

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

STATE OF WASHINGTON,

Respondent,

v.

JASON CAMPBELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF CLARK COUNTY

The Honorable Jay B. Roof

APPELLANT'S OPENING BRIEF

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WASHINGTON APPELLATE PROJECT
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A. ASSIGNMENTS OF ERROR

1. In Jason Campbell's trial on a charge of first degree trafficking of stolen tires, the trial court erred in granting the State's request to instruct the jury on second degree, "reckless" trafficking.

2. The trial court violated Mr. Campbell's federal and state constitutional rights to control his defense under State v. Lynch, 178 Wn.2d 487, 309 P.3d 482 (2013), by forcing him to accept an affirmative defense jury instruction over his objection.

3. The court in so doing also violated Mr. Campbell's right to counsel and his Due Process rights.

4. The trial court erred in giving the jury a missing witness instruction.

5. The definition of recklessness relieved the State of its burden of proof on second degree trafficking.

6. The trial court erred in answering a jury inquiry over Mr. Campbell's objection.

7. The trial court erred in denying defense counsel's pre-trial motion to withdraw on the basis of conflict.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. At trial on a charge of first degree trafficking in stolen property, a Sheriff's Deputy testified that Jason Campbell admitted

being pretty sure that the tires, which he obtained from his cousin who had a theft record, were stolen. He also told the Deputy that his neighbor, who advertised the tires online, was not involved and did not know the tires were stolen. Jason testified at trial, however, that he had no idea the tires were stolen, and he had told the Deputy so when he was interrogated. The State either proved all, or nothing – proving that Mr. Campbell had knowledge, or failing to prove he had knowledge. Did the trial court err in granting the State’s request to instruct the jury on the next lower degree of trafficking (second degree, “reckless” trafficking), where a party is not entitled to a lesser offense instruction simply because of the risk that the jury might disbelieve or reject the evidence of the greater crime?

2. On the additional charges of two counts of bail jumping, did the trial court violate Mr. Campbell’s Sixth Amendment and Article 1, section 22 right to control his own defense, by instructing the jury on the affirmative defense?

3. Did the court also violate Mr. Campbell’s Sixth Amendment and Wash. Const. art. 1, § 22 right to counsel and his Due Process rights under the Fourteenth Amendment and Wash. Const. art. 1, § 3, requiring automatic reversal?

4. Where Mr. Campbell was not raising the affirmative defense and the witnesses in any event were not peculiarly available to him, did the trial court abuse its discretion in giving the jury a missing witness instruction on ground that he did not call certain witnesses to support it?

5. Did the definition of recklessness, by generically defining the term by reference to disregarding the risk of a "wrongful act," by typographically omitting other language as to what must be disregarded by the defendant, and by telling the jury that the defendant could be deemed reckless if he acted intentionally, relieve the State of its burden of proof on second degree trafficking? Was this manifest constitutional error? Does it require reversal?

6. Over defense objection, the trial court answered a jury inquiry by telling the jury – erroneously -- that the defendant was charged with first degree trafficking, and by telling the jury that this offense was a class B felony. Did the court err by providing the jury with evidence on the first count of bail jumping that had not been elicited in the proofs? Did the trial court also comment on the evidence?

7. Did the trial court err in denying defense counsel's pre-trial motion to withdraw on the basis of conflict, where it was premised on RPC 1.7?

C. STATEMENT OF THE CASE

1. Charging. Jason Campbell was charged with trafficking in stolen property in the second degree. CP 1-3; RCW 9A.82.055. The charge was laid after a Kitsap sheriff's deputy investigated an online Craigslist advertisement placed by Campbell's neighbor, David Hogdgon, offering the sale of several tires. The tires were depicted in a photograph that looked like it had been taken in front of Mr. Campbell's home on Dyes Inlet. They appeared to be similar to the tires that had recently been reported stolen from the LK Auto Repair business. CP 3-11.

When Mr. Campbell refused to plead guilty, the prosecutor added two additional counts, for bail jumping under RCW 9A.76.170, based on Jason having arrived late to two Kitsap court hearings earlier in the pendency of the case, on January 28 and February 4, 2013. The amended information, filed July 22, 2013, also upgraded the trafficking charge, count 1, to trafficking in the first degree pursuant to RCW 9A.82.050. 10/9/13RP at 222-23; CP 18-21 (amended information, charging "knowingly" trafficking).

2. Trial. At trial, Deputy Sonya Matthews testified that Mr. Campbell told her during Mirandized interrogation that his cousin Michael Smith had brought the tires by his house; Campbell was pretty sure they were stolen because of Smith's theft record, but he was adamant that his neighbor Hogdgon was not involved. 10/8/13RP at 78-81, 92, 98.

As to the bail jumping, Mr. Campbell told the jury about how he had no telephone no car and no license; what he did do was carefully and diligently arrange for car rides to court for January 28, and then for February 4, 2013. When these people did not arrive, he begged a ride or walked all the way to the Kitsap court, arriving both times as court was ending.¹ 10/8/13RP at 151-55.

Mr. Campbell objected unsuccessfully to the court's instructing the jury on the lesser offense of second degree trafficking (which was the original charge before it was upgraded to first degree). The jury subsequently issued a verdict of guilty on the second degree offense. 10/9/13RP at 218, 222-23.

¹ The record indicates that Mr. Campbell was able to have the bench warrants issued upon each "Failure to Appear" quickly quashed. Docket in 13-1-00077-4 (entries of 1/28/13 to 2/6/13); Supp. CP ____, ____ (Sub #'s 5, 10) (minutes of 1/31/13 and 2/6/13).

Mr. Campbell also objected to the court instructing the jury on the affirmative defense of Uncontrollable Circumstances, a statutory necessity defense to bail jumping that admits proof of the elements of the crime, and which a defendant must prove by a preponderance of the evidence. 10/9/13RP at 148-50; 10/9/13RP at 221-22, 227-28.

Following the jury verdict of guilty on the lesser offense of second degree trafficking, and on the two charges of bail jumping, Mr. Campbell was sentenced to standard range terms on the convictions. CP 53-64.

Mr. Campbell timely appeals. CP 65.

