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CLERK OF SUPREME COURT
STATE OF WASHINGTON

Supreme Court No. ____
(COA No. 55405-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DEMETRIUS WILLIAMS,

Petitioner.

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

PETITION FOR REVIEW

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

Demetrius Williams, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Williams seeks review of the published Court of Appeals' decision dated June 19, 2006, affirming his conviction for bail jumping in the second degree. A copy of the decision is attached hereto as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Prior Court of Appeals decisions hold that an essential element of bail jumping, based on express statutory language, is the nature and classification of the underlying offense for which the accused person failed to appear in court. Since the published decision in the case at bar expressly disavows those prior decisions, does the obvious conflict and substantial public interest underlying the importance of explaining the essential elements of bail jumping require this Court to accept review?

2. An information and a to-convict instruction must contain all essential elements of a charged offense. In the instant case, the

information and to-convict instruction omit any reference to the classification of the offense for which Mr. Williams failed to appear in court, an essential element of the punishment imposed for bail jumping. Did these deficiencies deprive Mr. Williams of his constitutional rights to notice of the charge against him and fair trial by jury?

3. The Sixth and Fourteenth Amendments require the prosecution plead and prove all essential elements of a charged offense. Did the Court of Appeals misconstrue controlling United States Supreme Court precedent and incorrectly rule that since the classification of the underlying charge in a bail jumping offense is relevant to punishment, it is not an element of the offense that must be plead and proved to the jury beyond a reasonable doubt?

4. Since juvenile adjudications were never proven to a jury beyond a reasonable doubt, does it violate the Sixth and Fourteenth Amendments for a trial court to increase punishment based on the existence of such juvenile adjudications?

D. STATEMENT OF THE CASE

Shortly after Mr. Williams filed a motion to suppress unlawfully seized evidence, on which he soon prevailed, the prosecution filed an information charging Mr. Williams with bail jumping. CP 92; 93-

99; 5/7/04RP 5-9. Due to the suppression of evidence, the prosecution dismissed the charge of possession of a controlled substance and proceeded solely with the bail jumping allegation. CP 86. On appeal, Mr. Williams challenged the adequacy of the information, based on its failure to state the class of felony for which Mr. Williams was charged and failed to appear, which is essential to the punishment imposed. RCW 9A.76.170(1), (3). He also argued the court failed to instruct the jury on every element essential to bail jumping since the court repeated the inadequacy in the information in its to-convict instruction. Mr. Williams further contended the court improperly included juvenile adjudications in his offender score, in violation of his Sixth and Fourteenth Amendment rights, there was insufficient evidence to sustain a conviction, and he received ineffective assistance of counsel based on counsel's failure to move exculpatory evidence into evidence at trial.

The Court of Appeals affirmed Mr. Williams' conviction, finding that despite prior rulings indicating otherwise, bail jumping does not contain an essential element requiring the prosecution to prove the type of charge from which an accused person fails to appear. The Court of Appeals rejected the remainder of Mr. Williams'

arguments, as discussed below.

The facts are further set forth in the Court of Appeals opinion, pages 1-2, and Appellant's Opening Brief, pages 5-6, as well as Appellant's Statement of Additional Grounds. The facts as outlined in each of these pleadings is incorporated by reference herein.

E. ARGUMENT

1. THE PUBLISHED COURT OF APPEALS DECISION INCORRECTLY HOLDS THAT ALL ESSENTIAL ELEMENTS OF BAIL JUMPING DO NOT NEED TO BE INCLUDED IN THE INFORMATION, CONTRARY TO NUMEROUS OTHER COURT OF APPEALS DECISIONS, THUS RAISING AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE.

a. The federal and state constitutions protect the accused person's right to notice of a criminal accusation. The Sixth Amendment and Article I, section 22 of the Washington Constitution require the prosecution to inform the accused of the nature and cause of the accusation. U.S. Const. amend. 6; Wash. Const. art. I, section 22. A charging document must contain "[a]ll essential elements of a crime." State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991).

