NO. 45488-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

JASON SCOTT CAMPBELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 13-1-00077-4

BRIEF OF RESPONDENT

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SERVICE		
	Oliver Ross Davis 1511 3rd Ave Ste 701 Seattle, WA 98101-3647 Email: oliver@washapp.org	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED August 28, 2014, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

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II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Jason Scott Campbell was charged by information filed in Kitsap County Superior Court with second-degree trafficking in stolen property. CP 1. After Campbell twice failed to appear, the matter went to trial on amended charges of first-degree trafficking in stolen property and two counts of bail jumping. CP 18. The jury found Campbell guilty of bail jumping and of the inferior-degree offense of second-degree trafficking. CP 51-52. Other procedural issues will be addressed in the argument portion of the brief.

B. FACTS

Matthew Knowlton's rims and tires was stolen. RP 58. Knowlton was on craigslist about a week later and discovered his rims and tires offered for sale for $150. RP 59-60. He contacted the poster via text message and then contacted the sheriff's office. RP 62.

After speaking to Knowlton, Kitsap County Sheriff's Deputy Sonya Matthews went to the address Knowlton provided. RP 73. There was no one home. RP 74. She noticed that the house across the street resembled the background of the craigslist photo. RP 74-75. She went back the next day and contacted Campbell there. RP 75-76. She told Campbell she was investigating a theft of some tires and rims, and asked if he knew anything about it. RP 77. Campbell denied knowing anything

about it. RP 77.

Matthews then told him that they were for sale on craigslist, and Campbell responded that he did not sell stuff on craigslist. RP 77. Campbell continued to deny any knowledge of the wheels, but told her he might be able to find something out. RP 79. He said his "cousin," Michael Smith, might know something. RP 80, 82, 90. Matthews told him she thought he knew more than he was saying, and that she knew the tires had been on his property because of the photo in the ad. RP 81. Campbell now stated that Smith had brought them over, and the neighbor across the street had offered to put them for sale on craigslist. RP 81.

Campbell asserted that he did not know where Smith had gotten the tires and that and he had not asked. RP 81. He said he was pretty sure they were stolen, but that he had not asked, so he did not know for sure. RP 81. He thought they could be stolen because Smith had committed thefts in the past. RP 82.

Campbell asked his neighbor David Hodgson if he wanted to buy some tires. RP 102, 111. He did not need them, but offered to post them on craigslist for Campbell. RP 103. Campbell said, "Sure." RP 103.

Campbell was alone when they had the conversation. RP 104. Smith was not present. RP 104. Hodgson never took possession of the tires. RP 105. Hodgson had no idea the tires were stolen. RP 105.

The district court clerk, criminal division supervisor testified and introduced into evidence showing that Campbell had a pending felony complaint for second-degree trafficking in stolen property. RP 117. Campbell appeared in that court on January 17, 2013, and was advised that he had a court date in superior court, room 212, on January 28, 2013, at 10:30. RP 122. Campbell signed the order. RP 122. *See* CP 76-83.

The county clerk's records and court operations supervisor presented documentary evidence showing that Campbell was charged with second-degree trafficking in stolen property in superior court and that on January 28, 2013, Campbell failed to appear. RP 123-29; CP 85-87, 95.

On January 31, 2013, Campbell appeared in court and was advised orally and in writing that the next hearing would be on February 4, 2013, at 10:30 a.m. RP 130-31; CP 89-90. On February 4 he again failed to appear. RP 133; CP 92.

Campbell testified that on January 28, 2013, he was supposed to be in court. RP 136. He did not show up. RP 136. He recalled receiving the hearing notice (CP 80) in district court. RP 137. He arrived at court on January 28 around noon. RP 138. He knew he was supposed to be there at 10:30. RP 138.

Over State objection Campbell testified that on January 28, he had arranged the ride the day before, but they did not show up by 10:00. RP

151. Campbell did not drive and did not have a vehicle. RP 152. He walked up to the school to use the phone. RP 152. He did not attempt to call for a ride from the school. RP 152. A teacher gave him a ride to the courthouse. RP 152. He arrived between 11:00 and 11:30 at the latest. RP 153. He went into the district court courtroom and asked where his attorney was. RP 153. They told him he was in the wrong place and needed to be upstairs in room 212. RP 153. Everyone was walking out of the courtroom when he got there. RP 153. The clerk told him court was over. RP 153.

Campbell asserted that he did not receive a written copy of the notice for the February 4 hearing, but he was told the date and showed up. RP 154. However showed up at 11:30 or noon. RP 154. He knew he was supposed to be there at 10:30. RP 154.

Again over the State's objection, he testified that he had arranged for his mother to give him a ride. RP 154. However, she had some "business matters" that came up, and he walked to court. RP 154-55. He did not attempt to call. RP 155.

Smith told Campbell that he had bought the tires for his jeep. RP 160. Campbell asserted that he did not think that they might be stolen until the deputy mentioned it:

I mentioned that my cousin was -- sometimes had been

> involved, as public knowledge, in some things I don't associate with, thievery and stuff. In hindsight it was making sense as she -- that was the only mention I made to any sort of -- possibly them being stolen.
>
> Previously to that point, I never thought to them being stolen.

RP 162.

Campbell denied offering to sell the tires to Hodgson. RP 169. He also never heard Hodgson or Smith talking about putting the tires on craigslist. RP 173. When asked if he knew that Smith had been in trouble for theft, Campbell responded, "He had been in trouble for some sort of shady things. It was in the newspaper." RP 174. He did not suspect anything when they came over:

> I had no reason to think what he was telling me wasn't true. There was nothing that set red flags off, and I had no reason to believe they were stolen.

RP 175. Denied telling Matthews that Hodgson had offered to put them on craigslist. RP 178.

Campbell also called Michael Smith, who, at the time of trial, was incarcerated. RP 192. He had convictions for theft and burglary. RP 198.

Smith testified that he purchased the tires for his jeep. RP 192. He did not know the woman who sold him the tires. RP 198. He bought them at Hank's convenience store from a woman in a red truck. RP 193. He paid $150 cash for them. RP 200.

Smith and Campbell were so close that he was allowed to go over

to Campbell's house when he was not home. RP 194. He went to Campbell's after he bought the tires to put them on the jeep, although Campbell was not home. They did not fit, so he left them there and went to his house in Bainbridge Island. RP 194. He had not discussed the tires with Campbell at that point. RP 194. He did not see Campbell that day. RP 194.

Smith later told Campbell that he had bought the tires. RP 196. Smith went back the day after he left the tires and spoke with Campbell. RP 201. Smith just took them and left that day. RP 202. They never discussed selling them. RP 202. Smith had not met Hodgson. RP 202.

Smith later modified that jeep so the tires would fit. RP 195. Smith never made an attempt to sell them. RP 194. He never asked anyone else to try to sell them. RP 196. He did not learn they were for sale online until recently. RP 197.