D. ARGUMENT

1. MR. CAMPBELL'S SECOND DEGREE TRAFFICKING CONVICTION, PROCURED UNDER A LESSER OFFENSE INSTRUCTION TO WHICH THE PROSECUTION WAS NOT ENTITLED, MUST BE REVERSED.

a. Objection - all or nothing case. The jury in Mr. Campbell's case could either find the State's claim of knowledge proved beyond a reasonable doubt, or reject the claim, and acquit Mr. Campbell of first degree trafficking. As Mr. Campbell stated when objecting to the lesser offense instruction on second degree trafficking, this case was one of "it's all or nothing . . . that would be

the objection.” 10/9/13RP at 223. Mr. Campbell may appeal. RAP 2.5(a).²

b. State’s case of knowledge, and defense case of no knowledge. Kitsap County Sheriff’s Deputy Sonya Matthews related how she investigated the online *Craigslist* advertisement, going to the vicinity of the address listed, where she noticed a property across the street that matched the photograph where the stolen tires had been photographed. 10/8/13RP at 75, 85. Deputy Matthews then observed suspicious tires in the garage area that initially seemed to match the description of the stolen property.

² There was no ‘waiver’ of this issue for appeal on ground that defense counsel at one point agreed with the prosecutor’s legal statement that “both [the State and defense] sides can request [a] lesser included.” 10/9/13RP at 223 (agreeing that lesser offense instructions are “equally available to both the State and defense” per State v. Tamalini, 134 Wn.2d 725, 728-29, 953 P.2d 450 (1998)). Mr. Campbell’s counsel specifically objected to the proposed instruction, first indicating to the court that Mr. Campbell had refused to plead guilty to the original second degree charge, resulting in the amended information upgrading the charge to first degree. 10/9/13RP at 222. Mr. Campbell stated that this case was one of “it’s all or nothing.” 10/9/13RP at 223. As counsel properly argued, “that would be the objection.” 10/9/13RP at 223; see also State v. Grier, 171 Wn.2d 17, 30-31, 246 P.3d 1260 (2011) (decision about lesser included offenses is partly the defendant’s decision and partly counsel’s after consultation).

Further, of course, conviction for a crime not charged and not classifiable as a lesser offense is always constitutional error, and is always manifest, and thus appealable under RAP 2.5(a)(3). State v. Nguyen, 165 Wn.2d 428, 433-34, 197 P.3d 673 (2008) (citing, *inter alia*, State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) and State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (error is manifest where result -- conviction -- is indisputable)); and Wash. Const. article I, section 22 and State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988) (error to convict a defendant of a crime that is not charged)). The principle is longstanding. See, e.g., State v. Smith, 2 Wn.2d 118, 98 P.2d 647 (1939) (individual charged with larceny could not be convicted of embezzlement).

After some discussion with the resident, Jason Campbell, the Deputy arrested and Mirandized him. 10/8/13RP at 78-81. The Deputy testified that Mr. Campbell gradually admitted to knowing the tires, which his cousin Michael Smith had brought by, were stolen:

But I talked to him about knowing that they were stolen, and he told me that he was pretty sure that they were stolen, but he didn't ask [Smith] so he didn't know for sure.

10/8/13RP at 81. When Deputy Matthews told the defendant outright that the stolen tires were on his property, Mr. Campbell admitted that he did know what she was talking about; he said he had received the tires from his cousin, Smith, who had been involved in "theft issues" before. 10/8/13RP at 92. Mr. Campbell defended his neighbor, David Hogdgon, who had listed the tires online; the Deputy testified that

Jason was adamant that the neighbor did not know they were stolen, that David was not involved in this.

10/8/13RP at 98.

In the defense case, Mr. Campbell testified that Michael Smith had showed up at his house with some tires. Smith told Jason that he had purchased them for his Jeep but they did not fit the vehicle. 10/8/13RP at 160-61. Smith also wanted to borrow

some kind of tool or jack to try and make them fit; Mr. Campbell told Smith to take the tires “down the road,” and Mr. Smith left, perhaps to make arrangements with David Hogdgon to sell the tires online. 10/8/13RP at 159-61. When Smith left Jason’s house, he took the tires with him – they did not ever stay on the Campbell property or at the Campbell house. 10/8/13RP at 161-62.

Jason testified that he told Deputy Matthews, when she showed up and questioned him several days later, that he did not know the tires were stolen and “[he] had no idea what she was talking about.” Id.

Mr. Campbell also told the jury that, in hindsight, the Deputy’s inquiry about stolen tires now made sense, because he knew from the newspaper about things Michael Smith had been involved in, like thievery. 10/8/13RP at 162, 174. However, prior to that conversation with the Kitsap deputy, Mr. Campbell never thought that the tires might be stolen. 10/8/13RP at 162. When pressed as to whether he even did “feel at all” that Smith’s tires might be stolen at any time when Smith had arrived, and then left with the tires, Jason testified:

Not at all. If they were chrome rims or something flashy. They were regular tires. No reason to think

they were stolen. They were nothing out of the ordinary, very ordinary.

10/8/13RP at 163. Mr. Campbell did not even know these tires had been listed for sale online, until Deputy Matthews interrogated him about that also. 10/8/13RP at 172-73, 175-76.³

c. Instructing the jury on the lesser offense of second degree trafficking was not permissible under the factual prong of the *Workman/TamalinilFernandez-Medina* analysis. Upon the prosecutor's request for the instruction, the trial court gave it, over Mr. Campbell's objection and exception. 10/9/13RP at 218, 222-23 (objection), 227-28 (exception); CP 38-42 (lesser offense jury instructions).

The State was not entitled to the second degree trafficking instruction under lesser offense analysis of Workman and Fernandez-Medina, infra, and the giving of that instruction over his specific objection was error.

³ In any event, the tires that Deputy Matthews saw at Mr. Campbell's house had nothing to do with any tires stolen from LK Auto Repair; the actual stolen tires were later located on a car being driven by . . . Michael Smith. 10/8/13RP at 78, 83, 87-89. Smith testified as a defense witness that he purchased the tires in July or August of 2012, from a woman in a pick-up truck who approached him at Hank's gas station near Chico. Mr. Smith later visited his friend Mr. Campbell's home on Dyes Inlet to use tools to try to fit the tires to his Jeep. 10/9/13RP at 192-94. He did not speak with Campbell that day, and left the tires at the property briefly but shortly retrieved them. 10/9/13RP at 192-95.

d. A lesser offense instruction on reckless trafficking may not be obtained based on a concern that the jury may disbelieve or reject the State's accusation of knowledge.

Pursuant to the Sixth Amendment of the United States Constitution⁴ and Article 1, § 22 of the Washington Constitution, a criminal defendant may only be convicted of those offenses charged in the information, or those offenses which are either lesser included offenses, or inferior degrees of the charged offense. Schmuck v. United States, 489 U.S. 705, 717-18, 109 S.Ct. 2091, 103 L.Ed.