This court has long required that the charging document include facts supporting every element of the crime charged. Kjorsvik, 117 Wn.2d at 101; State v. Leach, 113 Wn.2d 679, 689,

782 P.2d 552 (1989). Courts liberally construe an information challenged for the first time on appeal, to discern whether the necessary facts appear in any form on the charging document. State v. Ibsen, 98 Wn.App. 214, 216, 989 P.2d 1184 (1999).

b. The Court of Appeals decision directly conflicts with numerous decisions stating the underlying charge is an essential element of bail jumping. In Ibsen, 98 Wn.App. at 215; State v. Green, 101 Wn.App. 885, 889, 6 P.3d 53 (2000), rev. denied, 142 Wn.2d 1018 (2001); and State v. Pope, 100 Wn.App. 624, 629, 999 P.2d 51, rev. denied, 141 Wn.2d 1018 (2000), the Court of Appeals held that the underlying crime or charge is an essential element of bail jumping.¹

Bail jumping is defined in RCW 9A.76.170(1) as:

Any person having been released by court order or admitted to bail with the 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.

Additionally, RCW 9A.76.170(3) further specifies,

Bail jumping is:

(a) A class A felony if the person was held for, charged with,

¹ The Court of Appeals reached a similar conclusion in at least one unpublished case, State v. Walker, 123 Wn.App. 1007, 2004 WL 1922314 (2004), mentioned here to demonstrate the extent the published decision in the instant case conflicts with prior rulings by the Court of Appeal, and since Judge Becker purposefully distances herself from that prior opinion, which she authored, in Gonzalez-Lopez, infra, at 639 (Becker, J., concurring).

- or convicted of murder in the first degree;
- (b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in the first degree;
- (c) A class C felony if the person is held for, charged with, or convicted of a class B or class C felony;
- (d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

As demonstrated by the statutory language and the above-cited cases, the prosecution must allege and prove that an accused person failed to appear at a court for a specific offense, or at least a specific class of offense, in order to establish all essential elements of the bail jumping. Pope, 100 Wn.App. at 629 (An essential element of bail jumping is that the defendant was held for, charged with or convicted *of a particular crime*); see also Washington Pattern Jury Instructions: Criminal 120.41(2d ed. 1994) (WPIC).

In the case at bar, the Court of Appeals relied on a recent case, State v. Gonzalez-Lopez, 132 Wn.App. 622, 132 P.3d 1128 (2006) (decided May 16, 2006), which refused to follow Ibsen and held that the penalty classification is not an essential element of bail jumping.² In Gonzalez-Lopez, the information charged the defendant with failing to appear having been charged with

² It does not appear that the appellant sought review by this Court in Gonzalez-Lopez, further underscoring the importance that this Court accept review of the case at bar to address the Gonzalez-Lopez Court's repudiation of prior cases.

“Attempted Child Molestation in the First Degree, a felony. . . .”

The Court of Appeals ruled that no further specificity was required, since the defendant was adequately informed of the underlying criminal charge.

But in the instant case, even if Gonzalez-Lopez is correct, Mr. Williams was not afforded the same level of specificity. The prosecution merely charged Mr. Williams with failing to appear in court while charged with “Possession of a Controlled Substance, a felony.” CP 92. Possession of a controlled substance is not an obvious or discrete offense, but instead depends upon the nature of the substance to discern the level of punishment and its classification. While “attempted child molestation in the first degree, a felony” could only be one specific offense and one degree of felony, “possession of a controlled substance” could be a misdemeanor if less than 40 grams. RCW 69.50.401(e) (2004).³

For example, In State v. Goodman, the court addressed the question whether the state must plead the identity of a controlled substance as an essential element of the charge. State v.

³ The statute was changed in 2005, but at the time of Mr. Williams’ offense, the statute defining the classification of possession of a controlled substance depended upon the nature of the substance possessed, and said, “(e) Except as provided for in subsection (a)(1)(iii) of this section any person found guilty of possession of forty grams or less of marihuana shall be guilty of a misdemeanor.” RCW 69.50.401(e) (2004); Laws 2005, ch. 218 section 1.

Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004). In an amended information, the state alleged that Goodman "did knowingly and unlawfully possess a controlled substance with intent to deliver, to wit: meth." Goodman, at 779. The initial information included the complete word "methamphetamine." Id. Goodman waived his right to a jury and he was convicted in a bench trial. Id.

For the first time on appeal, Goodman challenged the sufficiency of the information, arguing that "meth" was insufficiently descriptive because numerous controlled substances could be similarly abbreviated. Goodman, at 784-90. Division Three of the Court of Appeals affirmed, concluding that the identity of the specific controlled substance is "surplusage." Goodman, 150 Wn.2d at 785 (quoting State v. Goodman, 114 Wn. App. 602, 608, 59 P.3d 696 (2002)).