On rebuttal, Matthews testified that Smith told her that he had originally told Campbell he was looking for some wheels and tires for his jeep. RP 215. Campbell told him that he would see if he could find some that Smith could buy. RP 215. A few days later, Campbell called him and told him that he had found a girl who would sell him some tires for $150. RP 215. Smith said he could not afford that much, so Campbell offered to throw in $50. RP 215. A few days later, Smith went to Campbell's to

install the wheels, but discovered that they did not fit. RP 215. Campbell said that he could not get their money back, but that Hodgson might be able to sell them on eBay or craigslist for $150. RP 215. Smith said he did not know who Campbell had gotten the tires from. RP 215.

III. ARGUMENT

A. CAMPBELL FAILS TO SHOW THAT THE TRIAL COURT COMMITTED MANIFEST CONSTITUTIONAL ERROR IN INSTRUCTING THE JURY ON THE INFERIOR-DEGREE OFFENSE OF SECOND-DEGREE TRAFFICKING IN STOLEN PROPERTY WHERE THE JURY COULD HAVE BELIEVED ALL THE STATE'S EVIDENCE AND STILL HAVE CONCLUDED THAT CAMPBELL ACTED RECKLESSLY RATHER THAN KNOWINGLY.

Campbell argues that the trial court erred in granting the State's request for an instruction on the inferior degree offense of second-degree trafficking in stolen property. He asserts that the evidence did not affirmatively show that he committed only the inferior-degree offense of recklessly trafficking in stolen property. This claim was not preserved for review by a timely objection. Moreover, even were it properly before the Court, the evidence was sufficient to grant the instruction.

1. Campbell did not claim below that the evidence did not satisfy the factual prong of the Workman test.

The State disagrees that an objection based on counsel's recitation that Campbell wanted to pursue an "all or nothing" defense is sufficient to

preserve the argument that the evidence did not satisfy the factual prong of the test set forth in *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) "RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial. *Id.*

Scott specifically applied this rule to criminal jury instructions. The Court noted that CrR 6.15(c) "requires that timely and *well stated* objections be made to instructions given or refused 'in order that the trial court may have the opportunity to correct any error.'" *Scott*, 110 Wn.2d 685-86 (*quoting Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976)) (emphasis supplied). The Court therefore "on many occasions has refused to review asserted instructional errors to which no meaningful exceptions were taken at trial." *Scott*, 110 Wn.2d 686; *accord State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) (a party therefore may only assign error in the appellate court on the specific ground of the objection made at trial).

Here, Campbell's sole objection was that he was that he was

consciously choosing not to seek an instruction on the inferior degree offense. RP 222. The State reasonably responded that it also had the right to seek an inferior-degree instruction. RP 223. Campbell conceded that point. RP 223. At no point did he ever assert that the State was not factually entitled to the instruction. As such this claim is not preserved for review.

2. Campbell fails to meet the requirements of RAP 2.5(a).

RAP 2.5(a) provides that a party may not raise a claim of error on appeal that was not raised at trial unless the claim involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *State v. Kirkpatrick*, 160 Wn.2d 873, ¶ 7, 161 P.3d 990 (2007) (*quoting Scott,* 110 Wn.2d at 686). The Supreme Court has noted, however, that "'the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below.'" *Id.* (*quoting Scott*, 110 Wn.2d at 687) (internal quotation marks omitted).

Whether RAP 2.5(a)(3) should allow the argument for the first time on appeal is determined after a two-part analysis. *Kirkpatrick*, 160 Wn.2d at ¶ 8. First, the Court determines whether the alleged error is truly constitutional. *Id.* Second, the Court determines whether the alleged error

is '"manifest,' i.e., whether the error had 'practical and identifiable consequences in the trial of the case."' *Id.* (*quoting State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001)). Campbell fails to meet either part of the analysis.

3. The factual prong of the **Workman** *test is not of constitutional magnitude.*

Both Const. art. 1, s 22, and the Sixth Amendment confer upon a defendant the right to be informed of the nature and cause of the accusation against him. *State v. Fernandez-Medina*, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000). Nevertheless, a criminal defendant may be convicted at trial on the charged offense or "any degree inferior thereto." RCW 10.61.003. This statute gives a defendant sufficient notice that he must also defend himself against inferior degrees of the offense charged. *State v. Berlin*, 133 Wn.2d 541, 545, 947 P.2d 700 (1997).

Thus the only *constitutional* requirement involved in this context is notice. Because notice is satisfied by RCW 10.61.003, the trial court's giving of an inferior degree offense instruction that satisfies the legal prong of the *Workman* test presents no issue of constitutional magnitude. *Berlin*, 133 Wn.2d at 546 ("The *Workman* test incorporates the constitutional requirement of notice into its legal prong."). None of the cases Campbell cites are to the contrary: it is the lack of notice due to the failure of the legal prong that render the conviction unconstitutional.

Because Campbell never objected that he factual prong of *Workman* was not satisfied, no constitutional claim was preserved for appeal.

4. Campbell fails to show any manifest error where the evidence supported a finding that he acted recklessly but not knowingly.

Even if Campbell could show that his claim were of constitutional magnitude, he would still fail to show any manifest error. As such this Court should decline to consider this claim.

When determining whether the evidence at trial was sufficient to support the trial court's giving of a inferior-degree offense jury instruction, the Court views the supporting evidence in the light most favorable to the instruction's proponent, here the State. *State v. Corey*, ___ Wn. App. ___, 325 P.3d 250, 253 (2014) (*citing Fernandez–Medina*, 141 Wn.2d at 455-56). The supporting evidence must consist of more than the jury's disbelief that the defendant committed the greater-degree offense and, instead, must affirmatively establish that the defendant committed the inferior-degree offense. *Fernandez–Medina*, 141 Wn.2d at 456. "[I]t is not enough that the jury might disbelieve the evidence pointing to guilt." *Id.* A trial court should give a requested lesser-degree jury instruction "'[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.'" *Id.* (*quoting State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

While the Court reviews the legal prong of a request for a jury

instruction on a lesser included offense de novo, the factual prong is reviewed for an abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Only the factual prong is at issue here.

RCW 9A.82.050(1) provides:

> A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

RCW 9A.82.055(1) provides:

> A person who recklessly traffics in stolen property is guilty of trafficking in stolen property in the second degree.

Thus, the only difference between first- and second-degree trafficking in stolen property, as applied to this case,[1] is the scienter element. RCW 9A.08.010(1) defines these elements:

> (b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:
>
> > (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
> >
> > (ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.
>
> (c) RECKLESSNESS. 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 his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the

[1] There was no evidence that Campbell knowingly initiated, organized, planned, financed, directed, managed, or supervised the theft of property for sale to others.

same situation.

Taken in the light most favorable to the State the evidence was such that the jury could find an absence of knowledge and find that Campbell acted recklessly. When Deputy Matthews asked Campbell if he knew where Smith had gotten the tires, Campbell asserted that he did not know and he had not asked. RP 81. He said he was pretty sure they were stolen, but that he had not asked, so he did not know for sure. RP 81. He thought they could be stolen because Smith had committed thefts in the past. RP 82.