⁴ The Sixth Amendment, which governs several issues in the present case, provides in part:

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 defence.

U.S. Const. amend. 6. The Washington Constitution, Article 1 section 22 provides in pertinent part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases[.]

Wash. Const. art. 1, § 22.

734 (1989); State v. Tamalini, 134 Wn.2d 725, 731, 953 P.2d 450 (1998) (citing State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1998) and RCW 10.61.003); U.S. Const. amend. 6; Wash. Const. Article 1, § 22.

An instruction on a lesser included offense is warranted where: (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged (the “legal prong” of the analysis); and (2) the evidence in the case supports an inference that only the lesser offense was committed (the “factual prong”). State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997) (relying on State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). Similarly, it has been stated that an instruction for an inferior degree offense is proper only where:

the statutes for both the charged offense and the proposed inferior degree offense “proscribe but one offense;” [and] there is evidence that the defendant committed only inferior offense.

Tamalini, 134 Wn.2d at 732. Thus, “the test for determining if a party is entitled to an instruction on an inferior degree offense differs from the test for entitlement to an instruction on a lesser included offense only with respect to the legal component of the test.” State v. Fernandez–Medina, 141 Wn.2d 448, 455, 6 P.3d

1150 (2000). The “factual prong” of both tests is the same: the evidence must support an inference that the defendant committed **only** the lesser included or inferior degree offense. Fernandez–Medina, 141 Wn.2d at 445–46.

Thus the instruction should be given only “[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing Beck v. Alabama, 447 U.S. 625, 635, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)).⁵

It is true that in applying the factual prong for either type of lesser offense, a court must view the supporting evidence in the light most favorable to the party requesting the instruction. Fernandez-Medina, at 455-56. However, the rule is that an instruction on a lesser offense is not proper simply because the jury might disbelieve the State’s case. Fernandez-Medina, 141 Wn.2d at 456. Instead, the affirmative evidence must support the inference that only the lesser offense was committed. Fernandez-Medina, at 455-56; State v. Peterson, 133 Wn.2d 885, 891, 948

⁵ The Court of Appeals reviews a trial court's determination of the factual prong of the Workman test for an abuse of discretion. State v. LaPlant, 157 Wn. App. 685, 687, 239 P.3d 366 (2010). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or untenable reasons. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

P.2d 381 (1997) (the evidence must support inference that the defendant "committed only the inferior offense") (quoting State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979); State v. Daniels, 56 Wn. App. 646, 651, 784 P.2d 579 (1990)); see also State v. Henderson, ___ Wn. App. ___, 321 P.3d 298 (Wash. App. Div. 2, March 19, 2014) (NO. 42603-0-II) (citing State v. Perez–Cervantes, 141 Wn.2d 468, 481, 6 P.3d 1160 (2000) (to determine whether factual prong is satisfied, court determines whether facts affirmatively establish guilt of lesser offense, to the exclusion of greater offense)).

Importantly, a person “knows” or acts with knowledge when he is aware of facts or circumstances described by a statute defining an offense, or he has information that would lead a reasonable person in the same situation to believe that such facts exist. RCW 9A.08.010(1)(b). The statutory definition of “knowledge,” as a type of criminal *mens rea*, permits the jury to find that the defendant had actual knowledge if it finds that an ordinary person would have had knowledge under the circumstances. CP 36; Sarausad v. State, 109 Wn. App. 824, 837-38 and n. 6, 39 P.3d 308 (2001); see also State v. Shipp, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980); State v. Keend, 140 Wn. App. 858, 869, 166 P.3d

1268 (2007) (both stating that the jury is permitted to find the defendant had subjective knowledge if there is sufficient information that would lead a reasonable person to believe that the fact exists).⁶

In Mr. Campbell's case, proof of knowledge could only be rejected by disbelieving the State's evidence that Mr. Campbell knew the tires were stolen or had information that would lead a reasonable person in the same situation to believe that the tires were stolen. Here, the evidence supported only one of two conclusions (1) Mr. Campbell knew the tires were stolen, see, e.g., 10/8/13RP at 178-81, 192 (testimony of Deputy Matthews); or (2) Mr. Campbell, as he stated in his defense, had "no idea" the tires could be stolen. 10/8/13RP at 157-59. Jason Campbell was either guilty of knowingly trafficking stolen property, or he was not guilty because he had no knowledge. The jury was not entitled to issue a compromise verdict of 'reckless' trafficking, and the prosecutor was not entitled to place that compromise option before the jury. The evidence itself must support an inference that only the lesser

⁶ In contrast, a person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation. See RCW 9A.08.010(1)(c); see CP 40 (employing "wrongful act" language).

offense was committed. See also State v. Hurchalla, 75 Wn. App. 417, 423, 877 P.2d 1293 (1994); State v. Peters, 47 Wn. App. 854, 860, 737 P.2d 693, review denied, 108 Wn.2d 1032 (1987). In the present case, unless parties are entitled to a lesser “recklessness” offense instruction in “knowledge” prosecutions simply on ground that the jury might disbelieve or rejects the evidence of the State’s charge, Mr. Campbell’s trafficking conviction must be reversed.

2. THE TRIAL COURT VIOLATED MR. CAMPBELL’S RIGHT TO CONTROL HIS DEFENSE UNDER STATE V. LYNCH, 178 WN.2D 487, 309 P.3D 482 (2013), AND HIS RIGHT TO COUNSEL UNDER HERRING V. UNITED STATES.

a. **The court instructed the jury on the affirmative defense of Uncontrollable Circumstances over Mr. Campbell’s objection.** Mr. Campbell was charged with bail jumping for failing to be on time to court hearings in the present case where he had been told to arrive at court at 10:30 a.m. (January 28, 2013 court date, Count 2), and at 10:30 a.m. on a subsequent date (February 4, 2013 court date, Count 3). CP 18 (amended information).

At trial, the State brought forth a criminal division supervisor of the Kitsap County Court who attested that Mr. Campbell was supposed to arrive at court at the designated time(s) of day, and

summoned a court clerk to relate to the jury that Mr. Campbell did not timely arrive at said hearing(s), along with sheafs of documentary exhibits from Kitsap County Superior Court cause no. 13-1-000777-4. 10/8/13RP at 112-23, 10/18/13RP at 123-35; Supp. CP ____, Sub # 56 (Exhibit list) (exhibit 5A) (exhibit 5B) (exhibit 5C), (exhibit 6A (with attachments) [redacted]) (exhibit 6C), (exhibit 6D), (exhibit 6E).