The Supreme Court granted review and rejected this view as "wholly inconsistent with United States Supreme Court precedent." Goodman, at 785. Citing Apprendi, the court held that the identity of a controlled substance "is an element of the offense where it aggravates the maximum sentence with which the court may sentence a defendant." Goodman, at 785-86. Because the Legislature had imposed harsher punishment for

methamphetamine violations, the identity of the substance "was a 'fact that increases the penalty for a crime beyond the prescribed statutory maximum.'" Goodman, at 786 (quoting Apprendi, 530 U.S. at 490). "Therefore, the prosecution was obligated to allege and prove the substance Goodman possessed was methamphetamine." Goodman, at 786. The court expressly disapproved Division Three's contrary language. Id., at 787.

Here, the Court of Appeals believed that the specific felony was irrelevant to the charge, but to the contrary, a person could base a defense on the claim that he or she was actually charged with a lesser crime and thus should receive a lesser sentence, which is a typical defense in many cases. Given the departure in the case at bar and Gonzalez-Lopez from other cases plainly stating that the underlying offense is essential to a bail jumping prosecution, as it is an element of the offense, the Court of Appeals' departure from precedent requires review by this Court.

c. The published decision fundamentally misrepresents the characteristics of an essential element of an offense, contrary to the Sixth Amendment and Washington Constitution, Article I, section 22. The published decision surprisingly concludes that the level of punishment imposed for a crime has no bearing on the essential elements of that offense.

Yet the United States Supreme Court has made plain that any fact increasing the amount of punishment to which a person is exposed is indeed an element of that offense. Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (aggravating circumstances that make a defendant eligible for increased punishment “operates as the functional equivalent of an element of a greater offense”); Blakely v. Washington, 542 U.S. 296, 303-04, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004).

The bail jumping statute provides more serious penalties depending on the class of the underlying charged offense. For example, based on the Court of Appeals reasoning, the prosecution would not need to plead and prove necessary elements of a class A bail jumping. There is only one underlying offense -- first degree murder -- which will support a class A, level VI bail jumping offense. RCW 9A.76.170(3)(a). Before the state may impose a conviction and sentence for that class A, level VI crime, however, it clearly must prove that the underlying offense was first degree murder. Any other position would violate the Sixth and Fourteenth Amendments, as interpreted by Blakely and Apprendi.

Bail jumping is, in essence, an offense divided into different degrees. The state could not seriously contend that it need not plead and prove the different elements which divide many Washington offenses into different degrees. The Court of Appeals' contrary contention here conflicts with that fundamental requirement, and as a published decision, opens the door to confusion and discord regarding what elements of an offense must be proven to the jury when they are matters relevant to punishment.

Based on the substantial public interest involved and the Court of Appeals' departure from precedent, this Court should accept review.

2. THE TO-CONVICT INSTRUCTION
SIMILARLY FAILED TO INCLUDE ALL
ESSENTIAL ELEMENTS AND THEREFORE
DEPRIVED MR. WILLIAMS OF A FAIR TRIAL
BY JURY.

Fundamental to the right to due process of law is that the prosecution must prove each essential element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 53 L.Ed.2d 187 (1970); Apprendi, 530 U.S. at 490; State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995); U.S. Const. 14th amend.; Wash. Const. art. 1, 3 & 22. The essential elements include any "facts that increase the proscribed

range of penalties to which a criminal defendant is exposed.”
Appendi, 530 U.S. at 490 (citing United States v. Jones, 530 U.S.
227, 252-53, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)).

A jury verdict in Washington is defined by the “to convict” instruction. State v. Emmanuel, 42 Wn.2d 799, 820-21, 259 P.2d 845 (1953). This instruction purports to list the essential elements of the charged crime and thereby serves as the yardstick, directing the jury to the essential elements of the charge. Id.; State v. Smith, 131 Wn.2d 258, 262-63, 931 P.2d 156 (1997) (jury has the “right” to rely on the “to convict” as “complete statement of the law” and a violation is a “constitutional defect” requiring automatic reversal).

For the same reasons as argued above, the classification of the offense is an essential element of the offense. Accordingly, the court erred by failing to place that issue before the jury.

3. THE IMPROPER INCLUSION OF JUVENILE
ADJUDICATIONS IN MR. WILLIAMS'
OFFENDER SCORE DEPRIVED HIM OF HIS
RIGHT TO TRIAL BY JURY AND DUE
PROCESS OF LAW.