In his trial testimony, Campbell asserted that Smith told Campbell that he had bought the tires for his jeep. RP 160. Campbell testified that he did not think that they might be stolen until the deputy mentioned it:

> I mentioned that my cousin was -- sometimes had been involved, as public knowledge, in some things I don't associate with, thievery and stuff. In hindsight it was making sense as she -- that was the only mention I made to any sort of -- possibly them being stolen.
>
> Previously to that point, I never thought to them being stolen.

RP 162. On cross-examination, when asked if he knew that Smith had been in trouble for theft, Campbell responded, "He had been in trouble for some sort of shady things. It was in the newspaper." RP 174. He did not suspect anything when Smith brought the tires over:

> I had no reason to think what he was telling me wasn't true. There was nothing that set red flags off, and I had no reason to believe they were stolen.

RP 175.

Smith, called by Campbell, testified that he had bought the tires from a woman in a gas station. RP 193. Smith stated that he later told Campbell that he had bought the tires. RP 196.

In rebuttal, Deputy Matthews testified that when Smith was arrested (with the tires) Smith ultimately told her that he had originally told Campbell he was looking for some wheels and tires for his jeep. RP 215. Campbell told him that he would see if he could find some that Smith could buy. RP 215. A few days later, Campbell called him and told him that he had found a girl who would sell him some tires for $150. RP 215. Smith said he could not afford that much, so Campbell offered to throw in $50. RP 215. A few days later, Smith went to Campbell's to install the wheels, but discovered that they did not fit. RP 215. Campbell said that he could not get their money back, but that Hodgson might be able to sell them on eBay or craigslist for $150. RP 215. Smith said he did not know who Campbell had gotten the tires from. RP 215.

The wheels and tires were worth about $750 all together. RP 59.

Because there was no evidence of actual knowledge, the jury could have found knowledge only by applying the reasonable person standard of 9A.08.010(1)(b)(ii). However, for that provision to be constitutional, it must be read as "only permitting, rather than directing, the jury to find that

the defendant had knowledge if it finds that the ordinary person would have had knowledge under the circumstances. The jury must still be allowed to conclude that he was less attentive or intelligent than the ordinary person." *State v. Shipp*, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980).

Under these facts, a jury finding of recklessness, as opposed to knowledge, does not require disbelief of the State's evidence. Instead it is a question of what the evidence signifies. Neither in their statements to Matthews nor in their trial testimony, did Campbell or Smith ever admit to knowing the tires were stolen. The evidence was conflicting as to when Campbell might have affirmatively suspected they were stolen. The jury could have believed all the evidence, and still concluded that Campbell did not know that the tires were stolen.

In *Corey*, the defendant was charged with rape by forcible compulsion. The trial court properly gave an inferior degree instruction on non-consensual rape where the jury "could have believed the victim's testimony but still have found that the defendant's conduct did not amount to forcible compulsion." *Corey*, 325 P.3d at 255; *accord*, State v. Hampton, ___ Wn. App. ___, ¶¶ 48-49, 2014 WL 3929104 (Aug. 11, 2014). The same is true here. The jury could have believed the evidence presented, but still concluded that Campbell's conduct was merely

reckless rather than knowing. As such the trial court properly gave the instruction.

Because Campbell fails to show that the alleged error is either constitutional or manifest, the Court should decline to review this issue. Moreover, even were the claim properly before the Court, for the foregoing reasons, it should be rejected.

B. AFTER CAMPBELL TESTIFIED TO EXCUSES FOR NOT ATTENDING TWO COURT HEARINGS, THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE LEGAL REQUIREMENTS OF THE ONLY DEFENSE TO BAIL JUMPING.

Campbell next claims that the trial court violated his right to control his defense by instructing the jury over his objection on the uncontrollable circumstances defense to bail jumping. Campbell would have his cake and eat it too. Before testifying, Campbell presented an offer of proof in which he attempted to explain why he missed two court hearings. The State objected that the evidence was irrelevant unless the jury was instructed on the defense. The court indicated that if Campbell presented the testimony it would instruct the jury on unavoidable circumstances. Because Campbell chose to testify why he did not attend the hearings, despite having knowledge of his obligation to do so, the trial court did not err.

1. The trial court properly instructed the jury on the affirmative defense of uncontrollable circumstances after Campbell introduced evidence that was not relevant to any element of bail jumping and which was insufficient to establish the defense.

Campbell is generally correct that every competent defendant "has a constitutional right to at least broadly control his own defense." *State v. Jones*, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983). Neither the State nor the trial court may compel a defendant to raise or rely on an affirmative defense. *State v. McSorley*, 128 Wn. App. 598, 605, 116 P.3d 431 (2005). When considered as a whole, instructions are sufficient if they properly state the law. *State v. Stafford*, 44 Wn.2d 353, 355, 267 P.2d 699 (1954). "[T]he test of an instruction's sufficiency is an additional safeguard to be applied only where the instruction given is first found to be an accurate statement of the law." *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

In *State v. Ball*, 97 Wn. App. 534, 987 P.2d 632 (1999), the defendant was convicted of bail jumping under former RCW 9A.76.170(1) (1983). Ball argued that the State failed to prove the knowledge element of bail jumping because it did not prove he was aware of his duty to appear on the precise date of the scheduled hearing. *Ball*, 97 Wn. App. at 536, 987 P.2d 632. The Court rejected that contention, holding that knowledge on the specific date of the hearing is not an element of the offense. *Ball*, 97 Wn. App. at 536-37. Moreover, the Court observed that

that if there were such a requirement, "[t]he defendant could admit knowledge on every previous day but claim to have forgotten about his duty to appear on the hearing day. The statute does not require this, only proof that Ball was aware of his obligation to appear." *Ball*, 97 Wn. App. at 537.

RCW 9A.76.170(1) provides in relevant part:

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

Under a plain reading of the statute, the State had to prove that Campbell had knowledge of the requirement of a subsequent personal appearance when he was released by court order or admitted to bail. *State v. Carver*, 122 Wn. App. 300, 305–06, 93 P.3d 947 (2004) (the State must prove only that the defendant was given notice of his court date, not that he had knowledge of this date every day thereafter, and that the claim to have forgotten is not a defense to the crime of bail jumping).

Here, Campbell's "my ride did not show" was a legally insufficient affirmative defense. Campbell admitted at trial (1) to having had knowledge of both court hearings, RP 136, 138, 154, 165; (2) that he signed and received the orders the scheduling them, RP 137, 165; and (3) that he failed to appear before the hearings concluded. RP 136, 138, 153,

154. *See also* CP 80, 90.

Campbell testified at trial. After establish the foregoing facts regarding the first hearing Campbell missed, Campbell's counsel began to inquire on direct why he did not show up at the hearings. RP 138. The State objected that the reasons were irrelevant. RP 138-39. Campbell then presented an offer of proof.