Bail jumping requires that the State prove to the jury beyond a reasonable doubt that the accused was released on a pending charge, and knowingly failed to subsequently appear as required. RCW 9A.76.170.⁷

⁷ RCW 9A.76.170, the bail jumping statute, provides as follows:

(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.

(2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

(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;

Following the State's thorough mounting of its prosecution case for bail jumping, the defense sought to introduce Mr. Campbell's testimony that he had carefully arranged for car rides to court from his home in the Dyes Inlet area. 10/8/13RP at 138-49. Mr. Campbell did not have a telephone,⁸ a vehicle, or a driver's license, but he had spoken with friends who said they would come by and drive him to court on January 28. On the appointed morning, they did not arrive. Mr. Campbell walked to his old elementary school and persuaded a former teacher to drive him to the court. 10/8/13RP at 137-40. Unfortunately, he arrived at room 212 of the Superior Court as everybody was filing out for lunch. 10/8/13RP at 137-38.

Mr. Campbell realized that "this can't happen again after I quashed the warrant." 10/8/13RP at 141. For the February 4 court date, Mr. Campbell arranged with his mother that she would come

(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.

RCW 9A.76.170.

⁸ David Hogdgon confirmed that Mr. Campbell did not have a telephone. 10/8/13RP at 104.

to his house early and drive him to court; she did not arrive. He learned later that an employee at the tavern where his mother worked had not shown up to open the establishment, and she had been obligated to remain at her job. 10/8/13RP at 141-42. Mr. Campbell walked all the way to the court. He arrived as court was ending, and told the bail study clerk he was late, but she told him “there was nothing they could do.” 10/8/13RP at 141. Mr. Campbell did not have money for a taxi (or a phone, in any event), and waiting for the infrequent local bus would have caused him to arrive at court even later than by walking. 10/8/13RP at 141.

Following the defense offer of proof and Mr. Campbell’s argument that he was entitled to present relevant testimony for the jury to accept or reject, the trial court allowed portions of this testimony to be heard by the jury. 10/8/13RP at 141-50; see 10/8/13RP at 151-55.

Later, when jury instructions were discussed, the prosecutor again argued that Mr. Campbell must accept the affirmative defense of Uncontrollable Circumstances. 10/9/13RP at 221-

Mr. Campbell renewed his earlier objection to the jury being instructed on this affirmative defense; however, the trial court ruled it would give the instruction because it had earlier allowed the

testimony about Mr. Campbell's rides to court not showing up. Mr. Campbell took exception, which the court noted. 10/9/13RP at 221-22, 227-28. The court therefore gave Instruction 18:

It is a defense to the charge of Bail Jumping that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

An "uncontrollable circumstance" means an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of man such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

This defense must be established by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true. If you find that the Defendant has established this defense, it will be your duty to return a verdict of not guilty.

CP 46 (Instruction 18).

b. Forcing an affirmative defense on Mr. Campbell violated his right to control his defense to the charges, protected by the Sixth Amendment. Instructing the jury on an affirmative defense over the defendant's objection violates the

accused's constitutional right to control his defense. U.S. Const. amends 6, 14; Wash. Const. art. 1, § 22; Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); State v. Lynch, 178 Wn.2d 487, 309 P.3d 482 (2013).⁹

Here, specifically, forcing the defense of Uncontrollable Circumstances on Mr. Campbell was inconsistent with his desired trial strategy of raising reasonable doubt. During argument on the admissibility of Mr. Campbell's testimony about the efforts he made to appear for the two hearings, the prosecutor – ultimately successfully -- contended that the defense would have to shoulder the preponderance burden of proving this affirmative defense, "Uncontrollable Circumstances." 10/8/13RP at 142-49. Defense counsel emphasized that Mr. Campbell was not pursuing any such defense and made clear to the court that the accused was not asking for any such jury instruction or burden, but wished to argue for reasonable doubt acquittal. 10/8/13RP at 148-50.

Rejecting those arguments and instructing the jury in the objected-to manner was error. Implicit in the Sixth Amendment is the criminal defendant's right to control his defense. Faretta v.

⁹ The Court of Appeals reviews alleged constitutional violations *de novo*. State v. Siers, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012) (citing State v. Vance, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010)).

California, 422 U.S. at 819-21; State v. Lynch, 178 Wn.2d at 491-93; State v. Jones, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983) (Faretta embodies the conviction that a defendant has the right to decide, within limits, the type of defense he wishes to mount).

The Washington courts have recognized that a defendant's right to control his defense is necessary "to further the truth-seeking aim of a criminal trial and to respect individual dignity and autonomy." State v. Coristine, 177 Wn.2d 370, 376, 300 P.3d 400 (2013); Wash. Const. art. 1, § 22.

Therefore, "[i]nstructing the jury on an affirmative defense over the defendant's objection violates the Sixth Amendment by interfering with the defendant's autonomy to present a defense." Lynch, 178 Wn.2d at 491; Coristine, 177 Wn.2d at 375; see also, e.g., State v. McSorley, 128 Wn. App. 598, 605, 116 P.3d 431 (2005) (trial court violated defendant's right to control his defense by instructing the jury on an affirmative defense to the crime of child luring over defendant's objection); Jones, 99 Wn.2d at 739 (trial court violated defendant's right to control his defense by forcing defendant to argue the insanity defense). The trial court violated Jason Campbell's right to control his defense by instructing the jury

on the affirmative defense of Uncontrollable Circumstances over his objection.

c. The constitutional error was not harmless. The error in this case must be proved harmless beyond a reasonable doubt, by the Respondent. State v. Lynch, 178 Wn.2d at 494-95. “[I]f trial error is of constitutional magnitude, prejudice is presumed and the State bears the burden of proving it was harmless beyond a reasonable doubt.” Lynch, supra (citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

Thus in Lynch, where the trial court required the defendant to argue the defense of consent because he introduced evidence of willing participation in intercourse, the error was not harmless because the defendant was forced to shoulder an *affirmative* burden – there, the defense of consent -- that is a greater ‘burden’ than that normally required for gaining acquittal, i.e., the raising of reasonable doubt. Lynch, 178 Wn.2d at 492-94; see also U.S. Const. amend. 14.