The Court of Appeals relied on its decision in State v. Weber, 127 Wn.App. 879, 112 P.3d 1287 (2005), rev. granted, 156 Wn.2d 1010 (2006), as dispositive of Mr. Williams’s contention that including his juvenile adjudications in his offender score violated his

rights under the Sixth and Fourteenth Amendments. Slip op. at 8. The Court of Appeals acknowledged that this Court may disagree with its decision in Weber, and if it does, the issue should be reconsidered.

Since Weber is presently on review before this court, and based upon the requirements of a jury trial and proof beyond a reasonable doubt for all facts that elevate a person's penalty as articulated in Apprendi and Blakely, this Court should accept review of the issue as it did in Weber.

4. THERE WAS INSUFFICIENT EVIDENCE MR. WILLIAMS KNOWINGLY MISSED A COURT APPEARANCE, AN ESSENTIAL ELEMENT OF BAIL JUMPING.

As Mr. Williams explained in his Statement of Additional Grounds for review, and as the Court of Appeals conceded, the prosecution was required to prove Mr. Williams knowingly missed the December 4, 2003, court hearing. RCW 9A.76.170(1); Slip op. at 9; Winship, 397 U.S. at 364. While Mr. Williams signed a document stating he had a court date on December 4, 2003, the previous hearing on October 3, 2003, contains no reference to Mr. Williams' required appearance on that date. Additionally, his signature on the document does not establish that he received a copy. The court clerk took detailed minute notations from the

October hearing but made no notation whatsoever regarding the setting of any December hearing date. Slip op. at 9, 11.

Accordingly, and for the reasons argued in Mr. Williams' Statement of Additional Grounds, the Court of Appeals improperly inferred Mr. Williams had knowledge of the December court date.

5. MR. WILLIAMS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A person accused of a crime has a constitutional right to effective assistance of counsel. United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend. 6⁴; Wash. Const. art. 1, section 22.

The Court of Appeals acknowledged Mr. Williams' trial attorney "demonstrated poor judgment" and made a "disconcerting" decision not to offer into evidence a transcript from the October 3, 2004, hearing in which there was absolutely no discussion of setting the December hearing. Slip op. at 11 and n.45. The jury requested such a transcript during deliberations but the court was

⁴ The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

unable to provide it as the transcript had not been offered into evidence.

Despite these obvious lapses in professional judgment, failing to offer relevant exculpatory evidence, the Court of Appeals concludes Mr. Williams was not prejudiced. Yet the October hearing was critical to his defense, since it demonstrated he did not have knowledge of the hearing date, and despite his signature on a piece of paper, since no one told him about the date he did not realize he was supposed to attend.

An attorney's failure to adequately investigate and offer into evidence information that would demonstrate that the defendant did not commit the offense as alleged is ineffective assistance of counsel. Lord v. Wood, 184 F.3d 1083, 1093 (9th Cir. 1999); State v. Visitacion, 55 Wn.App. 166, 173, 776 P.2d 986 (1989). Based on the essential contested nature of whether Mr. Williams knew about the December court date and the fact that no such date was discussed at the prior hearing, it plainly prejudiced Mr. Williams that his attorney failed to offer the transcript into evidence, as evident by the jury requires to review this transcript during deliberations. Slip op. at 11. Given the clear deficiency in counsel's failure to move into evidence significant exculpatory information evidence, the outcome of the trial was surely affected and reversal is

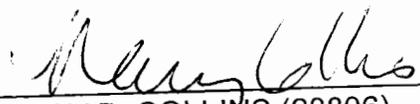
required.

F. CONCLUSION

For the reasons stated above, this Court should accept review under RAP 13.4(b).

Dated this 11th day of July 2006.

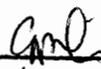
Respectfully submitted,



NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Petitioner

I have deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff/defendant containing a copy of the document to which this declaration is attached.

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



Name

JUL 11 2006

Date

Done in Seattle, Washington

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 DEMETRIUS TRE WILLIAMS,)
)
 Appellant.)
 _____)

No. 55405-1-I

RECEIVED

DIVISION ONE

JUN 19 2006

Washington Appellate Project

PUBLISHED IN PART

FILED: June 19, 2006

AGID, J. – A jury convicted Demetrius Williams of bail jumping based on the underlying charge of Possession of a Controlled Substance. In this appeal, he asks us to hold that the penalty classification of either the bail jumping charge or the underlying charge is an essential element of bail jumping that must be included in the information charging the crime and the instruction telling the jury what it must find to convict the defendant. But the penalty classification is relevant only to the sentence to be imposed on conviction, a topic the jury is not even permitted to consider in its deliberations.¹ It is not an element of the crime, so there was no infirmity in the information or the “to convict” instruction here. We affirm.