In the offer, Campbell testified that on the first date, his ride to court did not show up. RP 139. He did not have a phone. RP 139. He walked up to the school to use the phone, but he could not get a hold of anyone. RP 140. Ultimately, a teacher gave him a ride, but it was too late. RP 140. He had arranged the ride the day before, but they did not show up. RP 140. Campbell's license was suspended. RP 140. He could not call a cab because he did not have a phone, and did not have money for a cab. RP 140.

Campbell further testified that before the second hearing he missed, he arranged for his mother to give him a ride. RP 140. His mother owned a bar in Belfair, and her employee did not show up to open the business on that date. RP 141. So she did not come, and he walked to court and arrived late. RP 141.[2]

[2] Campbell subsequent testimony to the jury was more or less consistent with his offer of proof. RP 151-55, 166-68.

Over the State's objection, the court ruled that Campbell could testify about these matters. RP 149. It also made clear, however, that it would instruct the jury on the statutory defense. *Id.* The court made clear to Campbell that if he wished to present this evidence, the jury would be given appropriate instructions to guide its deliberations:

> MR. THIMONS: Your Honor, I'm concerned about offering the affirmative defense. And that tells the jury that we have proof that we have to present to them in the affirmative defense. I'm asking that we don't present the affirmative defense instruction to them because I'm not seeking that.
>
> THE COURT: No. You're seeking to have a defense that's not authorized by statute.
>
> MR. THIMONS: But it is a defense.
>
> THE COURT: It's not a lawful defense other than the fact that you're going to get him to say he was here on those occasions.
>
> MR. THIMONS: And the reason why he wasn't here on time?
>
> THE COURT: His reasons, yes.
>
> MR. THIMONS: Okay.

RP 149.

The court was correct that Campbell's proposed "defense" did not meet the statutory requirements, a point Campbell conceded below. RP 145; *see* RCW 9A.76.170; *cf. State v. Carver*, 122 Wn. App. 300, 304, 93 P.3d 947 (2004). The court thus properly included the uncontrollable circumstances defense jury instruction to clarify the legal effect of the testimony that Campbell offered to excuse his missed appearances. On the

evidence Campbell presented, the trial court had a general duty to inform the jury of the applicable law on the affirmative defenses to bail jumping, of which there is only one: the uncontrollable circumstances affirmative defense in RCW 9A.76.170(2).

The trial court thus did not impose an affirmative defense on Campbell; rather, it clarified any potential confusion the jury may have had regarding the legal sufficiency of the defense Campbell chose to present. The jury instructions, read as a whole, properly stated the law on bail jumping and the legally cognizable affirmative defense to the charge.

Campbell's reliance on *State v. Lynch*, 178 Wn.2d 487, 309 P.3d 482 (2013), and similar cases is thus misplaced. In most of those cases, the evidence relating to the affirmative defense also went to an element the State was required to prove. *See Lynch*, 178 Wn.2d at 492, 494 (defense of consent versus element of forcible compulsion); *State v. Coristine*, 177 Wn.2d 370, 379-380, 300 P.3d 400 (2013) (defense that defendant reasonably believed that victim was not mentally incapacitated versus element of victim being incapable of consent due to incapacitation); *State v. Jones*, 99 Wn.2d 735, 664 P.2d 1216 (1983) (insanity defense versus element of intent). In *State v. McSorley*, 128 Wn. App. 598, 116 P.3d 431 (2005), the defendant was charged with child luring. Over defense objection, the trial court instructed the jury on the statutory defense that "It

is a defense to a charge of luring that it was a defense that "(1) The defendant's actions were reasonable under the circumstances; and (2) The defendant did not have any intent to harm the health, safety, or welfare of the minor." There did not, however, appear to be any evidence that the defendant was claiming this defense.

Here, on the other hand, the affirmative defense of uncontrollable circumstances does not negate any element of the offense of bail jumping. *State v. Fredrick*, 123 Wn. App. 347, 353-354, 97 P.3d 47 (2004). Campbell admitted to all of the elements of the charges. He nevertheless insisted upon offering an excuse for the charges. The trial court gave him the opportunity to not present this evidence, which was irrelevant to any element of the offense. Nor did Campbell's testimony pertain to any element of the offense. Under these circumstances, the trial court did not deny Campbell's right to present a defense. Instead it instructed the jury on the proper legal effect of the evidence presented at trial. This claim should be rejected.

2. Any error would be harmless where Campbell admitted to every element of bail jumping.

Moreover, even if the trial court erred, any error would be harmless. Violation of a defendant's right to control his own defense is subject to review for harmless error. *Jones*, 99 Wn.2d at 748; *Coristine*, 177 Wn.2d at 380.

Here the alleged error is harmless because Campbell admitted that he failed to appear for both court dates after knowing that he was required to appear. Instruction 16 informed the jury that to convict Campbell of the crime of bail jumping, the State had to prove the following beyond a reasonable doubt:

> (1) That on or about January 28, 2013,[3] 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 or 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.

Campbell's own testimony, as noted above, leaves no reasonable doubt that he committed these offenses. He admitted that he was not in court at 10:30 a.m. on January 28, 2013, or February 4, 2013. RP 136, 138, 153, 154, 167. He testified that he recognized Exhibit 5B, a certified copy of the court order showing that he had a court date on January 28 at 10:30 a.m. in Room 212; he acknowledged that had signed it and received a copy. RP 137, 165. He also testified that he knew he was supposed to be in court on February 4 at 10:30. RP 154, 167.

The State admitted a certified copy of the felony complaint filed in

[3] Instruction 17 is identical but substitutes "February 4, 2013." CP 45.

district court charging Campbell with second-degree trafficking in stolen property. CP 76. It admitted the release order requiring Campbell to appear on January 28, which bore his signature. CP 80. It admitted the district court docket reflecting that Campbell had received a copy of the order. CP 83. It admitted the clerk's minutes that showed that Campbell had not yet appeared on January 28 when the courtroom was polled at 11:00, a half hour after he was supposed to be there. CP 95.

The State also admitted the information filed in superior court on January 18, 2013 charging Campbell with second-degree trafficking in stolen property. CP 85. The State also admitted the order setting the February 4 hearing, which also bore Campbell's signature. CP 90. It admitted clerk's minutes showing that Campbell was given oral and written notice of the February 4 hearing. CP 89. It admitted the clerk's minutes that showed that Campbell had not yet appeared on February 4 when the courtroom was polled at 11:55, an hour and a half after he was supposed to be there. CP 92.

Unlike in *Lynch* and *Coristine*, Campbell offered no evidence went to any element of the offense. Thus, even without the affirmative defense instructions, there is no reasonable doubt that the jury would have convicted Campbell of both counts of bail jumping. Any alleged error would be harmless.

3. The defense instruction did not constitute a limitation on Campbell's right to present argument: a defendant has no right to present argument that is contrary to the law.

Nor does Campbell's claim that the limitation on his counsel's ability to argue his defense have merit. A criminal defendant has the right to present his defense. *State v. Hudlow*, 99 Wn.2d 1, 14–15, 659 P.2d 514 (1983). But this right is not unlimited.

