstrom voir dired Ms. Foote to elicit testimony that she did not personally know Mr. Bergstrom’s signature, although the signature of a ‘Zachary Bergstrom’ was present on the exhibits which required the defendant’s signature. RP 171-72, 256-58.

Exhibit 1 is a certified copy of the release conditions the trial court ordered after Mr. Bergstrom’s first appearance on September 22, 2017, including that he was required to post bond in order to be released, and appear at all court dates if he did so. Ex. 1. This exhibit bore Mr. Bergstrom’s signature. Ex. 1; RP 256-59.

Exhibit 2 is a certified copy of the agreement between Mr. Bergstrom and his bonding company. Ex 2; RP 166, 168.

Exhibit 3 is a certified copy of a scheduling order filed November 3, 2017. Ex. 3; RP 167-68. A signature purporting to belong to Mr. Bergstrom was present on the document. Ex. 3; RP 168-69. The order set a pretrial conference hearing for Mr. Bergstrom on January 12, 2018. Ex. 3. The document contained boilerplate advisory language indicating defendants were required to attend, or a “warrant may issue.” Ex. 3.

Exhibit 4 is a certified copy of the trial court’s order authorizing a bench warrant for Mr. Bergstrom’s failure to appear at the January 12, 2018, hearing. Ex 4; RP 169-70.<sup>2</sup> Exhibit 5 is a certified copy of the State’s motion for a bench warrant for Mr. Bergstrom’s failure to appear. Ex 5; RP 171. Exhibit 6 is a certified copy of an order issuing a bench warrant for Mr. Bergstrom’s failure to appear at the January 12, 2018, hearing. Ex. 6.

Exhibit 7 is a certified copy of a scheduling order requiring Mr. Bergstrom to appear at a pretrial conference on May 4, 2018. Ex. 7. Exhibit 7 contains a place for the defendant’s signature, and the signature

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<sup>2</sup> Ms. Foote explained that judges authorize the issuance of bench warrants as a placeholder when defendants fail to appear in court, before eventually issuing a bench warrant. RP 170. Ms. Foote also explained that if someone is not present in court when their name is called, the deputy clerk or judicial assistant will page for the individual in the hallway. RP 170-71

of ‘Zachary Bergstrom’ appears in the space provided. Ex. 7. Exhibit 10 is a certified copy of an order authorizing a bench warrant for Mr. Bergstrom’s failure to appear at the May 4, 2018, pretrial hearing. Ex. 10. Exhibit 11 is a certified copy of the prosecutor’s motion for a bench warrant for Mr. Bergstrom’s failure appear at the May 4, 2018, pretrial hearing. Ex. 11. Exhibit 12 is a certified copy of an order for a bench warrant for Mr. Bergstrom’s arrest for that failure to appear. Ex. 12.

Exhibit 8 is a certified copy of an order releasing Mr. Bergstrom from custody in order to “observe” therapeutic drug court, as a prerequisite to entering drug court. Ex. 8. The order required Mr. Bergstrom to attend drug court on April 11, 2018, and April 18, 2018, at 3:00 p.m. *Id.* Exhibit 9 is an order authorizing a bench warrant for Mr. Bergstrom’s arrest due to Mr. Bergstrom’s failure to appear at the April 18, 2018, drug court hearing as required. Ex. 9.

*Mr. Bergstrom’s testimony and resolution.*

Mr. Bergstrom testified on his own behalf. RP 221. Related to this appeal, he testified he was arrested for possession of a controlled substance and was booked “right away,” remaining in jail for two months. RP 235-36. He posted bail and was aware he had a court date on January 12, 2018. RP 236. Mr. Bergstrom admitted he did not go to court that day, but at first could not remember what he was doing. RP 236-37. Eventually, he testified

he was at the hospital the night before, receiving treatment for symptoms of influenza, pneumonia, and dehydration. RP 237. When he left the hospital, he went to a friend's house for a few days. RP 237-38, 262. Two days after he was required to appear in court (and had failed to do so), he contacted his bonding company, who told him to report to them and bring in medical documentation. RP 237-38. The bonding company surrendered Mr. Bergstrom to the custody of the jail for non-compliance, and no medical documentation supporting the hospital stay was produced at trial. RP 237-39.

Mr. Bergstrom also admitted that he was later released from custody to observe drug court. RP 240-41. He claimed that he was only late for his hearing on April 18, 2018, which was inconsistent with the testimony of Ms. Kavadias. RP 232.

Mr. Bergstrom also essentially confessed to not communicating with or reporting to Officer Wilson, claiming he was confused and had difficulty keeping track of his various criminal charges and court dates. RP 243-47, 263-64. He explained he "went off the grid" when confronted with Officer Wilson's request that he turn himself in. RP 263-64.

The State had Mr. Bergstrom review his initial release conditions, which he signed at his first appearance. RP 256-57. The State also reviewed

his bond company agreement and the remainder of the orders, each purporting to contain his signature. RP 258-59.

At the conclusion of the presentation of evidence, Mr. Bergstrom did not object to any jury instruction. RP 264-67. The jury acquitted Mr. Bergstrom of the possession charge. CP 162. The jury found him guilty of the remaining counts. CP 163-66. The court ordered Mr. Bergstrom to serve 27.75 months confinement, with 27.75 months of community custody. CP 224-25. The court ordered this sentence run concurrent to an unrelated cause number, but consecutive to the sentence for a third cause number. CP 229-231. Mr. Bergstrom timely appeals. CP 218.

#### **IV. ARGUMENT**

##### **A. ESCAPE FROM COMMUNITY CUSTODY IS NOT AN ALTERNATIVE MEANS CRIME**

Mr. Bergstrom claims he did not receive constitutionally adequate notice of the crime of escape from community custody because the information charged one alternative means while the to-convict instruction contained only a different alternative means. His argument is premised on the assertion that escape from community custody is an alternative means crime. Because it is not, his claim fails.