¹ The Legislature classifies felonies as A, B or C depending on their seriousness. The maximum penalty that may be imposed upon conviction is determined by the class of felony committed. RCW 9A.20.021(1).

FACTS

On April 11, 2003, the State charged Demetrius Williams with one count of felony Possession of a Controlled Substance (cocaine) in violation of RCW 69.50.401(d). On October 3, 2003, the parties agreed to continue the trial until January 9, 2004. At the continuance hearing, Williams signed a two page agreed trial continuance form that included the new trial date and the date for an omnibus hearing to be held on December 4, 2003. The court released him on his own recognizance. He failed to appear for the December 4 omnibus hearing, and the court issued a bench warrant for his arrest. He was later apprehended.

On April 13, 2004, Williams filed a motion to suppress the evidence and dismiss the possession charge. On April 23, the State filed an amended information adding one count of bail jumping based on Williams' failure to appear at the December 4 omnibus hearing. On May 18, 2004, the trial court granted Williams' motion to suppress and dismissed the possession charge. The State then filed a second amended information charging only bail jumping. A jury convicted Williams on that charge, and the trial court sentenced him to 43 months in prison, the low end of the standard range for Class C felony bail jumping.

DISCUSSION

I. Essential Elements of Bail Jumping

Williams argues for the first time on appeal that the information failed to adequately notify him of the essential elements of bail jumping. He contends the penalty class of bail jumping is an essential element of that crime, and the information must therefore identify either the class of the underlying crime on which he jumped bail

or the class of bail jumping charged. Williams may raise this argument for the first time on appeal because a challenge to the sufficiency of a charging document is of constitutional magnitude.² We review the sufficiency of a charging document de novo.³ However, because he raised his objection for the first time on appeal, we liberally construe the information in favor of validity.⁴

As a threshold matter, we note that the cases and analysis used to rule on the sufficiency of an information only apply if it omits an essential element of the crime. Because we hold the class of either crime is not an element of bail jumping, this line of cases is not relevant to the real issue presented. We will, however, discuss the sufficiency analysis because the parties briefed it that way.

The State must inform the defendant of the nature and cause of the accusation against him.⁵ The information “shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.”⁶ The “essential elements” rule requires that a charging document adequately identify the crime charged and allege facts supporting every element of the offense.⁷ Essential elements are those necessary to establish “the very illegality” of the crime itself.⁸ The objective is to provide the accused with a meaningful opportunity to prepare an adequate defense.⁹

² State v. Campbell, 125 Wn.2d 797, 800, 888 P.2d 1185 (1995).

³ Id. at 801.

⁴ State v. Tandecki, 153 Wn.2d 842, 848-49, 109 P.3d 398 (2005).

⁵ U.S. CONST. amend. VI; WASHINGTON CONST. art. I, § 22 (amend. 10).

⁶ CrR 2.1(a)(1).

⁷ State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989).

⁸ State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)).

⁹ Tandecki, 153 Wn.2d at 846 (citing State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991)).

RCW 9A.76.170 provides:

(1) Any person having been released by court order or admitted to bail with knowledge of the requirements of a subsequent personal appearance before any court of this state, or the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

...

(3) Bail jumping is:

(a) A class A felony if the person was held for, charged with, or convicted of murder in the first degree;

(b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in the first degree;

(c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony;

(d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.^[10]

Here, both the amended information and the second amended information contained identical bail jumping language:

BAIL JUMPING, committed as follows: That the defendant, on or about the 4th day of December, 2003, being charged with Possession of a Controlled Substance, a felony, and having been released by court order with the requirement of a subsequent personal appearance before Snohomish County Superior Court, a court of the State of Washington, for Omnibus Hearing on December 4, 2003, and knowing of the requirement of the subsequent personal appearance, did fail to appear as required, proscribed by RCW 9A.76.170(1), a felony.

We reaffirm our recent holding that the penalty classification is not an essential element of bail jumping.¹¹ Thus, the information charging Williams with bail jumping was adequate.