[I]nstructing the jury that Lynch had the burden of proving consent was inconsistent with Lynch's trial strategy of casting doubt on the element of forcible compulsion. The consent instruction imposed a burden on Lynch that was greater than the burden necessary to create a reasonable doubt about forcible compulsion. See Martin v. Ohio, 480 U.S. 228, 234,

107 S.Ct. 1098, 94 L.Ed.2d 267 (1987) (noting that evidence creating a reasonable doubt about an element of a crime "could easily fall far short" of proving a defense by a preponderance of the evidence).

Lynch, at 494. The same is true here. Uncontrollable Circumstances as a defense to bail jumping is a statutory form of a necessity defense, which admits factual proof of the charged crime's elements but argues justifiable excuse. RCW 9A.76.010(4); 120(2); 11 and 11A Washington Practice, Jury Instructions-Criminal, WPIC 19.17 (Comment), WPIC 120.41 (Comment) (3rd ed. 2008). The defense requires the accused to prove the facts of the defense, and do so by a preponderance. RCW 9A.76.120(2); State v. Frederick, 123 Wn. App. 347, 353, 97 P.3d 47 (2004). Mr. Campbell was forced to shoulder an affirmative burden qualitatively different and quantifiably greater than normal trial circumstances where the State must secure the guilty verdict beyond a reasonable doubt. The error in this case was not harmless beyond a reasonable doubt, and reversal is required.

d. The court's ruling also violated Mr. Campbell's right to counsel, causing structural error that requires automatic reversal. Additionally, the court's ruling instructing the jury on the affirmative defense, which set up an obligation in defense counsel

to persuade the jury of that defense, violated Mr. Campbell's right to counsel. This is constitutional error, and requires automatic reversal. The trial court does have discretionary power over the scope of counsel's closing argument. Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975); State v. Perez-Cervantes, 141 Wn.2d 468, 474-75, 6 P.3d 1160 (2000) (court has power to restrict the argument of counsel to the facts in evidence).

However, it is generally permissible for defendants to argue any defense to the charges -- even inconsistent defenses (not applicable here) -- supported by the evidence. See Mathews v. United States, 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988); State v. Fernandez-Medina, 141 Wn.2d 448, 458-60, 6 P.3d 1150 (2000); State v. Conklin, 79 Wn.2d 805, 807, 489 P.2d 1130 (1971). This right to have one's lawyer argue one's chosen defense in closing is so central to the right to counsel that courts cannot even compel counsel to argue "logically." City of Seattle v. Arensmeyer, 6 Wn. App. 116, 121, 491 P.2d 1305 (1971).

In this case, the trial court so limited and restricted the scope and viability of the defense to choose its closing argument, as to violate Mr. Campbell's constitutional rights. The court created

circumstances in which defense counsel was not left unfettered to argue for acquittal as counsel saw fit, and to do so without contravening the law of the case in the court's instructions. But the Sixth Amendment right to counsel encompasses the delivery of an unfettered closing argument. Herring, 422 U.S. at 858, 95 S.Ct. 2550. This is because closing argument is a centrally important part of counsel's strategic representation of his or her client. Perez-Cervantes, 141 Wn.2d at 474.

The error here restricted Mr. Campbell's lawyer from being able to present argument that counsel calculated would present a valid, successful defense argument, supported by the instructions of law. The State in its initial closing argument mocked Mr. Campbell's claim that his "ride didn't show up" as being of no comparison to a flood, earthquake or fire, and argued that "the defense has raised the defense" and therefore "the burden shifts to them."¹⁰ 10/9/13RP at 242-43.

Defense counsel valiantly tried to make clear in closing that his defense was straightforward -- the prosecutor had failed to meet

¹⁰ The State went on to fault Mr. Campbell for failing to support the Uncontrollable Circumstances defense that "he" was advancing, by not calling his friends or mother, who one would naturally expect him to call as witnesses "about an issue for which it is the defendant that has the burden of proof." 10/9/13RP at 243-45.

the “reasonable doubt standard.” 10/9/13RP at 247-48. But the prosecutor then announced to the jury in rebuttal that Mr. Campbell and the jury had no choice but to accept the affirmative defense instructions because “they’re the court’s instructions. They’re the law that applies to the facts and charges of this case.” 10/9/13RP at 255-56. Clearly, the trial court’s ruling hobbled defense counsel’s closing argument, and violated his client’s Sixth Amendment right to counsel. State v. Frost, 160 Wn.2d 765, 772-73, 161 P.3d 361 (2007).

Additionally, the court’s improper limitation of closing argument also abrogated Mr. Campbell’s Fourteenth Amendment and state constitutional Due Process¹¹ rights as set forth in In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Here, the trial court limited the effectiveness of argument by forcing an affirmative defense upon counsel that admitted the facts of the charged crime, and thus eviscerated the State’s constitutionally required burden under Due Process. State v. Frost, 160 Wn.2d at 773-74 (citing Conde v. Henry, 198 F.3d 734, 739 (9th Cir.1999)).

¹¹ The Due Process clauses of the Washington Constitution and the federal constitution both provide that the State shall not deprive any person of “life, liberty, or property, without due process of law.” U.S. Const. amend. 14; Wash. Const. art. I, § 3.

Automatic reversal is required because the constitutional violation was structural error. Structural error is a defect affecting the very framework within which the trial proceeds. See Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); see, e.g., United States v. Gonzalez-Lopez, 548 U.S. 140, 148–50 & n. 4, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (denial of Sixth Amendment right to counsel of choice not subject to harmless error analysis). Unduly restricting defense counsel's ability to argue for acquittal in closing argument in violation of the Sixth Amendment and Due Process is this sort of error, and as such, it is not subject to harmless error affirmance. Frost v. Van Boening, ___ P.3d ___, ___ (9th Cir. No. 11-35114) (April 29, 2014, at pp. 13-17) (finding unreasonable application of federal law in applying harmless error analysis to error where court forced counsel to choose his advocacy between “inconsistent” defenses of either reasonable doubt, or duress which admits the elements) (citing Herring v. New York, supra, 422 U.S. at 863, and Sullivan v. Louisiana, 508 U.S. at 277-78)).

The Ninth Circuit in Frost compared the trial court's actions circumscribing closing argument in that case to effectively directing

a verdict for the State on the elements of the offense charged. Frost v. Van Boening, (Slip Op., at pp. 13-14); see also State v. Lynch, supra, 178 Wn.2d at 495 (rejecting State's argument that jury would first evaluate State's own burden of proof). Similar occurred here. The prosecutor, enabled by the jury instruction, told the jury that the defense in the case was an affirmative burden. And notably, when the court stated that the jury would indeed be instructed on the affirmative defense of Uncontrollable Circumstances, the court at the same time noted that Mr. Campbell would not actually be able to persuade the jury of it. 10/8/13RP at 149-50. This Court should reverse Mr. Campbell's convictions for bail jumping.

4. THE STATE WAS NOT ENTITLED TO THE MISSING WITNESS INSTRUCTION, BECAUSE MR. CAMPBELL HAD NOT RAISED THE AFFIRMATIVE DEFENSE OF UNCONTROLLABLE CIRCUMSTANCES.

a. Giving the missing witness instruction was error. As noted, the State also sought, and received, a missing witness instruction. 10/9/13RP at 225-28. Against the defense objection, the State argued that Mr. Campbell had failed, *inter alia*, to bring mother Campbell into court to testify, which the prosecutor argued

goes to witnesses for the bail jump and affirmative defense. So the jury is going to be advised that this is an unusual circumstance where **the defendant does have some burden of proof.** And as the defense is more than able to argue, if they feel that the State could have proved their case by bringing additional witnesses, the State should be able to argue that the defendant has introduced the concept of these two people being involved as bail-jump and to corroborate his statements, these witnesses should have been called. **It's an unusual circumstance because of the affirmative defense.**

(Emphasis added.) 10/9/13RP at 225-26. Mr. Campbell strenuously objected that he had never wished, and still did not wish, to raise the affirmative defense, which the court noted. 10/9/13RP at 227. However, the court ruled it would give the missing witness instruction because of all of the witnesses the prosecutor argued were indeed missing, and noted the further defense exception. 10/9/13RP at 227-28; CP 47 (Instruction 19).

This was an abuse of discretion. Pursuant to the "missing witness" rule, where a party fails to call a witness, and it would be natural for that party to have produced that witness, the jury may infer that the witness's testimony would have been unfavorable to that party. State v. Russell, 125 Wn.2d 24, 90, 882 P.2d 747 (1994); State v. Blair, 117 Wn.2d 479, 489, 816 P.2d 718 (1991). The missing witness instruction allows the party requesting it to tell

the jury it may so assume. WPIC 5.20; see CP 47; State v. Montgomery, 163 Wn.2d 577, 598, 183 P.3d 267 (2008).

But in this case, the State, which was the proponent of the defense it claimed the defendant was obliged to prove, had equal access to the witnesses the prosecution described. As the Montgomery Court held, the State is only entitled to argue the missing witness inference if: (1) the missing witness is not equally available to the State; (2) the defendant does not satisfactorily explain the witness's absence; (3) the inference would not infringe on the defendant's constitutional right to silence or shift the burden of proof; and (4) the witness's testimony would be material and not cumulative. Montgomery, 163 Wn.2d at 598–99, 183 P.3d 267; see also Blair, 117 Wn.2d at 488-91.

Almost none of these criteria were present below. The State had full subpoena power and access to Mrs. Campbell and any friends of Mr. Campbell the prosecution desired to call, yet never asked for any opportunity or continuance to even attempt to call those witnesses. The witness in question must be “peculiarly available” to the party failing to call her. State v. Davis, 73 Wn.2d 271, 280, 438 P.2d 185 (1968). Here, if anyone, it was *Mr. Campbell* who should have found himself surprised at the idea that

he should be calling these witnesses to trial in support of “his” affirmative defense.

Mr. Campbell also more than adequately explained these witnesses’ absence to the trial court, since they were, by definition, not material to a defense which he was not raising in the first place – rather, this was the *prosecution’s* notion of what Mr. Campbell should be contending. 10/9/13RP at 227 (“I want to note that we have objected to the State’s proposing the affirmative defense.”) (defense counsel, objecting to missing witness instruction).

And finally, imposing the defense on Mr. Campbell in the first place, against his will -- an affirmative defense which the *accused* must prove by a preponderance of the evidence -- *dramatically* shifted the burden of proof necessary to gain acquittal. See State v. Lynch, supra, 178 Wn.2d at 495; Frost v. Van Boening, supra (Slip Op., at pp. 13-14). Faulting Mr. Campbell for not calling certain witnesses to support the defense was additional error that greatly exacerbated the first. The trial court abused its discretion.

b. Reversal is required. The instructional error was not trivial. In one fell swoop, the trial court (admittedly at the State’s vigorous urging), after forcing Mr. Campbell into a surprise, last-minute affirmative defense he did not want, then told the jury it

could reject that defense because Jason had not brought certain witnesses into court to prove it. This was prejudicial, and not harmless. State v. Williams, 81 Wn. App. 738, 744, 916 P.2d 445 (1996) (“An instructional error is harmless if it is trivial, formal or merely academic and in no way affected the outcome of the case.”). Reversal is required.

5. THE ERRONEOUS INSTRUCTION DEFINING RECKLESSNESS RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ELEMENTS OF THE CRIME, AND THE ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

a. Jury instruction 12 misstated an element of the crime

in multiple manners. Jury instruction 12 read as follows:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a **wrongful act** may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness as to a particular **[sic]** is required to establish an element of the crime, the element is also established if the person acts intentionally or knowingly as to that fact.

CP 40 (Instruction 12). This was multi-faceted error. In a criminal case, Due Process requires the State to prove the elements of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. 14; Wash. Const. art. 1, § 3. It is therefore reversible error to

instruct the jury in a manner that would relieve the State of its burden of proof. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).¹²

Mr. Campbell was charged by a lesser offense instruction of recklessly trafficking in stolen property. However, the above jury instruction relieved the State of its burden to prove the element of “recklessness” because it told the jury that it only needed to find that Jason was aware of and disregarded a substantial risk that some generic “wrongful act” could occur, rather than informing the jury it must find he was aware of and disregarded a substantial risk pertinent to trafficking in stolen property. See, e.g., State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011); see also State v. Harris, 164 Wn. App. 377, 387-88, 263 P.3d 1276 (2011).

Thus in State v. Peters, Mr. Peters was convicted of first degree manslaughter, which required the State to prove beyond a reasonable doubt that he “recklessly cause[d] the death of another person.” Peters, 163 Wn. App. at 847. The definition of the recklessness element should have instructed the jury that the State had to prove beyond a reasonable doubt “that Peters knew of and

¹² A defendant may raise a claim of error that the jury instructions relieved the State of its burden of proof for the first time on appeal. State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011); RAP 2.5(a)(3).

disregarded a substantial risk that death may occur.” (Emphasis added.) Peters, 163 Wn. App. at 849-50. Because the definitional instruction stated that the State needed to prove only that Peters knew of and disregarded a substantial risk that a *wrongful act* may occur, it relieved the State of its full burden on the essential elements. Peters, at 849-50. See also State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005); State v. Harris, supra, 164 Wn. App. at 387.

In this case, the definition of “recklessness” in the instructions included the same inadequate “wrongful act” language as in Peters, Gamble, and Harris. Nothing in the “to-convict” instruction clarified the correct standard. See State v. Johnson, Supreme Court No. 88683-1 (May 1, 2014, Slip Op., at pp. 9-14).

In addition, the State’s burden was further lessened because the jury instruction told the jury, vaguely, that the recklessness element was proved if Jason Campbell acted intentionally. Similarly imprecise phrasing in a recklessness definition was disapproved of in State v. Hayward, 152 Wn. App. 632, 640, 217 P.3d 354 (2009). This language improperly creates an erroneous presumption that merges the concepts of recklessness and intent, here, by telling the jury that if Mr. Campbell intentionally held the

stolen tires for sale, he was therefore “reckless” in some manner that satisfied the recklessness element of trafficking in the second degree. See also State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005).

Notably, the omission of any helpful word or phrase after the word “particular [sic]” in the definition of recklessness would have only heightened the jury’s lack of direction as to how to correctly define, or apply, the legal concept of recklessness and the question of whether, or how, intentional conduct could prove that element. CP 40; compare WPIC 10.03 at 209 (3d ed. 2008). The jury instructions in Mr. Campbell’s case did not hold the State to its burden of proof on second degree trafficking.

b. The trafficking conviction must be reversed. A jury instruction that misstates an element of the crime is harmless only if the element is supported by uncontroverted evidence. Peters, 163 Wn. App. at 850; State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). The State bears the burden to show the error is harmless beyond a reasonable doubt. Peters, 163 Wn. App. at 850.

Here, the evidence was highly controverted. When Deputy Matthews came to Mr. Campbell’s house and asked him about some stolen tires, Jason told her he “didn’t understand.” 10/8/13RP

at 157. He testified, “I had no idea what she was talking about.” Id.; see also 10/8/13RP at 159 (testifying that he told the Deputy that he does not steal, and “I didn’t know what she was talking about.”). Jason controverted the State’s claim that he held property for sale with any awareness that it was stolen property. Reversal of his trafficking conviction is therefore required. Peters, 163 Wn. App. at 850-51; Harris, 164 Wn. App. at 387-88.

6. THE COURT IMPROPERLY ANSWERED THE JURY INQUIRY REGARDING COUNT 2 OF BAIL JUMPING BY GIVING THE JURY NEW EVIDENCE, AND ERRONEOUS STATEMENTS OF FACT AND/OR LAW, AND BY COMMENTING ON THE EVIDENCE.

a. **The State was required to prove the class of felony underlying Count 2 of bail jumping.** Bail jumping is a class C felony if the person, when he failed to appear, was charged with a class B or class C felony, but it is merely a misdemeanor if the person was charged with a misdemeanor. RCW 9A.76.170(3)(c) and (d). In Mr. Campbell’s case, the to-convict instruction for count 2 (bail jumping on January 28, 2013) included the element that the

defendant was charged at the time with a class B or class C felony.¹³ CP 44, see CP 42, see also CP 45.

Although the 'to-convict' instruction in a bail jumping case may or may not need to identify the underlying offense on which the defendant failed to timely appear for a hearing, or its classification, State v. Williams, 162 Wn.2d 177, 178, 170 P.3d 30 (2007), under the "law of the case" doctrine, all of the elements set forth in the prosecution-submitted instruction in this case became required elements for the State to prove, as a matter of evidentiary sufficiency under Due Process. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998); U.S. Const. amend. 14. The State was therefore required to prove, to secure conviction for this count of

¹³ The 'to-convict' instruction for count 2 (the first of the two bail jumping charges) read, in pertinent part:

To convict the defendant of the crime of Bail Jumping as charged in Count 11, each of the following elements of the crime must be proved beyond a reasonable doubt-

(1) That on or about January 28th, 2013, the defendant failed to appear before a court;

(2) that the defendant was charged with a class B or class C felony

(3) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and

(4) that the acts occurred in the State of Washington.

CP 44. The to-convict instruction for count 3 (bail jumping on February 4, 2013) included the element that the defendant was charged at the time with a class C felony, which is the classification of the original charge.

bail jumping, that Mr. Campbell's failure to timely appear on January 28, 2014 was on "a class B or class C felony." CP 44.

b. The trial court's answer to the jury inquiry interjected new evidence into the case, including erroneous facts, and commented on the evidence. During deliberations, the jury asked,

Instruction 15 says trafficking in stolen property in the second degree is a class C felony. Is trafficking in stolen property in the first degree a class B or class C felony? We're confused because Instruction No. 10 [CP 38] says the defendant is charged with one count of trafficking in stolen property in the first degree, while the felony complaint and information seem to show that defendant is charged with trafficking in the stolen property in the second degree.

CP 50; 10/9/13RP at 268. Mr. Campbell objected to the court's answer which stated in writing,

The original Complaint and Information was for Trafficking in the Second Degree. An Amended Information has been filed. Defendant is currently charged with trafficking in the First Degree. Each of the charges is either a Class B or Class C felony.

CP 50; 10/9/13RP at 269.

Mr. Campbell argued unsuccessfully that the jury should simply be told to read its instructions. 10/9/13RP at 266-70.

The court's answer, given over that objection, created error. In Mr. Campbell's case, another instruction informed the jury that

second degree trafficking is a class C felony; this statement properly matched the documentary evidence the jury was presented with, in the form of the original district court felony complaint for second degree trafficking in No. 10011835P, and the corresponding January 18, 2013 information, Kitsap County No. 13-1-00077-4. CP 43; Supp. CP ____, Sub # 56 (Exhibit list, "Exhibit 5A" and "Exhibit 6A"); 10/8/13RP at 116-119; 10/8/13RP at 126, 133.

This was the original charge that Mr. Campbell had been released on prior to the January and February dates of his alleged bail jumping -- the charge was only upgraded to first degree trafficking in July of 2013 after Jason did not plead guilty.

The jury had not, however, been provided with any amended information setting forth the July 22, 2013 upgraded charge, or any statement in the form of a submission or instruction agreed by the parties stating that first degree trafficking was a class B felony.

Further, when the court provided that information in its answer to the jury note, it implicitly if not expressly instructed the jury that the original charge had been somehow "amended" to first degree trafficking in such a way that such charge was pertinent for purposes of the defendant's alleged failures to appear in January

and February. The court not only interjected new evidence of the amendment, it interjected falsely misleading evidence or cloaked that new factual evidence in an erroneous statement of law.

It is true that the trial court may, in proper circumstances, submit additional instructions of law to the jury following an inquiry, but it goes without saying, first, that an answer to a jury inquiry is not a proper vehicle for providing the jury with evidence not admitted in the evidence phase of trial. See generally State v. Pete, 152 Wn.2d 546, 553–55, 98 P.3d 803 (2004). The long-standing rule is that consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced. Pete, 152 Wn.2d at 555 n. 4; State v. Rinkes, 70 Wn.2d 854, 862, 425 P.2d 658 (1967); see also State v. Boggs, 33 Wn.2d 921, 207 P.2d 743 (1949).

Whether to give further instructions in response to a request from a deliberating jury is within the discretion of the trial court. State v. Brown, 132 Wn.2d 529, 612, 940 P.2d 546 (1997); State v. Ng, 110 Wn.2d 32, 42–43, 750 P.2d 632 (1988). But the Court of Appeals has also held that the trial court is not allowed to add a new legal theory of criminal culpability during deliberations if the

parties have not had a chance to argue that theory. See State v. Ransom, 56 Wn. App. 712, 714, 785 P.2d 469 (1990).

Supplemental instructions may not go beyond matters that either had been, or could have been, properly argued. State v. Becklin, 133 Wn. App. 610, 620, 137 P.3d 882 (2006)

Most importantly, the trial court here commented on the evidentiary state of the case. This is impermissible. State v. Levy, 156 Wn.2d 709, 719–20, 132 P.3d 1076 (2006); cf. State v. Woods, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001) (jury instructions that do no more than accurately state the law pertaining to an issue do not constitute an impermissible comment on the evidence by the trial judge).

Under article 4, section 16 of our constitution, a judge is prohibited from conveying to the jury his personal opinion about the merits of the case or from instructing the jury that a fact has been established. State v. Levy, 156 Wn.2d at 721; Wash. Const. art. 4, § 16. The purpose of this provision is to prevent the jury from being influenced by knowledge conveyed to it by the court regarding the case. State v. Elmore, 139 Wn.2d 250, 275-76, 985 P.2d 289 (1999); see also State v. Ciskie, 110 Wn.2d 263, 283, 751 P.2d 1165 (1988) (an indication to the jury of the judge's personal

attitudes toward the merits of the case is an impermissible comment on the evidence); State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

Each of the foregoing, related proscriptions was violated when the trial court interjected new matters, some erroneous, and provided the jury with new proof and a new legal avenue of proving criminal liability for the prosecution. The court's answer to the jury inquiry was error.

c. The error requires reversal. Impermissible judicial comments on the evidence are presumed to be prejudicial. State v. Levy, 156 Wn.2d at 723. Here, it is more than equally as likely that the jury relied on the conception that Mr. Campbell bail-jumped on a first degree trafficking charge (a B felony) as it was that the jury concluded that he bail-jumped on a class C felony, of second-degree trafficking.

Even greater than that, this jury – which would have reasonably concluded from the court's answer that the later amendment of the charge legally 'mattered' for purposes of the crime pending when Mr. Campbell had earlier failed to appear in late January of 2013, probably rested its verdict for count 2 on its determination that Mr. Campbell was technically under a charge of

first degree trafficking at that time. If this was a mere routine non-constitutional error, such as evidentiary error, reversal would be required because it would said that the error, within reasonable probabilities, contributed to the verdict.

But the standard is that reversal is required for comments on the evidence in violation of the state constitution unless the State shows beyond a reasonable doubt that the defendant was not prejudiced, or the record affirmatively shows that no prejudice could have resulted. State v. Levy, 156 Wn.2d at 725. Certainly, this cannot be said. Reversal is required.

7. THE COURT IMPROPERLY DENIED COUNSEL'S PRE-TRIAL MOTION TO WITHDRAW.

Prior to trial, the court denied defense counsel's motion to withdraw and substitute counsel on the basis of conflict. 7/22/13RP at 9-11.

Counsel argued that his firm's representation of witness Michael Smith created a requirement that he withdraw because Mr. Smith would likely be called as a defense witness, and sensitive or confidential information about Mr. Smith, from the defendant Campbell, and Smith's attorney Tyner, would be available to impeach Smith if he denied a prior statement or needed to be

impeached for any reason. Supp. CP ____, Sub # 28; CP 12-20; Supp. CP ____, Sub # 30; 7/22/13RP at 4-8, 9-11.

This was error. Determining whether a conflict of interest precludes continued representation of a client is a question of law subject to *de novo* review. State v. Vicuna, 119 Wn. App. 26, 30, 79 P.3d 1 (2003), review denied, 152 Wn.2d 1008 (2004).

Washington's rules of professional conduct explain that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. RPC 1.7(a); see also United States v. Moscony, 927 F.2d 742, 748 (3d Cir.) (Sixth Amendment guarantees right to attorney's conflict-free, undivided loyalty), cert. denied, 501 U.S. 1211 (1991).

Such a conflict exists if there is a significant risk that the client's representation will be materially limited by the lawyer's responsibilities to a third person or the lawyer's personal interests. RPC 1.7(a)(2).

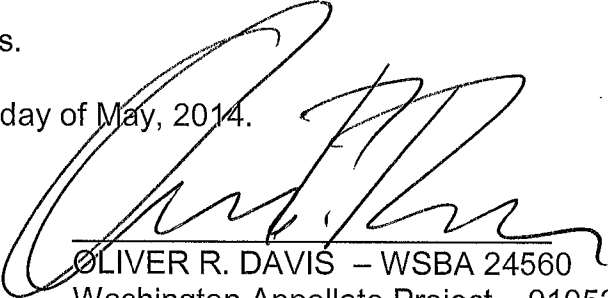
Here, counsel Thimons's duties of loyalty and independence were so likely to be materially limited by the lawyer's responsibilities to another, that counsel should certainly have been permitted to withdraw. RPC 1.7, comment 9. Mr. Campbell respectfully argues

that the trial court erred in denying the motion to withdraw and substitute counsel.

E. CONCLUSION

For all the reasons above, this Court should reverse Jason Campbell's convictions.

Dated this 8 day of May, 2014.



OLIVER R. DAVIS – WSBA 24560
Washington Appellate Project – 91052
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 45488-2-II
)	
JASON CAMPBELL,)	
)	
Appellant.)	

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