It is reversible error if (1) a to-convict instruction contains an alternative means not charged in the information, and (2) the other

instructions as a whole do not clearly limit the crime to the charged alternative. *State v. Brewczynski*, 173 Wn. App. 541, 549, 294 P.3d 825 (2013). Determining which statutes create alternative means crimes is left to judicial interpretation. *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010). This de novo review begins by analyzing the language of the criminal statute at issue. *See State v. Owens*, 180 Wn.2d 90, 96, 323 P.3d 1030 (2014).

“An alternative means crime is one ‘that provide[s] that the proscribed criminal conduct may be proved in a variety of ways.’” *Peterson*, 168 Wn.2d at 769 (quoting *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007)). “The more varied the criminal conduct, the more likely the statute describes alternative means. But when the statute describes minor nuances inhering in the same act, the more likely the various ‘alternatives’ are merely facets of the same criminal conduct.” *State v. Sandholm*, 184 Wn.2d 726, 734, 364 P.3d 87 (2015).

The Washington Supreme Court has “disapproved of recognizing alternative means crimes simply by the use of the disjunctive ‘or.’” *Id.* Rather, the statutory analysis focuses on whether each alleged alternative describes “distinct acts that amount to the same crime.” *Peterson*, 168 Wn.2d at 770.

Pursuant to RCW 72.09.310, “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 or by failing to maintain contact with the department as directed by the community corrections officer shall be deemed an escapee and fugitive from justice.”

Mr. Bergstrom claims that the inclusion of the two disjunctive terms – “making whereabouts unknown” or “failing to maintain contact” – in the statute transformed these terms into alternative means of the crime, and, therefore, required adequate notice of the means ultimately found in the to-convict instruction. To this point, he repeatedly underlines or emphasizes the word “or” in the statutory language. Appellant’s Br. at 11. But, this bare analysis, based solely on the use of disjunctive terms, has been disapproved by the Supreme Court. *Owens*, 180 Wn.2d at 96. Mr. Bergstrom does not cite any authority other than the statutory language in support of his analysis of the applicable statute. Mr. Bergstrom fails to offer any argument on how the statute describes more than different facets of the same criminal conduct. For these reasons, this Court should decline to analyze the issue. *See State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004).

If this Court does reach his argument, the crux of the conduct prohibited by the community custody violator statute is an escape due to the violator’s willful refusal to acquiesce to supervision. Whether that is by

failing to contact the department or by failing to make the person's whereabouts known is immaterial because both are facets of escaping from supervision. The aim of the statute is to ensure that convicted persons subject to supervision bear responsibility for adequate supervision. Supervision cannot occur if a person fails to adhere to the basic requirement of communication.

The crime of failing to register as a sex offender is an example of a crime that uses disjunctive language but is not an alternative means crime. *Peterson*, 168 Wn.2d at 771. RCW 9A.44.130(1) requires a person convicted of a sex offense to regularly register his whereabouts in a county with that county's sheriff. When an offender vacates or otherwise leaves his or her residence, the statute sets forth various time limits for reregistration, depending on the offender's residential status. *Peterson*, 168 Wn.2d at 771-72. For example, an offender who becomes homeless must register within 48 hours of leaving a fixed residence, whereas an offender who moves from one fixed residence to another within a county has 72 hours to register. *Compare* RCW 9A.44.130(6)(a) with RCW 9A.44.130(5)(a). Following a move, the longest grace period available to an offender is 10 days, and all deadlines exclude weekends and holidays. RCW 9A.44.130.

The defendant in *Peterson* argued that that failure to register is an alternative means crime because it can be accomplished by three different

means: (1) failing to register after becoming homeless, (2) failing to register after moving between fixed residences within a county, or (3) failing to register after moving from one county to another. 168 Wn.2d at 769-70. Our high court disagreed, noting that the various disjunctive methods all amounted to the conduct of “mov[ing] without alerting appropriate authority,” even though each method involved different deadlines and had different conditions. *Id.* at 770. Similarly, a community custody violator refuses to acquiesce to supervision, even if the statute identifies various disjunctive methods of doing so.

As another example, in *Owens* the Supreme Court held that the trafficking in stolen property created only two alternative means, although the statute used eight disjunctive terms. 180 Wn.2d at 97-98; RCW 9A.82.050. The analysis indicated the statute only really differentiated between participating in the theft of stolen property and distributing stolen property. *Owens*, 180 Wn.2d at 97-98. This is despite the seemingly intuitive conclusion that someone who finances trafficking in stolen property performs a different act than someone who supervises or actively engages in the trafficking. The key is that both acts are participating in the trafficking.

For the statute at issue in this case, in either regard the person has escaped supervision. Failing to maintain contact as directed and making

whereabouts unknown are facets of the same criminal conduct. Logically, if a violator does not maintain contact in person as directed, they are in effect making their whereabouts unknown. No error occurred because the community custody violator statute does not create an alternative means crime. Consequently, the court did not instruct the jury on an uncharged alternative.

If this Court disagrees and determines that Mr. Bergstrom both adequately analyzed the issue and the statute creates alternative means, the error is nonetheless harmless. *See Brewczynski*, 173 Wn. App. at 549-50. This error is harmless where the instructions as a whole limit the jury's consideration to the charged alternative. *Id.* at 549.

The final amended information alleged Mr. Bergstrom "did willfully discontinue making himself or herself available to the department for supervision by making his or her whereabouts unknown." CP 131. The definitional instruction in this case provided "a person commits the crime of escape from community custody when he or she is an inmate in community custody who willfully discontinues making himself or herself available to the department for supervision by failing to maintain contact with the department as directed by the community corrections officer." CP 155. This is the "means" that Mr. Bergstrom contends should have been charged. Appellant's Br. at 10-12. The to-convict instruction similarly

contains only this language. CP 156. The jury instructions as a whole limited the jury to consider only whether Mr. Bergstrom failed to maintain contact with his community custody officer as directed. Even if Mr. Bergstrom is correct, the error is harmless.

## **B. THE STATE'S EVIDENCE WAS SUFFICIENT**

Mr. Bergstrom contends the State did not provide sufficient evidence of his convictions for bail jumping. However, he challenges the State's evidence by claiming it was not properly authenticated. He did not assert that objection at trial. That argument is also contrary to the standard of review, which requires him to admit the truth of the State's evidence and all reasonable inferences from the evidence. Furthermore, Mr. Bergstrom's signature appeared on documents that were all self-authenticating, so his argument is without merit. The State's evidence supports the elements for each charge of bail jumping.

### *1. Principles of law.*

In a criminal case, the State must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In evaluating the sufficiency of the evidence, the court must determine whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a

reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995). All reasonable inferences must be interpreted most strongly in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Reviewing courts must defer to the trier of fact “on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *Thomas*, 150 Wn.2d at 874-75. This Court does not reweigh the evidence or substitute its judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). For sufficiency of evidence claims, circumstantial and direct evidence carry equal weight. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). A claim of insufficiency of the evidence admits the truth of the State’s evidence and all reasonable inferences from that evidence. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010).

## 2. *Bail jumping – Knowledge and identity.*

A person is guilty of bail jumping if he fails to appear as required, after having been released by court order or admitted to bail, with knowledge of the requirement of a subsequent personal appearance before a court. RCW 9A.76.170(1).

The critical flaw in Mr. Bergstrom’s argument is that he waived any challenge to authenticity when he failed to object at the trial court level.

*State v. Levy*, 156 Wn.2d 709, 733-34, 132 P.3d 1076 (2006); *City of Seattle v. Bryan*, 53 Wn.2d 321, 324, 333 P.2d 680 (1958); *State v. Trader*, 54 Wn. App. 479, 484-85, 774 P.2d 522 (1989). Yet, his entire argument is premised on the assertion that the State should have authenticated his signature, contained on self-authenticating documents that he concedes were admissible. Appellant's Br. at 15. A challenge to the sufficiency of the evidence is not a vehicle to assert unpreserved evidentiary objections; in fact, the standard of review requires Mr. Bergstrom to admit the truth of the State's evidence. Since Mr. Bergstrom's appeal requires this Court to agree with his assertion that the State did not properly authenticate his signature, Mr. Bergstrom's complaint is wholly unfounded.<sup>3</sup> This Court should affirm.

If this Court chooses to address this issue, the argument that Mr. Bergstrom implicitly makes is that the State failed to prove the person on trial was the same person who earlier failed to appear. *See State v. Huber*, 129 Wn. App. 499, 502, 119 P.3d 388 (2005). If criminal liability depends on the accused being the person to whom a certain document pertains, such as with bail jumping, the State must do more than authenticate and admit

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<sup>3</sup> At trial, Mr. Bergstrom could have provided evidence the certified court records were forgeries, but the documents would still be admitted, and his contrary evidence would only go to their weight, to be considered by the trier of fact. *See* 5C Karl B. Tegland, WASH. PRAC.: EVIDENCE LAW AND PRACTICE § 902.1 (4<sup>th</sup> ed. 1999).

documentary evidence; rather, the State must prove the person named in the documents is the same person who failed to appear and is on trial. *Id.* The State can meet this burden in multiple ways, including introducing booking photographs, booking fingerprints, eyewitness identification, or distinctive personal information. *Id.* at 503.

In this case, the State provided sufficient evidence that Mr. Bergstrom was the person who failed to appear. The State offered and the court admitted several certified copies of court records with Mr. Bergstrom's signature, all providing notice of future hearing dates and informed him failure to appear could result in additional crimes. Mr. Bergstrom agrees that the documents themselves were admissible, despite his argument that they require an additional layer of authentication. Appellant's Br. at 15. Additionally, two witnesses, clerks of the court, identified each of those documents and discussed the contents of the documents, and noted Mr. Bergstrom's purported signature on the documents. The clerks testified that the case name and cause number were the same on each document.

The jury could easily verify this information because the exhibits were properly admitted into evidence. The exhibits show the same name, Zachary Bergstrom, and the same cause number as seen on the information charging the underlying possession of a controlled substance charge.

Mr. Bergstrom does not argue his identification with regard to the possession charge was in error. Thus, when the bail jumping charges were tried together with the possession of a controlled substance charge under the same cause number, any reasonable trier of fact could have logically concluded the identity of the individual alleged to have committed bail jumping was identical to the identity of the individual facing the possession charge.

A law enforcement witness testified and identified Mr. Bergstrom in court as the person whom he arrested and the State charged with possession of a controlled substance. Although it is not impossible that an imposter would appear in court for Mr. Bergstrom, and sign promises to appear in his name, it is unlikely.

Furthermore, and, perhaps most importantly, Mr. Bergstrom testified in his own defense, and *admitted* that he was arrested for possession of controlled substance, booked into jail, and given release conditions at his first appearance. Mr. Bergstrom testified that he remained in the jail for a few months. RP 235-36. He testified he bonded out. RP 236. He agreed that he was required to appear in court on January 12, 2018. RP 236. A reasonable trier of fact could also assess this evidence and was free to compare the signature from Mr. Bergstrom's first appearance to the other documents admitted as exhibits.

Ultimately, proof of the crimes of bail jumping did not require proof that Mr. Bergstrom signed the orders that memorialized the requirement that he appear at future hearings. Instead, these orders served merely as circumstantial evidence that Mr. Bergstrom had knowledge of the requirement of a subsequent personal appearance before that court. *State v. Grimes*, 165 Wn. App. 172, 192, 267 P.3d 454 (2011).

Finally, even if the unauthenticated signatures were not admitted, the remaining uncontested evidence is sufficient to prove identity. And by establishing sufficient evidence of identity, the State has established sufficient evidence of knowledge.

3. *Bail jumping – April 18, 2018, hearing subject to change.*

Mr. Bergstrom's last argument is that because the orders noted a date and time potentially subject to change, for example changed after a continuance, the State did not provide sufficient evidence he was required to appear at this hearing date as ordered. This argument is without merit.

Ms. Kavadias testified she was a deputy clerk of the superior court, working in the courtroom on the day Mr. Bergstrom was required to appear. The State admitted exhibits 8 and 9 during her testimony. Exhibit 8 and the clerk's testimony make clear that Mr. Bergstrom was released with the requirement to appear in drug court on April 11 and April 18 at 3:00 p.m. RP 184; Ex. 8. Mr. Bergstrom agreed to attend those hearings, which were

mandatory appearances for entry into therapeutic drug court. Ms. Kavadias testified the hearing took place as scheduled, that Mr. Bergstrom did not appear, and that the judge signed an arrest warrant authorization the following day for Mr. Bergstrom's failure to appear. Ms. Kavadias noted that her docket notes from April 18 indicated Mr. Bergstrom "was on the docket for drug court and he failed to appear, so the matter was struck and an order authorizing warrant was signed." RP 186. This evidence supports all elements of the to-convict instruction for this charge. CP 150.

Had the court date changed, the to-convict instruction would simply reflect the date that it had been moved to, had Mr. Bergstrom failed to appear on that date instead, and the State would have been required to prove that the defendant had knowledge of the new court date. Mr. Bergstrom's hypothetical situation is not present. Every court date is subject to change, so Mr. Bergstrom's argument would lead to absurd results. The State provided sufficient evidence that Mr. Bergstrom did not appear on April 18, 2018, as ordered, at a hearing that took place as scheduled, with knowledge that his presence was required. This Court should affirm.

### **C. DEFENSE COUNSEL WAS EFFECTIVE**

Notwithstanding his acquittal on the drug possession charge, Mr. Bergstrom asserts trial counsel was ineffective. He claims trial counsel (1) failed to pursue an affirmative defense, (2) failed to object to

Mr. Bergstrom's unauthenticated signatures pursuant to his sufficiency challenge above, and (3) failed to object to certified copies of court records as inadmissible hearsay. These claims are without merit.

*1. Principles of law.*

An appellate court reviews claims of ineffective assistance of counsel de novo. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). To prevail on a claim of ineffective assistance, a defendant must show both (1) deficient performance and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). An appellate court's scrutiny of defense counsel's performance is highly deferential, and the court employs a strong presumption of reasonableness. *Strickland*, 466 U.S. at 689; *McFarland*, 127 Wn.2d at 335-36.

To establish prejudice, a defendant must show a reasonable probability that the outcome of the hearing would have been different absent counsel's deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Failure on either prong of the test bars a claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

2. *Affirmative defense.*

Mr. Bergstrom first claims trial counsel was ineffective for failing to propose an affirmative defense to the January 12, 2018, failure to appear charge. Mr. Bergstrom could not meet his burden to establish the elements of the defense, so this claim fails.

Jury instructions are adequate if they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *State v. O'Brien*, 164 Wn. App. 924, 931, 267 P.3d 422 (2011). A defendant is entitled to have the jury instructed on his theory of the case if evidence supports that theory. *Id.* A defendant must establish each element of an affirmative defense by a preponderance of the evidence. *Id.*

RCW 9A.76.170(2) provides an affirmative defense to the crime of bail jumping: that “uncontrollable circumstances prevented the [defendant] from appearing or surrendering.” To establish the defense, a defendant must prove that he did not contribute to the circumstances in “reckless disregard of the requirement to appear or surrender” and that he “appeared or surrendered as soon as such circumstances ceased to exist.” *O'Brien*, 164 Wn. App. at 931. Thus, in order to be entitled to use the defense, a defendant must demonstrate that (1) he appeared or surrendered as soon as such circumstances cease to exist, (2) the circumstances were

uncontrollable, and (3) the defendant must not have contributed to the circumstances. *Id.* at 931-32; RCW 9A.76.170(2). Uncontrollable circumstances may include a medical condition that requires immediate hospitalization. RCW 9A.76.170(4).

The problem with Mr. Bergstrom's claim is that the evidence does not support the affirmative defense. *O'Brien* is instructive. 164 Wn. App. 924. In that case, the defendant challenged the court's refusal to give the uncontrollable circumstances instruction. *Id.* at 930-31. The appellate court affirmed, noting that the defendant did not meet his burden in producing evidence to support the instruction because the evidence showed he did not surrender himself as soon as the uncontrollable circumstances ceased to exist. *Id.* at 931-32.

Mr. Bergstrom contends that because he testified he was at the hospital, his counsel should have requested the instruction. This is insufficient to establish entitlement to an instruction on the affirmative defense, and his assertion requires the court to assume the existence of additional evidence not present in this record. Mr. Bergstrom explained he was at the hospital instead of attending his court date on January 12, 2018, but could not recall the details of his stay at first. RP 236-37. Eventually he stated he was treated for the symptoms of influenza, pneumonia, and dehydration. RP 236-37. Mr. Bergstrom actually only testified that he was

at the hospital the night *prior* to his court date. RP 236-38. When released, he went to a friend's house for a few days instead of surrendering himself. RP 237, 262. Ultimately, Mr. Bergstrom's bond company surrendered him to the jail for non-compliance. RP 238. Although he claimed to have documentation in support of this hospital visit, he did not produce it at trial. RP 238.

Fatal to his claim, Mr. Bergstrom did not surrender or appear as soon as he was released from the hospital. He freely admitted during his testimony that after his release from the hospital he went to a friend's house. As in *O'Brien*, Mr. Bergstrom was not entitled to the instruction on this basis alone; a defendant must immediately surrender themselves when the circumstances no longer exist. Additionally, Mr. Bergstrom did not surrender himself; it was his bond company that surrendered him days later. If Mr. Bergstrom had been arrested pursuant to a warrant and law enforcement returned him to court, he likely would not claim that he surrendered himself and would, therefore, be entitled to the instruction, so it is not clear how a third-party bonding agency surrendering him would be any different. Counsel could not be deficient for failing to assert an affirmative defense that Mr. Bergstrom was not entitled to use.

This Court also must presume counsel was effective. Mr. Bergstrom claimed to have documentation that supported the reason for his

hospitalization but failed to produce these documents at trial. *See* RP at *passim*.<sup>4</sup> Presumptively, effective counsel would have sought to admit that evidence at trial, if it existed, because this affirmative defense requires a defendant to prove that he or she did not contribute to the circumstances which prevented his or her appearance in court, i.e., that the defendant did not contribute to the hospitalization, such as an overdose or other drug-related complication. Mr. Bergstrom readily admitted to using drugs during the time in question. And, Mr. Bergstrom testified he was hospitalized the night prior to his required court appearance and did not clarify whether or not he remained hospitalized at the time of his hearing. In light of the presumption that counsel was effective, this Court can assume counsel made a calculated decision not to pursue the affirmative defense for this reason because counsel could not prove by a preponderance of the evidence that Mr. Bergstrom was not the reason for the hospitalization, or that he was even hospitalized at the time of his hearing.

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<sup>4</sup> No reference appears in the Clerk's Papers either, and Mr. Bergstrom appears not to have admitted any exhibits. Although the State designated its own exhibits to resolve the issues Mr. Bergstrom challenges on appeal after Mr. Bergstrom failed to do so, it is his burden to perfect the record. RAP 9.2(b). Any medical documentation not admitted at trial is outside of the record.

3. *Authentication.*

Mr. Bergstrom complains his trial counsel was ineffective for failing to object to his “unauthenticated” signatures on certified public records. His argument misses the import of the rules governing authentication. Trial counsel had no basis to object under ER 901 because the records themselves were self-authenticating and admissible as certified copies of public records.

Authentication is a specialized rule of relevance, and threshold requirement designed to assure that evidence is what it purports to be. 5C Karl B. Tegland, WASH. PRAC.: EVIDENCE LAW AND PRACTICE § 900.2, at 175, § 901.2 at 181-82 (4th ed. 1999); *State v. Rodriguez*, 103 Wn. App. 693, 701, 14 P.3d 157 (2000). The State satisfies ER 901, which requires that documents be authenticated or identified, if it introduces prima facie proof to permit a reasonable juror to find in favor of authenticity or identification. *State v. Danielson*, 37 Wn .App. 469, 471, 681 P.2d 260 (1984). “Rule 901 does not limit the type of evidence allowed to authenticate a document. It merely requires some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be.” *United States v. Jimenez Lopez*, 873 F.2d 769, 772 (5th Cir. 1989).

A party to an agreement or a party who signed a document may authenticate the agreement or document, without the presence of a certified copy, since the party can verify the accuracy of the writing. ER 901(b)(1). A document under seal or certified copy thereof is a self-authenticating public record, and no additional extrinsic evidence of authenticity is required. ER 902(a), (d). ER 901 explicitly contemplates that public records may be authenticated in ways other than the testimony of a party to the writing. ER 901(b)(7). Court records and copies of public records are admissible when certified. RCW 5.44.010; RCW 5.44.040.

RCW 5.44.040 permits admission of “[c]opies of all records and documents ... on file” in this state when certified by “respective officers having by law the custody thereof.” RCW 5.44.010 similarly permits the admission of the records of proceeding of a court when certified. A public record certified in this manner self-authenticates. ER 902(d); *State v. Monson*, 113 Wn.2d 833, 836-37, 784 P.2d 485 (1989).

Counsel did not perform deficiently by not making an objection the trial court would not have granted. The trial court would not have sustained any objection under ER 901 because all of the exhibits Mr. Bergstrom now challenges on appeal were self-authenticating certified copies of official court records. Exs. 1-12; *see* ER 902. The deputy clerks testified that the records were certified. RP 115, 166, 168-69, 171-72, 174, 176-77, 184-85.

The State would only need to authenticate the documents through another method, such as Mr. Bergstrom's signature under ER 901, if the documents were *not* self-authenticating.

That is only one method of authenticating the documents. Mr. Bergstrom cannot demonstrate prejudice because had counsel objected and the trial court inexplicably sustained it, the State simply could have called a witness such as judge or attorney who saw Mr. Bergstrom sign the documents at his first appearance or another hearing. Even if Mr. Bergstrom had testified unequivocally that he did not sign the documents, which he did not do, the State's burden only requires a prima facie showing to support admissibility, so Mr. Bergstrom's argument would only go to the weight of the evidence and not whether it was admissible. *State v. Tatum*, 58 Wn.2d 73, 76, 360 P.2d 754 (1961). In addition, the jury was free to view the signatures on the exhibits and compare them to the release conditions document Mr. Bergstrom acknowledged he signed. RP 256. The outcome would not have changed.

As with his sufficiency challenge, the argument Mr. Bergstrom is implicitly making is that the State did not prove he was the person who signed all of the documents. That claim fails, as discussed above. There is no ineffective assistance of counsel for trial counsel's failure to request the State authenticate a signature on a self-authenticating document.

4. *Hearsay.*

Mr. Bergstrom alleges trial counsel was ineffective for failing to object to allegedly hearsay statements that he failed to appear at hearings in the documents discussed above. Because these documents fall squarely within the public records hearsay exception, or are cumulative with those documents, this claim fails.

At the outset, it is important to note that Mr. Bergstrom claims in his appeal that the “only evidence” the State provided that Mr. Bergstrom was not present consisted of hearsay statements from “non-testifying witnesses in motions and orders for bench warrants.” Appellant’s Br. at 29. This is wrong. Deputy Court Clerks Ms. Kavadias and Ms. Foote both testified that they were present in the courtrooms on the relevant dates performing their official functions and that they observed and recorded that Mr. Bergstrom did not appear for the hearings as required. RP 173-74 (count 2), RP 177-78 (count 3), RP 186 (count 4). The entire premise of Mr. Bergstrom’s argument relies on an incorrect factual statement. Mr. Bergstrom cannot demonstrate prejudice where his complained of evidence is merely cumulative to properly admitted evidence, and trial counsel would have no reason to object for the same reason. This Court need not reach this argument.

Court orders that are not created for the purpose of establishing a fact or in anticipation of criminal prosecution are non-testimonial public records that fall within the recognized hearsay exception for such records. *State v. James*, 104 Wn. App. 25, 31-35, 15 P.3d 1041 (2000). Nontestimonial statements do not implicate the confrontation clause and are admissible if they fall within a hearsay exception. *State v. Hubbard*, 169 Wn. App. 182, 186, 279 P.3d 521 (2012). Certified court records are public records and fall within the recognized hearsay exception for such records. RCW 5.44.010, RCW 5.44.040; *State v. Benefiel*, 131 Wn. App. 651, 654-55, 128 P.3d 1251 (2006).

The admissibility requirement of RCW 5.44.010 is similar to the public records rule, RCW 5.44.040. *James*, 104 Wn. App. at 32-33. Although the rules within Chapter 5.44 RCW appear facially as only rules of authenticity, our Supreme Court has specifically held that RCW 5.44.040 codifies the common law public records exception to the hearsay rule. *Monson*, 113 Wn.2d at 838.

The public records exception is a “firmly rooted” exception to the hearsay rule long recognized in our state. *Steel v. Johnson*, 9 Wn.2d 347, 358, 115 P.2d 145 (1941); *Monson*, 113 Wn.2d at 843. Not all public documents meeting the literal requirements of the public records exception are admissible. To be admissible, the public 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 Wn.2d at 839.

Additionally, one older Washington case specifically treated RCW 5.44.010 as a hearsay exception comparable to the public records exception when examining whether a trial judge could rely on clerk's minutes contained in a court file. *State v. Scriver*, 20 Wn. App. 388, 399-400 n. 1, 580 P.2d 265 (1978). Second, although court documents are not specifically cross-referenced in Washington ER 803(8) as is RCW 5.44.040, court records likely fall within the broad category of "public records."

Mr. Bergstrom relies on *James* for the proposition that, like a prosecutor's declaration that a defendant failed to appear in support of an arrest warrant, a court record noting that a defendant fails to appear is inadmissible hearsay. 104 Wn. App. at 34. That argument misses the forest for the trees.

That case specifically identified orders setting release conditions, notices of trial settings, and orders for bench warrants are properly admitted under the public records hearsay exception. *Id.* at 31-32. Those are the same documents Mr. Bergstrom now claims are hearsay. *James* also held that

while a prosecutor's motion for a bench warrant and declaration in support does not fit within the exception, the admission is harmless if other corroborating evidence was properly admitted. *Id.* at 34-35. That scenario is present here.

The reasons the prosecutor's declaration constituted inadmissible hearsay in *James* are: (1) the declaration necessarily contained the prosecutor's own legal conclusion because it requested a warrant for failing to appear, (2) the declaration was made by the prosecutor in his capacity as an advocate and not as a neutral public official, and (3) the declaration contained the prosecutor's assertion of facts that the State introduced for the express purpose of their truth to prove the crime of bail jumping. *Id.* at 33-34. The court distinguished that adversarial declaration from "the type of routine court record, made and maintained in the public capacity, that merely contains facts placing it within the exception." *Id.* at 34.

Contrast that with the trial court orders in this case. They were routine court records, made in a public capacity, that contained facts relating to Mr. Bergstrom's decision not to attend court dates. They were made by public officials *in neutral capacities*: the various judges authored the orders as part of their judicial function. The records were made for the purpose of securing Mr. Bergstrom's presence in court by ordering law enforcement to arrest him, not for use in a criminal proceeding. They are public in nature

and routinely filed. The trial court's orders authoring bench warrants are plainly distinguishable from a prosecutor's *declaration*, which is intrinsically adversarial.

Trial counsel is presumed effective, and this Court may presume that trial counsel did not object on the basis that routine public documents fall squarely within a well-recognized hearsay exception. Failing that, Mr. Bergstrom cannot demonstrate prejudice when the deputy clerks testified that he was not present in court on the dates at issue.

As *James* recognized, the erroneous admission of possible hearsay in prosecutor's motions would be harmless because that hearsay is simply cumulative with the orders authorizing bench warrants and with the testimony of the deputy clerks. The trial court's orders authorizing the bench warrants contain the same information and are admissible. The testimony of the two deputy clerks also establish that Mr. Bergstrom failed to appear. Mr. Bergstrom cannot demonstrate trial counsel was ineffective because he cannot establish prejudice from the harmless admission of cumulative evidence.

#### **D. THE BAIL JUMPING TO-CONVICT INSTRUCTION WAS CONSTITUTIONALLY SUFFICIENT**

Mr. Bergstrom next argues the pattern to-convict instruction for bail jumping omits an essential element of the crime. Mr. Bergstrom did not

object at trial, so this error is not preserved unless it is a manifest constitutional error. For multiple reasons, it is not manifest error. Additionally, identical challenges have been repeatedly rejected by other divisions of this Court.

*1. Reviewability.*

A party may not assert a claim on appeal that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *Id.* at 749. This principle is embodied in Washington under RAP 2.5. The rule is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749.

Although RAP 2.5 permits an appellant to raise for the first time on appeal an issue that involves a manifest error affecting a constitutional right, our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Because there was no objection below, the claim must be a manifest constitutional error in order to merit review for the first time on appeal.

RAP 2.5(a)(3) analysis involves a two-prong inquiry: first, the alleged error must truly be of constitutional magnitude and, second, the asserted error must be manifest. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). Due process is obviously an issue of constitutional magnitude.

Analysis of whether an issue is manifest must strike “a careful policy balance between requiring objections to be raised so trial courts can correct errors and permitting review of errors that actually resulted in serious injustices to the accused.” *State v. Dunleavy*, 2 Wn. App. 2d 420, 427, 409 P.3d 1077, *review denied*, 190 Wn.2d 1027 (2018) (citing *Kalebaugh*, 183 Wn.2d at 583). To establish manifest error, the complaining party must show actual prejudice. *Kalebaugh*, 183 Wn.2d at 584. “To demonstrate actual prejudice, there must be a plausible showing ... that the asserted error had practical and identifiable consequences in the trial of the case.” *Id.* (quoting *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010)). The “consequences should have been *reasonably obvious* to the trial court, and the facts necessary to adjudicate the claimed error must be in the record.” *Dunleavy*, 2 Wn. App. 2d at 427 (internal citations omitted) (emphasis added).

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review... It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the

potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

*O'Hara*, 167 Wn.2d at 99-100. Manifest error is “unmistakable, evident or indisputable.” *State v. Burke*, 163 Wn.2d 204, 224, 181 P.3d 1 (2008). The appellant bears the burden of demonstrating manifest error. *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011).

In a footnote, Mr. Bergstrom asserts that because due process is constitutional, this Court should review his issue. Appellant’s Br. at 32 n. 6. That is only half the analysis; Mr. Bergstrom wholly fails to meet his burden because he makes no effort to analyze whether his alleged error is manifest. Regardless, the alleged error is not manifest.

The court’s instructions in this case mirrored the pattern instruction. CP 148, 150, 152; 11A WASHINGTON PRAC.: WASHINGTON PATTERN JURY INSTR. CRIM. WPIC 120.41 (4th ed. 2016). A recently published decision is on-point, having rejected an argument identical to the one Mr. Bergstrom makes in this appeal. *State v. Hart*, 195 Wn. App. 449, 455-56, 381 P.3d 142 (2016), *review denied* 187 Wn.2d 1011 (2017). This alleged error does not fit within the Washington Supreme Court’s description of manifest because it is not obvious or identifiable. The trial court’s instruction was clearly

based on the standard WPIC, and a published case on-point flatly rejects his argument. This is not to say that pattern instructions approved by the Washington Supreme Court cannot contain errors. Rather, if Mr. Bergstrom wishes this Court to consider the alleged error, he must first have raised the claim at the trial court level to preserve it for review. This Court cannot say that if it were to place itself in the same position as the trial court, with a pattern instruction and on-point precedent<sup>5</sup> rejecting this argument, it would have corrected or even identified Mr. Bergstrom's new complaint on appeal. *See O'Hara*, 167 Wn.2d at 100.

Notably, several other unpublished<sup>6</sup> decisions reject Mr. Bergstrom's argument on the basis that those appellants had not demonstrated manifest error. *See, e.g., State v. Leatherman*, 51276-9-II, 2019 WL 2950057, 9 Wn. App. 2d 1055 (2019), *review denied*, 194 Wn.2d 1008 (2019); *State v. Humphries*, 52151-2-II, 2019 WL 6499440, 11 Wn. App. 2d 1036 at \*5-6 (2019), *review denied*,

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<sup>5</sup> Decisions of a division of the Court of Appeals are binding on *all* state trial courts, even though they do not bind the other divisions for purposes of appellate review. *See, Mark DeForrest, In the Groove or in A Rut? Resolving Conflicts Between the Divisions of the Washington State Court of Appeals at the Trial Court Level*, 48 Gonz. L. Rev. 455, 487-88 (2013).

<sup>6</sup> Pursuant to RAP 14.1(a), a party may cite to an unpublished opinion after March 1, 2013 as nonbinding authority without precedential value; the court may afford it whatever persuasive value is deemed appropriate.

98033-1, 2020 WL 1557614 (2020); *State v. Wolfe*, 2020 WL 1158081 at \*8-9 (2020). This Court should decline to review this unpreserved alleged error because it is not so obvious on the record that it warrants appellate review.

2. *The to-convict instruction did not violate due process.*

Mr. Bergstrom contends the to-convict instruction relieved the State of its burden to prove he failed to appear at a court hearing as required. But the instruction notified the jury it could only convict if the State proved Mr. Bergstrom was required to attend all subsequent court dates, had knowledge he was required to attend subsequent court dates, and failed to appear for subsequent court dates; therefore, this challenge fails.