In State v. Gonzalez-Lopez,¹² the information alleged that Gonzalez-Lopez, "being charged with Attempted Child Molestation in the First Degree, a felony, . . . did

¹⁰ RCW 9A.76.170(1), (3).

¹¹ State v. Gonzalez-Lopez, No. 53592-7-I (Wash. Ct. App. May 1, 2006).

¹² No. 53592-7-I (Wash. Ct. App. May 1, 2006).

fail to appear as required, proscribed by RCW 9A.76.170(1), a felony.”¹³ Gonzalez-Lopez argued the information was inadequate because it failed to allege either the class of the underlying felony or the class of the bail jumping charge. To determine whether the penalty class of bail jumping is an essential element of the crime of bail jumping, we applied the Supreme Court’s analysis in State v. Miller.¹⁴ We examined the express language of the bail jumping statute and held that RCW 9A.76.170(1) defines all the essential elements of the crime necessary for the jury to determine guilt, and it does not include or even reference the penalty classes of bail jumping set forth in section (3). Further, we noted that nothing in the statute or case law indicates the penalty class of bail jumping is an implied essential element.¹⁵

Gonzalez-Lopez relied on, as Williams does here, State v. Ibsen, a decision reversing a bail jumping conviction because the information failed to reference the underlying offense.¹⁶ We held that Ibsen was inconsistent with Miller and otherwise unpersuasive because it ignored the plain language of the bail jumping statute. We noted, “While the *penalties* for bail jumping are divided into classes, the *crime* itself is not.”¹⁷ We held that the information was sufficient under either a strict or liberal reading.

Williams makes the same argument as Gonzalez-Lopez, and it fails for the same reason. The jury need not know of or consider the penalty class of bail jumping, so the defendant need not prepare to defend against the State’s allegation about the penalty for bail jumping. As such, it is not an essential element of that crime, and the

¹³ Id. at 4-5.

¹⁴ 156 Wn.2d 23, 27, 123 P.3d 827 (2005).

¹⁵ Gonzalez-Lopez, 53592-7-I, slip. op. at 7 (Wash. Ct. App. May 1, 2006).

¹⁶ 98 Wn. App. 214, 217, 989 P.2d 1184 (1999).

¹⁷ Gonzalez-Lopez, 53592-7-I, slip. op. at 13 (Wash. Ct. App. May 1, 2006).

information need not include it. The information in this case includes all the essential elements of bail jumping as defined in section (1) of the statute.

Williams also argues, as Gonzalez-Lopez did, that the “to convict” instruction was inadequate because it failed to specify the class of the underlying crime.¹⁸ We review challenges to jury instructions de novo.¹⁹ Jury instructions that omit essential elements of the crime violate due process because they relieve the State of its burden to prove every essential element beyond a reasonable doubt.²⁰ As with the information, the class of the underlying crime merely establishes the penalty that may be imposed following a bail jumping conviction. As we held in Gonzalez-Lopez, there is no authority for the proposition that a jury may decide this sentencing question.²¹ In fact, jurors are prohibited from considering punishment in their deliberations.²² That information is superfluous, and the “to convict” instruction should not include the class of either crime.

Williams further argues the sentencing court violated Apprendi v. New Jersey²³ and Blakely v. Washington²⁴ by relying on a fact not found by the jury, namely that the underlying charge was a class B or C felony. Apprendi held that any fact, other than the fact of a prior conviction, that increases punishment beyond the statutory maximum

¹⁸ A “to convict” instruction must contain all elements of the charged crime because the instruction dictates how the jury measures the evidence to determine guilt or innocence. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (citing State v. Emmanuel, 42 Wn.2d 799, 819-20, 259 P.2d 845 (1953)).

¹⁹ State v. Hunt, 128 Wn. App. 535, 538, 116 P.3d 450 (2005) (citing State v. Woods, 143 Wn.2d 561, 590, 23 P.3d 1046, cert. denied, 534 U.S. 964 (2001)).

²⁰ State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997).

²¹ Gonzalez-Lopez, 53592-7-I, slip. op. at 16 (Wash. Ct. App. May 1, 2006).

²² WPIC 1.02 (“You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.”).