"[A]rgument by counsel must be restricted to the facts in evidence and the applicable law, lest the jury be confused or misled." *State v. Perez-Cervantes*, 141 Wn.2d 468, 474, 6 P.3d 1160 (2000). Consequently, the trial judge has discretion to restrict closing arguments. *Id.* The Court in *Perez-Cervantes* specifically cited to the very case upon which Campbell relies:

> "The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations.... He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he must have broad discretion."

Perez-Cervantes, 141 Wn.2d at 474-75 (*quoting Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975)); *accord State v. Frost*, 160 Wn.2d 765, 781-782, 161 P.3d 361 (2007) ("the scope of argument may be limited by the trial court"). The Supreme Court has thus held that the defense closing must be confined to the law as set forth in the instructions to the jury. *Perez-Cervantes*, 141 Wn.2d at 475. Restrictions

on the scope of argument are reviewed for abuse of discretion. *Id.*

Here, the trial court did not actually limit closing argument. All it did, as discussed above, was instruct the jury on the law that applied to the evidence Campbell presented at trial. To the extent that the trial court could be seen as limiting Campbell's argument, it prevented him from claiming a "defense" that was not supported in fact or law. Surely Campbell has no fundamental right to present such a defense.

4. Limitations on closing argument are not structural error, and any error here would be harmless.

Further even if the trial court erred, any error would be harmless. The purported error is not, would not, as Campbell claims, be structural. In the Supreme Court specifically rejected such a contention:

> The right to make argument through counsel is unquestionably fundamental, but the scope of argument may be limited by the trial court. Such a limitation does not necessarily "'render[ ] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" *Recuenco*, 126 S. Ct. at 2551 (*quoting Neder*, 527 U.S. at 9). Rather, an erroneous limitation of the scope of closing argument merely affects the "trial process itself," *Fulminante*, 499 U.S. at 310, and is analogous to the numerous other constitutional errors identified by the Supreme Court as subject to harmless error analysis. *Id.* at 306–07 (listing errors subject to harmless error analysis including: jury instruction misstating an element of the offense; erroneous exclusion of a defendant's testimony regarding circumstances of his confession, restriction on a defendant's right to cross-examine a witness for bias, denial of a defendant's right to be present at all critical stages, and denial of counsel at a preliminary hearing). Accordingly, we hold that the trial court's error in limiting

> the scope of closing argument in the present case was not structural and is subject to harmless error analysis.

Frost, 160 Wn.2d at 781-782. This point was reiterated in *Coristine*:

> To be clear, absolute denial of a defendant's right to control the defense is structural error and not subject to harmless-error analysis. *See*, *e.g.*, *McKaskle*, 465 U.S. at 177 n.8. However, we review lesser deprivations of this right for harmless error. *See Jones*, 99 Wn.2d at 748, 664 P.2d 1216. As in *Jones*, the error here was not an absolute deprivation.

Coristine, 177 Wn.2d at 380 n.1.

The Supreme Court has adopted the "overwhelming untainted evidence" test as the proper standard for harmless error analysis in Washington. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). "Under this test, the Court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *Id.* A finding of harmless error requires proof beyond a reasonable doubt that "any reasonable jury would have reached the same result in the absence of the error." *Guloy*, 104 Wn.2d at 425.

Here, the trial court's supposed limitation did not taint the evidence before the jury in any way, as counsel's argument is not evidence. Thus, all the evidence of Campbell's guilt, including his admissions to all the elements of bail jumping, may be considered in determining whether the trial court's error was harmless. Given this

evidence, and the fact that "my ride did not show up" is not a valid defense to these charges, it must be concluded beyond a reasonable doubt that "any reasonable jury" would have convicted Campbell, even absent the trial court's supposed limitation on counsel's argument. *Guloy*, 104 Wn.2d at 425; *see also State v. Berube*, 150 Wn.2d 498, 509, 79 P.3d 1144 (2003) (upholding finding of harmless error as a result of erroneous accomplice liability instruction, in part, because "the record clearly support[ed] a finding that the jury verdict of conviction would be the same absent the error"). This claim should be rejected.

C. THE TRIAL COURT PROPERLY GAVE A MISSING WITNESS INSTRUCTION WHERE CAMPBELL BLAMED HIS ABSENCE FROM COURT ON THE FAILURE OF HIS MOTHER AND AN UNNAMED FRIEND TO GIVE HIM A RIDE.

Campbell next claims that the trial court erred in giving a missing witness instruction. This claim is without merit because as previously discussed, Campbell testified, without any corroboration, that he missed court because his mother and an unnamed friend failed to pick him up. These individuals were clearly peculiarly available to him. Moreover, any error would be harmless.

1. The trial court properly gave a missing witness instruction where Campbell blamed his absence from court on the failure of his mother and an unnamed friend to give him a ride.

The Supreme Court has held that the missing witness doctrine

applies equally to the State and the defense. *State v. Blair*, 117 Wn.2d 479, 488, 816 P.2d 718 (1991). The doctrine applies when circumstances indicate, as a matter of reasonable probability, that the party against whom the missing witness rule was sought to be applied in the case would not knowingly fail to call the witness in question unless the witness's testimony would be damaging. *Id.* "In other words, 'the inference is based, not on the bare fact that a particular witness is not produced as a witness, but on his non-production when it would be natural for him to produce the witness if the facts known by him had been favorable.'" *Blair*, 117 Wn.2d at 488 (*quoting State v. Davis*, 73 Wn.2d 271, 280, 438 P.2d 185 (1968)).

If a witness's absence can be satisfactorily explained, no inference is permitted. *Blair*, 117 Wn.2d at 489. However, the State does not bear the burden of showing any reason for the absence of the witness. *Id.* It is the party against whom the rule would operate who is entitled to explain the witness's absence and avoid operation of the inference. *Id.*

The doctrine does not apply if the uncalled witness is equally available to the parties. *Blair*, 117 Wn.2d at 490. Contrary to Campbell's contentions, this question of availability does not mean that the witness is in court or is subject to the subpoena power. *Id.* For a witness to be "available" to the defendant, "there must have been such a community of

interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging." *Id.*

In *Blair*, the defendant argued that the State could have investigated and tried to locate the witnesses itself, but it did not demonstrate any attempt to do so, nor did the State offer any proof it had tried to identify or subpoena the witnesses. *Blair*, 117 Wn.2d at 491. The Court rejected that argument:

> The requirement, however, is, as one court has put it, that the party seeking benefit of the inference must show the "absent witness was peculiarly within the other party's power to produce". United States v. Williams, 739 F.2d 297, 299 (7th Cir.1984).

Blair, 117 Wn.2d at 491. Thus, where the missing witnesses appeared on a list in the defendant's possession at the time of his arrest, the instruction was proper. Here the missing witnesses were Campbell's unidentified friend and his mother. It is difficult to conceive of two witnesses more within the peculiar power of a party to produce.

Moreover, unlike in *State v. Montgomery*, 163 Wn.2d 577, 599, 183 P.3d 267 (2008), Campbell's testimony regarding his rides not showing up was not corroborated by any other witness. Also unlike

Montgomery, *id.*, since the two witnesses were the individuals who allegedly failed to pick up Campbell, they would presumably have relevant knowledge.