“Jury instructions need to express legal concepts in plain language for lay jurors.” 11A WASHINGTON PRAC.: WASHINGTON PATTERN JURY INSTR. CRIM. WPIC 0.10 (4th ed. 2016). The Washington Supreme Court Committee on Jury Instructions has noted that, when possible, they “translate[] complicated legal jargon into a series of simple, declarative, easy-to understand sentences, while being careful to retain legal accuracy.” *Id.* As a result, pattern instructions do not precisely follow the language of the statute. In fact, parroting statutory language “is appropriate only if the statute is applicable, reasonably clear, and not misleading.” *Bell v. State*, 147 Wn.2d 166, 177, 52 P.3d 503 (2002).

The instruction at issue here is substantively identical to the one at issue in *Hart*, 195 Wn. App. 449. In that case, Division Two addressed the argument Mr. Bergstrom makes here – that the to-convict instruction relieved the State of its burden to prove that he had failed to appear at a court hearing “as required.” *Id.* at 455. The trial court’s to-convict instruction in *Hart* also did not include “as required” after “the defendant failed to appear before a court.” *Id.* at 454. However, the instruction required the State to prove beyond a reasonable doubt that the defendant “had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court.” *Id.* The court held that the instruction did not violate Hart’s due process rights because the instruction included the element of a required subsequent appearance. *Id.* at 456.

The reasoning fully applies to Mr. Bergstrom’s case. As discussed, the evidence demonstrated that the trial court had admitted Mr. Bergstrom to bail, ordered him to attend *all* court dates, Mr. Bergstrom knew of the requirement to appear at all court dates, and Mr. Bergstrom failed to appear for three scheduled hearings as required. In this case, there was no evidence and no argument that Mr. Bergstrom failed to appear on any date other than the required dates. *See* Exs. 1-12; RP at *passim*. The State’s evidence only

demonstrated dates where Mr. Bergstrom was required to appear but failed to appear. Thus, there was no possibility the jury could be confused.

Mr. Bergstrom contends that *Hart* was wrongly decided because (1) its reasoning is erroneous in cases such as his where a defendant is released with knowledge of a required subsequent personal appearance, but is charged with bail jumping for failing to appear at a hearing other than the hearing the defendant had notice of at the time of release and (2) its reasoning conflates two different elements of bail jumping.

First, a defendant cannot have a valid claim that he or she did not fail to attend the hearing “as required” when the defendant knows that the court had ordered him or her to return for all future hearings, and the defendant fails to attend those hearings. Mr. Bergstrom would have a stronger argument if his initial release conditions only ordered him to attend hearings as required.

Mr. Bergstrom draws a distinction between evidence that the defendant failed to appear in court as required and evidence that the court ordered a hearing that the defendant was required to attend. Mr. Bergstrom argues that the to-convict instruction did nothing to inform the jury of the first prong, that he actually failed to appear as required by order. He also argues that the holding in *Hart* renders superfluous the language “as required” in RCW 9A.76.170(1).

Contrary to Mr. Bergstrom's claims, the reasoning in *Hart* is not flawed. Mr. Bergstrom's distinction between a defendant's knowledge of his or her required attendance at a future hearing and his or her actual failure to appear in court "as required" is unsupported by the reasoning in *Hart* or the language of RCW 9A.76.170(1). *Hart* specifically references the previous phrase "with knowledge of the requirement of a subsequent personal appearance," which makes it clear that a defendant cannot be convicted of bail jumping for failing to appear in court where there was no prior requirement that the defendant do so. 195 Wn. App. at 456. Omitting the words "as required" from the element of the to-convict jury instruction asking whether "the defendant failed to appear before a court" did not render the instruction legally erroneous, so long as the to-convict instruction conveyed the requirement in another way. *Id.* The instruction in this case did inform the jury of the requirement language in the third element. CP 148, 150, 152.

Mr. Bergstrom's distinction is unnecessary because regardless of any potential scheduling changes of a hearing, whether those stem from a defendant's failures to appear or other reasons, the defendant still knew that he or she is required to make a subsequent personal appearance at that hearing when it does occur.

As a final note, Mr. Bergstrom focuses on whether the decision in *Hart* is incorrect and harmful, but this Court is not bound by that decision and cannot overrule it. *See Matter of Arnold*, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018) (“one division of the Court of Appeals should give respectful consideration to the decisions of other divisions of the same Court of Appeals but one division is not bound by the decision of another division”). The State simply asserts that the reasoning in that case is sound. Mr. Bergstrom did not preserve his challenge, but even if he had, there is no error in the to-convict instruction.

#### **E. CUMULATIVE ERROR DOES NOT APPLY**

Mr. Bergstrom asks this Court to apply the cumulative error doctrine to his case, if no individual error results in reversal. Where there are no errors or the errors have little to no effect on the trial’s outcome, the cumulative error doctrine does not apply. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Mr. Bergstrom has not demonstrated any error that could have affected his trial, so the doctrine does not apply.

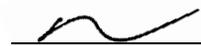
#### **V. CONCLUSION**

Mr. Bergstrom’s challenges to his convictions fail. Mr. Bergstrom did not preserve most of his arguments at the trial court. The evidence is sufficient. Trial counsel was effective. The failure to object to hearsay in the prosecutor’s motions for bench warrants was not prejudicial, as that

evidence was merely cumulative. The State respectfully requests this Court affirm.

Dated this 16 day of April, 2020.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Brett Pearce, WSBA #51819  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY BERGSTROM,

Appellant.

NO. 37023-2-III

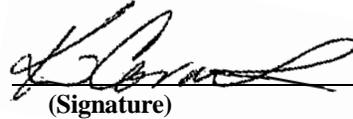
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on April 16, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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skylarbrettlawoffice@gmail.com

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(Date)

Spokane, WA  
(Place)

  
(Signature)

**SPOKANE COUNTY PROSECUTOR**

**April 16, 2020 - 9:03 AM**

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