²³ 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

²⁴ 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

must be proved to a jury beyond a reasonable doubt.²⁵ Blakely interpreted “statutory maximum” to mean the high end of the relevant standard range, or the maximum sentence the judge could impose based on the facts as found by the jury.²⁶

The “to convict” instruction for bail jumping stated in part, “To convict [Williams] of the crime of bail jumping as charged in Count I,” the State must prove beyond a reasonable doubt that he “was charged with Possession of a Controlled Substance.” Because the jury convicted Williams, it necessarily found he was charged with that crime. Bail jumping is a class C felony if the person was charged with a class B or class C felony, and the trial court sentenced Williams accordingly. RCW 9A.76.170(3)(c). There is no Apprendi problem because, as we stated in Gonzalez-Lopez, “specification of the underlying offense for the bail-jumping charge was . . . constitutionally sufficient to provide an essential element in the to convict instruction.”²⁷ The classification for sentencing purposes of both the underlying offense and the bail jumping charge is a question of law for the judge to be determined by reference to the statutes classifying each crime. Nothing in Apprendi requires that the jury make the classification determination.

II. Juvenile Convictions in Offender Score Calculation

Finally, Williams argues that the trial court erred by considering his juvenile convictions in calculating his offender score. He contends that because a juvenile has no right to a jury trial, juvenile convictions do not fall under the “prior conviction” exception in Apprendi and Blakely. We recently resolved this issue adverse to Williams’

²⁵ Apprendi, 530 U.S. at 490.

²⁶ Blakely, 542 U.S. at 303.

²⁷ Gonzalez-Lopez, 53592-7-1, slip. op. at 17 (Wash. Ct. App. May 1, 2006).

position.²⁸ In State v. Weber, we agreed with the Eighth Circuit (and disagreed with the Ninth Circuit) in holding that juvenile adjudications that include constitutionally required safeguards fall within the “prior conviction” exception.²⁹

Williams contends, as did Weber, the prior conviction exception has been eroded, and even if it remains valid, it does not extend to juvenile convictions.³⁰ He cites the Oregon Supreme Court’s recent holding in State v. Harris³¹ rejecting the Eighth Circuit’s analysis. The Washington Supreme Court recently granted review in Weber, and it will determine whether Washington follows the Eighth Circuit or the Ninth Circuit. Until it says otherwise, we will adhere to our holding in Weber. The remainder of this opinion has no precedential value. Therefore, it will not be published but has been filed for public record. See RCW 2.06.040; CAR 14.

III. Statement of Additional Grounds

Williams submitted a Statement of Additional Grounds in which he essentially argues there was insufficient evidence that he “knowingly” failed to appear and he received ineffective assistance of counsel.³² He contends he did not know about the December 4, 2003 omnibus hearing because it was never mentioned at the October 3, 2003 continuance hearing. He asserts his counsel was ineffective because she failed to offer at trial the transcript of the October 3 hearing, which allegedly showed that the

²⁸ See State v. Weber, 127 Wn. App. 879, 112 P.3d 1287 (2005), review granted, 156 Wn.2d 1010, ___ P.3d ___ (2006).

²⁹ Id. at 892 (citing United States v. Smalley, 294 F.3d 1030 (8th Cir. 2002), cert. denied, 537 U.S. 1114 (2003)); but see United States v. Tighe, 266 F.3d 1187 (9th Cir. 2001).

³⁰ See Weber, 127 Wn. App. at 889.

³¹ 339 Ore. 157, 118 P.3d 236 (2005).

³² Williams also apparently argues prosecutorial misconduct, but fails to cite specific instances to support this claim. This court will not consider a statement of additional grounds for review if it does not inform the court “of the nature and occurrence of alleged errors.” RAP 10.10(c).

judge never orally mentioned the omnibus hearing. He alleges counsel knew about this problem two weeks before his bail jumping trial.

A. Insufficient Evidence

To convict Williams of bail jumping, the jury had to find beyond a reasonable doubt that Williams “knowingly” failed to appear at the December 4, 2003 omnibus hearing.³³ Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits a rational trier of fact to find the elements of the crime beyond a reasonable doubt.³⁴ We assume the truth of the State’s evidence and all inferences that can reasonably be drawn from it.³⁵ Circumstantial and direct evidence are equally reliable.³⁶ We defer to the trier of fact’s evaluation of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.³⁷ Even though the trial court did not orally mention the December 4, 2003 omnibus hearing at the October 3, 2003 continuance hearing, Williams signed the two page agreed trial continuance form that specifically notified him of the December 4 hearing. The top of the second page stated, “The defendant must appear for trial and for all scheduled hearings. Failure to appear may result in issuance of an arrest warrant, forfeiture of bail, and criminal prosecution for Bail Jumping.” Because Williams voluntarily signed the continuance form, he is charged with knowledge of its contents despite his protests that he did not

³³ See RCW 9A.76.170(1).

