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NO. 61731-1-I

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

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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STATE OF WASHINGTON,

REC'D

Respondent,

NOV 19 2008

v.

King County Prosecutor  
Appellate Unit

NIKEEMIA COUCIL,

Appellant.

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

The Honorable Catherine Shaffer, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it sentenced appellant for a felony bail jumping offense, because he was convicted only of misdemeanor harassment as the underlying offense.

2. Appellant was denied a fair trial when the arresting officer impermissibly commented on the complaining witness' veracity and appellant's guilt.

Issues Pertaining to Assignments of Error

1. RCW 9A.76.170(3) sets forth the classifications for bail jumping. It provides that if the underlying offense is charged as a felony or results in a felony conviction, the bail jumping offense will be classified as a felony. The statute also provides that if the underlying charge or conviction is a misdemeanor, the bail jumping offense is classified as a misdemeanor. Here, appellant was originally charged with felony harassment as the underlying offense; however, he was convicted only of misdemeanor harassment as a lesser-included offense. After a jury later found him guilty of bail jumping, the trial court sentenced appellant for felony bail jumping despite his misdemeanor conviction for the underlying offense. Was this error?

2. During the trial for harassment, the arresting officer stated he had found the complaining witness to be the victim of threats. He also stated appellant had "maliciously harassed the victim." Was appellant denied a fair trial due to these impermissible comments?

**B. STATEMENT OF THE CASE**

1. Procedural Facts

On July 15, 2007, the King County prosecutor charged appellant Nikeemia Coucil with one count of felony harassment. CP 1-5. After appellant failed to appear at a hearing scheduled for August 14, 2007, the State amended the information, adding one count of bail jumping. CP 8-10. On March 26, 2008, the information was amended again to add one count of malicious harassment. CP 19-20.

The trial court granted Coucil's motion to sever the bail jumping charge. 2RP 6.<sup>1</sup> From March 26 to April 1, 2008, a trial pertaining to the harassment charges was held.<sup>2</sup> A jury found Coucil guilty only of the

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<sup>1</sup> Transcripts are referred to as follows: 1RP (July 31, 2007); 2RP (March 26, 2008); 3RP (March 27, 2008); 4RP (March 31, 2008); 5RP (April 1, 2008); 6RP (April 21, 2008); 7RP (April 22, 2008); 8RP April 25, 2008).

<sup>2</sup> The Honorable Catherine Shaffer presided over this trial.

lesser-included offense of misdemeanor harassment. CP 23-24. Coucil was later tried for bail jumping and found guilty.<sup>3</sup> CP 96.

On April 25, 2008, the trial court entered the misdemeanor harassment judgment, sentenced appellant to 12 months of community supervision, and ordered him to participate in anger management.<sup>4</sup> CP 98-100. The trial court also entered a felony bail jumping judgment, sentencing appellant to 17 months of confinement. CP 101-08. Appellant timely appeals. CP 109-19.

2. Substantive Facts

On June 26, 2007, police officers responded to a 911 call from King County Metro bus rider Paul Carlson. 3RP 118. Carlson had told the 911 operator that a man (later identified as Council) was threatening him as they rode on a metro bus. 3RP 118; 4RP 58-59. Officer Dustin Carrell pulled the bus over, boarded it, spoke to some passengers, and observed Coucil swearing at Carlson. 3RP 119-21. Coucil was removed from the bus and detained. 3RP 125.

Meanwhile, Carlson gave an oral statement to Officer Vasilios Sideris, who had arrived shortly after Carrell. 4RP 32, 38. Carlson

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<sup>3</sup> The Honorable Julie Spector presided over this trial.

<sup>4</sup> The bail jumping case was transferred back to Judge Shaffer for a consolidated sentencing hearing.

claimed Coucil had threatened to kill him, and he feared for his life. 4RP 40, 41, 44. Carlson said Coucil used racially derogatory language during the incident, calling him "cracker." 4RP 40.

While Carlson gave his statement, Carrell spoke with Coucil's community custody officer (CCO), who told Carrell to arrest Coucil. 4RP 23. Carrell did so. 4RP 23.

### 3. Facts Pertaining to Bail Jumping Issue

Prior to the bail jumping trial, defense counsel moved to have the charge downgraded to a misdemeanor since appellant had been convicted of misdemeanor harassment as the underlying offense. 6RP 6-7. In response, the State argued it could proceed with the felony bail jumping charge since there was no conviction at the time Coucil was charged. 6RP 8. The trial court found the State could proceed as charged and the to-convict instruction would simply include language indicating appellant had been charged with a felony. 6RP 13-14.

The trial court also noted, however, that the real question was what penalty Coucil would face if the jury found him guilty and whether the bail jumping offense would have to be downgraded to a misdemeanor at sentencing. 6RP 13, 18. The trial court declined to speculate as to the sentencing consequences, leaving that an open question. 6RP 18.

During the sentencing hearing, neither the parties nor Judge Shaffer (who had not been involved in the above noted pre-trial motion) discussed how the bail jumping offense should be classified, and appellant was sentenced to felony bail jumping. 8RP; CP 101-08.

4. Facts Pertaining to Improper Comments

During the State's case in chief at the harassment trial, the prosecutor asked Officer Carrell how he initially came into contact with Coucil. 4RP 118. Carrell responded:

I was dispatched to a 911 call from a complainant, later found to be the victim, for, he was being threatened. His life was being threatened on a Metro coach bus.

3RP 118.

Shortly afterward, the prosecutor again inquired about Carrell's initial contact with Coucil. 3RP 123. Carrell explained that before he made contact with Coucil he contacted Carlson, stating "I first made contact with who [sic] I later found to be the victim." 3RP 123.

During the State's redirect of Carrell, the prosecutor attempted to establish the fact that Carrell had grounds to arrest Coucil even if he had not spoken to Coucil's CCO. 4RP 46. When the prosecutor asked Carrell to explain why he would have arrested Coucil, Carrell responded, "Because he maliciously harassed the victim." 4RP 26. The prosecutor then asked,

"Did you have probable cause at the scene to believe that that had occurred?" RP 26. Carrell responded, "Yes." The prosecutor then asked, "And that is the standard you need to arrest somebody." 4RP 26. Again, Carrell answered, "Yes." 4RP 26.

Carlson also testified for the State. He claimed Coucil had threatened to kill him and repeatedly used racially derogatory terms. 4RP 50, 53-56, 88. He also said he believed Coucil would follow through on these threats and he was frightened for his life. 4RP 54, 57.

In closing argument, the prosecutor emphasized Carlson's testimony, arguing that if the jury believed Carson was credible it had to return a guilty verdict for malicious harassment and felony harassment. 4RP 102, 106, 108, 110. The jury did not do so and, instead, found appellant guilty of the lesser-included misdemeanor offense. CP 23-24.

C. ARGUMENT

1. THE TRIAL COURT ERRED WENT IT SENTENCED COUCIL FOR FELONY BAIL JUMPING.

Although Coucil was charged with felony harassment as the underlying offense for bail jumping, he was only convicted of misdemeanor harassment. As a result, Council's bail jumping offense should have been classified as a misdemeanor, and he should have been sentenced accordingly.

RCW 9A.76.170 provides:

(1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of 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."

Under Washington law, to be convicted of bail jumping, the defendant must be charged with "a particular [underlying] crime." State v. Pope, 100 Wn. App. 624, 627, 999 P.2d 51 (2000). However, the classification of the underlying felony or misdemeanor is not an essential element of bail jumping. State v. Williams, 162 Wn.2d 177, 188, 170 P.3d 30 (2007). Instead, the Washington Supreme Court indicated the

classification of the underlying charge is a penalty issue to be considered during sentencing:

"[W]hile the penalties for bail jumping are divided into classes, the crime itself is not." Therefore, the classification for sentencing purposes of both the underlying offense and the bail jumping charge is a question of law for the judge.

Id., at 191 (citing State v. Gonzalez-Lopez, 132 Wn. App. 622, 635, 132 P.3d 1128 (2006)).

Here, Coucil had been charged with an underlying felony at the time he was charged with bail jumping. However, he had only been convicted of a gross misdemeanor at the time of sentencing. Thus, the question here is whether the underlying charge or the underlying conviction controls the classification of a bail jumping offense for sentencing purposes.

RCW 9A.76.170(3) provides that a bail jumping offense can be classified as a felony at the time of sentencing if the defendant was "held for, charged with, or convicted" of a felony. However, the statute also provides that a bail jumping offense can be classified as a misdemeanor at the time of sentencing if the defendant was "held for, charged with, or convicted" of a gross misdemeanor. RCW 9A.76.170(3)(d). Thus, on the one hand, the statute can be read as supporting the position that Coucil's bail jumping offense should be classified based on the underlying charge. On the other hand, however, it can be read as supporting the position that

Coucil's bail jumping offense should be classified based on the underlying conviction. The statute is silent as to how to resolve this apparent ambiguity. As such, the rule of lenity, which requires this Court adopt the interpretation most favorable to the defendant, applies. See, State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991).

Applying the rule of lenity, this Court should interpret RCW 9A.76.170(3) as requiring the trial court to classify the bail jumping offense as a misdemeanor. Hence, this Court should vacate appellant's judgment and sentence for felony bail jumping and remand for misdemeanor sentencing.

2. COUCIL WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN OFFICER CARRELL WAS PERMITTED TO IMPERMISSIBLY COMMENT ON COUCIL'S GUILT AND CARLSON'S VERACITY.

No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference, because it violates the defendant's right to a trial by an impartial jury and his right to have the jury make independent evaluation of the facts. State v. Haga, 8 Wn. App. 481, 490, 507 P.2d 159 (1973). Likewise, witnesses are not permitted to testify, whether by direct statement or inference, regarding the veracity of another witness because such testimony invades the fact-finding province of the jury. State v. Kirkman, 159 Wn.2d 918, 927, 155

P.3d 125 (2007). Where the defendant fails to object to a witness's comment on the veracity of another witness at trial, the standard of review on appeal is "manifest error." RAP 2.5(a)(3). "Manifest error" exists when the jury hears "a nearly explicit statement by the witness that the witness believed the accusing victim." Kirkman, 159 Wn.2d at 936.

Here, the jury had to determine, as an element of the crime of harassment, whether Carlson was threatened. Officer Carrell stated that he "found" Carlson to be the "victim" of threats (3RP 118, 123), which directly conveyed to the jury that Carrell believed Carlson was telling the truth about being the victim of a crime. However, that should have been a fact for the jury to determine, not Carrell. See, Kirkman, 159 Wn.2d at 936. Importantly, this is not a case in which Carrell was simply referring to Carlson as the "victim" as a generic term. Instead, Carrell made a specific distinction between Carlson the complainant and Carlson the victim. Carrell initially referred to Carlson as the "complainant." 3RP 118. Carrell told to the jury that he "later found" Carlson was the "victim" of threats. Id. These comments constituted a "nearly explicit" statement that Carrell believed Carlson.

Additionally, Carrell commented on Coucil's guilt when he testified that "[Coucil] maliciously threatened the victim." 4RP 26. Although the

prosecutor attempted to soften the impact of this statement by asking Carrell if there was probable cause at the scene to believe the crime occurred, this was insufficient to mitigate the damage of Carrell's direct statement of Coucil's guilt. It did not matter that the jury heard that in theory, officers need only to establish probable cause in order to arrest someone and that Carrell believed there was probable cause at the scene, because the prosecutor never asked Carrell to clarify whether his opinion was actually based on this probable cause standard. Instead, the jury was left with the impression Carrell would have arrested Coucil, not just because he had probable cause, but because Carrell actually believed Coucil was guilty of harassing Carlson.

Carrell's comments were impermissible and constitute constitutional error. Kirkman, 159 Wn.2d at 936. Moreover, they were not harmless. As Washington Courts have noted, such comments are particularly troubling when the testifying witness is an officer because "[t]estimony from a law enforcement officer regarding the veracity of another witness may be especially prejudicial because an officer's testimony often carries a special aura of reliability." Kirkman, 159 Wn.2d at 28.

The prejudice of these comments was also amplified by the fact that the jury did not find the State's theory of the case persuasive. The State's

theory was highly dependant on the jury finding Carlson credible. In closing argument, the prosecutor argued repeatedly that if the jurors believed Carlson was a credible witness, they were required to find him guilty of felony harassment. 4RP 102, 106, 108, 110. The jury declined to do so. With the jury discounting Carlson's testimony, this left Carrell as the only other testifying witness who saw Coucil and Carlson interacting on the bus. 3RP 121. As such, Carrell's improper comments that Carlson was the victim of threatening behavior took on even greater weight.

In conclusion, Carrell's comments on Carlson's veracity and Coucil's guilt were improper, invaded the province of the jury, and were not harmless. Hence, Coucil was denied a fair trial and this Court should reverse his misdemeanor harassment conviction.

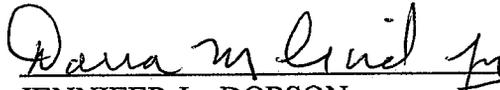
D. CONCLUSION

For the foregoing reasons, this Court should reverse Coucil's harassment conviction and vacate his felony bail jumping judgment and sentence.

DATED this 17<sup>th</sup> day of November, 2008.

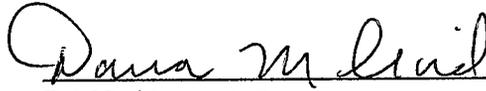
Respectfully submitted,

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