2. Under the facts of this case, where the evidence of bail jumping was uncontroverted and where Campbell specifically disavowed the affirmative defense, any error would be harmless.

Campbell further asserts the alleged error was harmful because "[i]n 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." Brief of Appellant at 32. This hyperbolic assertion misstates the record. First, as discussed above, the trial court warned Campbell before he introduced the testimony regarding his excuses for missing court that it would result in the instruction on the defense of unavoidable circumstances. Campbell chose to present the testimony anyway, knowing that the instruction would be given.

Secondly, the instruction was a very minor part of the case. In a 15-page closing argument, RP 230-45, the State very briefly mentioned it:

> The defendant took the stand and told you, I didn't make the ride because, one, first, my friend didn't get me. I don't recall if he mentioned a name. If it's in your notes, then there's a name you can put on it.
>
> Second, I didn't make it to court on time because my mother didn't come and pick me up. ... I would suggest

> to you that it would be reasonable in the uncontrollable circumstance that prevented me from coming to court on time was that my friend didn't come to pick me up, my mother didn't come to pick me up, I would call my friend and my mother to come in and testify this is what was in the way. It wasn't that he gave us a bad time, it wasn't that we tried to explain to him that we were going to be very busy and we might not be able to make it and he has to make other arrangements, that they would come in and presumably testify we tried very, very hard and we couldn't do it. But they did not testify about an issue for which it is the defendant that has the burden of proof.

RP 243-45.

In his closing, Campbell barely even addressed the bail jumping charges, other than to disavow any reliance on the affirmative defense. RP 247. He did not challenge the State's evidence in any way or give the jury any reason to find that the State had not met its burden. In rebuttal, the only passage in an eight-page argument, RP 255-63, that could possibly be seen as a reference to missing witnesses was extremely brief: "Other people were supposed to bring me. What is there to corroborate that? What is there to rely upon?" RP 258.

An erroneous instruction is harmless if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Montgomery*, 163 Wn.2d at 600. Whether a flawed jury instruction is harmless error depends on the facts of a particular case. *Id.* As previously discussed, Campbell admitted every element of the offense. He denied that he was claiming the affirmative defense. The State's

evidence of bail jumping was overwhelming and uncontroverted. It is difficult to see how this instruction, even if inappropriate, could have had any effect on the verdict whatsoever. This claim should be rejected.

D. THE SUPREME COURT HAS RULED THAT THE JURY INSTRUCTION THAT DEFINES RECKLESSNESS NEED NOT NAME THE PARTICULAR OFFENSE.

Campbell next claims, for the first time on appeal, that the trial court improperly defined recklessness for the jury. This unpreserved claim is without merit because the cases on which he relies have been overruled.

Campbell argues that the trial court erred when it improperly defined "reckless" in the jury in Instruction 12, which informed the jury:

> 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 is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact.

CP 40 (emphasis supplied). Campbell correctly notes that in *State v. Harris*, 164 Wn. App. 377, 263 P.3d 1276 (2011), and *State v. Peters*, 163 Wn. App. 836, 261 P.3d 199 (2011), this Court held that in the context of an assault, the phase "wrongful act," which appears in the WPIC, must be replaced with the injury specified under the statute.

However, in *State v. Johnson*, 180 Wn.2d 295, 305, 325 P.3d 135 (2014), the Supreme Court overruled *Harris* and *Peters* and held that "the generic instruction defining 'reckless' [is] sufficient without the charge-specific language given that the 'to convict' instruction include[s] the proper language." Here, the to-convict instruction required the jury to find the following beyond a reasonable doubt:

> (1) That on or about the period of August 1st, 2012 to August 4th, 2012, the defendant trafficked in stolen property;
>
> (2) That the defendant acted recklessly; and
>
> (3) That the acts occurred in the State of Washington.

CP 41. Here the only wrongful act in question was trafficking in stolen property. *Id.* The Court's analysis in *Johnson* is applicable here:

> Taken in their entirety, the instructions in this case were sufficient. The "to convict" instruction properly laid out the elements of the crime. It identified the wrongful act contemplated by Johnson as "substantial bodily harm." Separately providing a generic definition of "reckless" did not relieve the State of its burden of proof. The "to convict" instructions are the primary "yardstick" the jury uses to measure culpability, and here they were accurate. The Court of Appeals incorrectly concluded that the definitional instruction also had to use the charge-specific language.

Johnson, 180 Wn.2d at 306.

Moreover, even if *Johnson* were not dispositive, in *Harris*, the defendant proposed the correct instruction at trial. *Harris*, 164 Wn. App. at ¶ 13. Here, on the other hand, when asked, Campbell specifically stated

that he had no objection to the instruction. RP 221. As such, he must show manifest constitutional error before he may raise this issue on appeal.

As previously discussed, RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. A trial court's erroneous definitional instruction does not implicate a constitutional interest. While the failure to instruct the jury on every element of the charged crime amounts to constitutional error, if the instruction properly informs the jury of the required elements, however, any failure to further define terms used in the elements is not an error of constitutional magnitude.[4] *State v. Gordon*, 172 Wn.2d 671, 677, 260 P.3d 884 (2011); *State v. O'Hara*, 167 Wn.2d 91, 98, 105, 217 P.3d 756 (2009).

In *Scott*, the Supreme Court was asked whether the trial court's failure to define "knowledge" for the jury was constitutional error. *Scott*, 110 Wn.2d at 683-84. The Court clarified that it did not. The same reasoning by which the court has determined that a failure to properly define "knowledge" and "malice" is not constitutional error applies here. Absent constitutional error, the Court need not analyze whether any error was manifest or harmless. *Gordon*, 172 Wn.2d at ¶ 13. RAP 2.5(a)

[4] Campbell does not claim that the to-convict was incorrect or omitted any element.

applies, and if *Harris* applied, the Court would decline to review this claim.

E. THE TRIAL COURT PROPERLY CLEARED UP THE CONFUSION EXPRESSED BY THE JURORS REGARDING THE DISCREPANCY BETWEEN THE TRIAL CHARGE OF FIRST-DEGREE TRAFFICKING IN STOLEN PROPERTY AND THE DOCUMENTARY EVIDENCE SUBMITTED IN SUPPORT OF THE BAIL-JUMPING CHARGES, WHICH INDICATED A CHARGE OF SECOND-DEGREE TRAFFICKING.

Campbell next claims that that the trial court improperly commented on the evidence and introduced new evidence to the jury when it responded to the jury's mid-deliberation inquiry. This claim was not preserved for review and is without merit where all the court did was clarify the procedural history of the case.

1. Campbell did not preserve this issue for review when he failed to object to the trial court's response to the jury inquiry.

Campbell asserts that he objected to the court's response to the jury inquiry. That would be a very liberal reading of the report of proceedings. While Campbell proposed telling the jurors to read their instructions, he never in fact interposed any objection to the trial court's ultimate proposal:

> MR. THIMONS: Your Honor, I'm proposing that we just indicate to them that they have the law and the instructions as given to them and they should decide.

> THE COURT: Well, that's the easy way out, but I don't feel comfortable when they raise a specific issue that is legal in nature as opposed to potential comment on the evidence.
>
> MR. ANDERSON: I'm imagining they're thinking have they uncovered something, you read the wrong information to them. I don't think they should be confused about that.
>
> THE COURT: Right. Well, my response is going to be, "The original complaint and information was for trafficking in the second degree. An amended information has been filed, the defendant is currently charged with trafficking in the first degree. Each of the charges is either a Class B or Class C felony, which is the prerequisite for purposes of the bail-jump."
>
> So that will be the court's response.

RP 269. The proceedings then adjourned. Under indistinguishable circumstances, this Court has declined to review the issue for lack of preservation:

> At the time of the jury's question ... the court consulted with counsel. RP at 208. Mr. Cordero immediately suggested that the court answer the question "yes" and the State suggested that it answer the question "no." *Id.* at 209. But neither objected when the court announced its decision to respond, instead, "Refer to Court's Instructions on the Law." *Id.* It is too late now for Mr. Cordero to complain about the court's response to the jurors' question, RAP 2.5(a).

State v. Cordero, 170 Wn. App. 351, 371, 284 P.3d 773 (2012). Because Campbell never objected to the instruction that the trial court gave, the Court should decline to review the issue.

2. The trial court did not comment on the evidence by clarifying the procedural posture of the case.

Even if the issue were properly before the Court, no error occurred. The decision to answer jury questions and give further instructions is within the trial court's discretion. *State v. Becklin*, 163 Wn.2d 519, 529, 182 P.3d 944 (2008).

Here the jury asked the following question:

> 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 says the defendant is charged with one count of trafficking in stolen property in the first degree while the felony complaint & information seem to show that defendant is charged with stolen property in the second degree.

CP 50 (emphasis in original). As noted, the Court responded:

> 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. Nothing in this response incorrectly states the law or the procedural history of the case.

Campbell first argues that the trial court injected new evidence into the case by informing the jury that the charge had been amended to first-degree trafficking in stolen property. This was not "evidence." It was an instruction on the procedural posture of the case. Nor was it "new." The original felony complaint and information were admitted as exhibits

during trial. In its instructions, the court had already informed the jury on several occasions that Campbell was presently charged with first-degree trafficking in stolen property. Before jury selection, the court instructed the jurors in accordance with WPIC 1.01:

> Mr. Campbell is charged with three crimes, and I will read those to you at this time.
>
> Count 1 charges the crime of trafficking stolen property in the first degree and reads as follows: On or between August 1, 2012 and August 4, 2012, in Kitsap County, State of Washington, the above-named defendant did knowingly initiate, organize, plan, finance, direct, manage or supervise the theft of stolen property for sale to others, or did knowingly traffic in stolen property; contrary to Washington law.

RP 50-51. Notably Campbell does not claim that this instruction is a comment on the evidence. Instruction 9 again instructed the jury on what they needed to find to convict Campbell of first-degree trafficking in stolen property. CP 37. Nor was informing the jury that first-degree trafficking was a B or C felony a comment on the evidence. "[T]he classification for sentencing purposes of both the underlying offense and the bail jumping charge is a question of law for the judge." *State v. Williams*, 162 Wash.2d 177, 190, 170 P.3d 30 (2007). Notably, Campbell does not claim that Instruction 15, which informed the jury that trafficking in stolen property in the second degree was a Class C felony, CP 43, was a comment on the evidence.

While the law of the case doctrine holds that the State must prove

all elements included in the to-convict instruction, the court's supplemental instruction did not change the stated element that the case underlying the bail jump had to be a Class B or Class C felony.

Finally, even if the there were error, it would be harmless. "[N]ot every omission or misstatement in a jury instruction relieves the State of its burden." *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). A constitutional error is harmless when it appears beyond a reasonable doubt that the alleged error did not contribute to the verdict. *Brown*, 147 Wn.2d at 341 (*citing Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Applied to an jury instruction, an error is harmless if the element is supported by uncontroverted evidence. *Brown*, 147 Wn.2d at 347.

Here, the Count II[5] bail jumping to-convict instructions required the jury to find that Campbell had been charged with a class B or C felony. A separate instruction informed the jury that second-degree trafficking in stolen property was a Class C felony. No *evidence* was presented as to any charge other than second-degree trafficking.

The evidence was uncontroverted that Campbell had been charged by criminal complaint and then information with second-degree trafficking in stolen property, twice released by the court with the requirement of a

[5] Campbell does not appear to argue that the alleged error would have affected the verdict as to Count III.

subsequent personal appearance, and then twice knowingly failed to appear for court.

Moreover, nothing in the argument of the parties would have led the jury to believe they could convict Campbell of bail jumping based on the amended information. Indeed the degree of the underlying charge was not even mentioned until the State's rebuttal; the facts were simply not in issue at all regarding the bail jumping offenses. The State did not address the degree of the offense or even the identity of the offense in its first closing argument:

> Defendant has told you that he knew he had two appointments in court. He had signed for and had been told that he needed to come to court on January 28th, courtroom 212. He knew later he was supposed to come to court on February 4th, 10:30, and he's acknowledged to you freely, consistent with the clerks, he did not make those appointments. Meets all the elements of the crimes.

RP 231. Nor did the defense:

> The bail-jumping consists of what the clerks testified to you and possibly some exhibits that you can examine later, and also what Mr. Campbell testified to you. The state still has the burden to prove that he failed to appear and each element of each of those bail-jumping offenses must be proved before you're convinced -- before you're convinced beyond a reasonable doubt.

RP 248. Both sides argued, however that the jurors should rely on the testimony and the documentary evidence, which all indicated Campbell was charged with second-degree trafficking.

Moreover, in rebuttal, the State argued that the evidence showed

Campbell was charged with *second*-degree trafficking, which was a *Class C* felony:

> The defendant was charged with a Class B or Class C felony, and the court has instructed that trafficking stolen property in a second degree is a Class C felony and you have a document showing at the time the defendant was charged with trafficking stolen property in the second degree. There's no real dispute about that.

RP 256-57.

Further, the trial court properly instructed the jury that it was only to consider the evidence admitted at trial:

> The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial.

CP 27. This point was reemphasized:

> The evidence is the testimony and the exhibits.

CP 28. The court also instructed the jurors to disregard any apparent comments it may have made on the evidence:

> Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

CP 28. In light of all these factors, along with the uncontradicted evidence of bail jumping, which has been discussed previously, there is no likelihood that this alleged error could have affected the jury's verdict.

This claim should be rejected.

F. THE TRIAL COURT PROPERLY DENIED COUNSEL'S MOTION TO WITHDRAW BASED ON AN ALLEGED CONFLICT OF INTEREST DUE TO HIS FIRM'S REPRESENTATION OF WITNESS MICHAEL SMITH IN A FACTUALLY UNRELATED MATTER WHERE COUNSEL COULD NOT POINT TO ANY SECRETS OR CONFIDENCES HE KNEW ABOUT SMITH THAT WOULD IMPAIR HIS REPRESENTATION OF CAMPBELL.

Campbell claims that his counsel had a conflict of interest because counsel's firm represented witness Smith in an unrelated district court traffic matter. The trial court properly denied counsel's motion to withdraw where the two cases were factually unrelated and where counsel could not point to any secrets or confidences he knew about Smith that would impair his representation of Campbell.

Before trial, Campbell requested appointment of new defense counsel based upon a perceived conflict of interest because trial counsel's firm represented Michael Smith in an unrelated matter. Finding no evidence of an actual conflict, the trial court denied the motion, but with leave to renew if more facts came to light. RP (7/22) 10-11. Counsel did not renew the motion.

The determination of whether a conflict exists precluding continued representation of a client is a question of law and is reviewed de

novo. *State v. Hunsaker*, 74 Wn. App. 38, 41-42, 873 P.2d 540 (1994). Under RPC 1.7 an attorney may not represent a defendant if such representation "will be *directly adverse* to another client", or if the representation of the defendant might "be *materially limited* by the lawyer's responsibilities to another client" (emphasis supplied). Similarly, RPC 1.9 prohibits a lawyer representing a defendant in "the *same or a substantially related* matter in which that person's interests are materially adverse to the interests of the former client," or the where the current representation would require the attorney to "use *confidences or secrets* relating to the representation to the disadvantage of the former client" (emphasis supplied).

Absent evidence that the facts of Campbell's case and the facts of Smith's case were the same or substantially related, or where confidences or secrets were liable to be exposed, there was no conflict, and the trial judge did not abuse his discretion in denying the motion to withdraw.

In *Hunsaker*, 74 Wn. App. at 46-47, this Court held that there must be a "factual context analysis" of the matters in alleged conflict, and that if the matters are not substantially related "the court will not presume that confidential information was disclosed requiring disqualification" of counsel. The defense counsel has represented a witness in another matter is, by itself, a coincidence, not a conflict, and is insufficient to warrant a

change of defense counsel. In *Hunsaker*, the State called the victim of an earlier assault by the defendant as a witness. This witness had been a client of the same defense counsel's firm. The trial court found the prior representation of the witness presented a conflict. On discretionary review, this Court observed that there was no evidence that the factual matters of the current defendant's prosecution and the witness's former prosecution were in any way related. Based on this factual analysis the Court reversed the decision of the trial court. *Hunsaker*, 74 Wn. App. at 46.

In *Hunsaker*, counsel also asserted that the witness's prior conviction might be used to impeach the witness. The Court rejected this claim because the fact of the prior conviction was information available for impeachment to any defense counsel, was not confidential, and by itself, "failed to demonstrate that disqualification is necessary pursuant to RCP 1.9(b)." *Hunsaker*, 74 Wn. App. at 48.

The U.S. Supreme Court has applied the same reasoning. In *Mickens v. Taylor,* 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002), counsel represented Timothy Hall on a criminal matter. While that matter was pending, Mickens murdered Hall and the same lawyer was appointed to represent Mickens. Counsel did not disclose that he had earlier represented the victim until after Mickens was tried and convicted.

The Supreme Court rejected Mickens's claim that he was entitled to a new trial. It held that a conflict of interest means "precisely a conflict *that affected counsel's performance*–as opposed to a mere theoretical division of loyalties." *Mickens*, 535 U.S. at 171 (emphasis the Court's). The Court rejected the notion that overlapping representation automatically required a change of counsel. Instead, the defense must show the existence of an actual conflict that in a practical way affects actual representation. Absent a factual record for a court to consider, the mere assertion of a possible conflict is not sufficient for a court to require a change of lawyers.

This Court has also addressed the scenario where despite the absence of a factual connection between the cases, continued effective representation might require disclosure of confidential information from the other client. In *State v. Ramos*, 83 Wn. App. 622, 629, 922 P.2d 193 (1996), defense firm representing the defendant in a drug case had earlier represented the testifying co-defendant in a prosecution for theft. The Court found that the theft charge was not "substantially related" to the current prosecution of the defendant on the drug charge, and therefore under that factual analysis, there was no conflict. *Ramos*, 83 Wn. App. at 630.

Counsel also asserted that to represent Ramos, they would have to make "inquiry into confidences and secrets relating to the prior

representation of [the codefendant] to [the codefendant]'s disadvantage." *Ramos*, 83 Wn. App. at 630. The Court concluded that the record was inadequate to conclude there was a conflict:

> Although Ramos stated an intention to attack [the codefendant]'s credibility, in the absence of any contrary showing we can only conclude that such an attack would be based on [the codefendant]'s prior theft conviction, the existence of which was public information ... and not as a result of any prior representation of her by [counsel's firm], we conclude that withdrawal and substitution was not warranted.

Ramos, 83 Wn. App. at 632. The Court further ruled that absent a record establishing the nature of the "confidences and secrets" to be disclosed, it was error for the court to presume a conflict. Where defense counsel asserts a conflict based upon possible disclosure of confidences, there is an "affirmative duty on a trial court to determine whether an actual conflict exists ... unless an actual conflict exists, there has been no denial of effective assistance of counsel." *Ramos*, 83 Wn. App. at 632 (*citing In re Richardson*, 100 Wn.2d 669, 675 P.2d 209 (1983)).

Here, counsel learned shortly before trial that another member of his firm had been representing Smith in an unrelated traffic matter in district court. RP (7/22) 3-4. Because the matters were factually unrelated, no conflict existed from the mere fact of representation.

Moreover, counsel was unable to identify any specific matter that amounted to a conflict or that would impair his ability to represent

Campbell:

> And that in impeaching him, I might get to sensitive information or I might get to something of concern. So I don't have a specific thing in mind at this point, because, like I said, I wasn't representing him, but I have accessed Mr. Tyner's files.

RP (7/22) 5. The trial court thus declined to find a conflict and denied the motion to withdraw:

> THE COURT: Very well. At this point, the Court is unable to make a finding that there exists an actual conflict within the Thimons Tyner firm as it relates to representation of Mr. Campbell in this matter, and, therefore, I'm denying the motion to withdraw based on the information provided to me this morning.
>
> Certainly, as the case evolves if something comes up which does reflect an actual conflict, Mr. Thimons, you have leave to renote your motion. But as the record stands before the Court this morning, I'm not able to make a finding of a conflict, and the motion is denied.

RP (7/22) 10-11.

On this record Campbell's argument is precisely what this Court has held is inappropriate: the presumption of a conflict in the absence of any record that one exists in fact. The trial court did not err on this record, and this claim should be denied.

IV. CONCLUSION

For the foregoing reasons, Campbell's conviction and sentence should be affirmed.

DATED August 28, 2014.

Respectfully submitted,
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Deputy Prosecuting Attorney

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August 28, 2014 - 3:49 PM

Transmittal Letter

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