³⁴ State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003).

³⁵ State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

³⁶ State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

³⁷ State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107 (citing State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992)), review denied, 141 Wn.2d 1023 (2000).

read it or did not know what it said.³⁸ Viewed in the light most favorable to the State, Williams' signature on the continuance form permitted the jury to find that he knew he had to appear at the omnibus hearing.

B. Ineffective Assistance

Williams argues his trial counsel was ineffective because she failed to offer the transcript from the October 3, 2003 continuance hearing.³⁹ We review ineffective assistance of counsel claims de novo,⁴⁰ but there is a strong presumption that counsel provided adequate assistance.⁴¹ To establish ineffective assistance of counsel, a defendant must prove that counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced him; i.e., there is a reasonable possibility that, but for counsel's deficient conduct, the outcome of the trial would have been different.⁴² This places a heavy burden on the defendant.⁴³ If defense counsel's conduct can be characterized as legitimate trial strategy or tactics, it is not ineffective.⁴⁴

Williams' defense at trial was that he did not know about the December 4, 2003 omnibus hearing because nothing was said about it at the October 3 continuance

³⁸ Nat'l Bank of Wash. v. Equity Investors, 81 Wn.2d 886, 912, 506 P.2d 20 (1973) (citing Perry v. Cont'l Ins. Co., 178 Wash. 24, 33 P.2d 661 (1934)); see also Kinsey v. Bradley, 53 Wn. App. 167, 171, 765 P.2d 1329 (1989) ("One is presumed to know and understand the contents of documents one signs . . .").

³⁹ Williams also contends his trial counsel had a conflict of interest, but he fails to cite specific evidence of any conflict.

⁴⁰ State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995), review denied, 129 Wn.2d 1012 (1996).

⁴¹ State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

⁴² State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

⁴³ State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978).

⁴⁴ State v. Ray, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991) (citing State v. Mak, 105 Wn.2d 692, 731, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986), overruled in part on other grounds by State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994)).

hearing. He maintained that even though he may have signed the agreed trial continuance form, everything was happening so quickly he never noticed that the form included the omnibus hearing date. His trial counsel cross-examined the court clerk who was present at the October 3, 2003 hearing and asked many questions based on the clerk's minute entry from that hearing. The clerk confirmed that the minute entry said nothing about an omnibus hearing being set for December 4, 2003. In fact, there was no notation at all in the portion of the minute entry form specifically designated for inserting the date of a scheduled omnibus hearing. Williams' counsel got the clerk to expressly acknowledge that the December 4, 2003 omnibus hearing was not mentioned out loud at the October 3, 2003 continuance hearing.

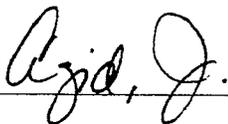
During deliberations, the jury asked the trial judge for the "court reporters [sic] minutes" from October 3, 2003. But the October 3 transcript was not available because Williams' counsel did not offer it.⁴⁵ Her failure to do so demonstrated poor judgment, as the transcript definitively proved Williams' contention that nothing about the December 4 hearing was said out loud at the October 3 continuance hearing. However, Williams fails to show how this omission prejudiced him.

Although the jury asked for additional evidence about what was said at the October 3 hearing, the available evidence, even without the transcript, showed that nothing was said out loud about the December 4 omnibus hearing. The State's case was based on Williams having signed the agreed trial continuance form that notified him

⁴⁵ It is unclear whether the jury requested the court clerk's minute entry or the court reporter's transcript. It is also unclear which document Williams addresses in his Statement of Additional Grounds. We analyze this issue based on Williams' counsel's failure to offer the transcript. While the minute entry also supported Williams' defense, his counsel's failure to request admission of the transcript is more disconcerting because it is the official verbatim recording of what was said at the October 3 hearing.

of the December 4 hearing. While the transcript would have confirmed the clerk's testimony that nothing was said about the December 4 hearing, it would have done nothing to change the fact that Williams signed the continuance form. As stated above, the agreement alone was sufficient evidence for the jury to find that Williams knew about the December 4 hearing. While Williams' counsel may have erred in failing to offer the October 3 transcript, there is no reasonable probability that, but for her error, the outcome would have been different.

We affirm.



WE CONCUR:

