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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

97483-7

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STATE OF WASHINGTON,  
Respondent,

v.

LAMAR JEFFRIES,  
Petitioner.

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

Pierce County Cause No. 15-1-04739-8

The Honorable Frank E. Cuthbertson, Judge

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PETITION FOR REVIEW

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**I. IDENTITY OF PETITIONER**

Petitioner Lamar Jeffries, the appellant below, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

**II. COURT OF APPEALS DECISION**

Lamar Jeffries seeks review of the Court of Appeals unpublished opinion entered on June 25, 2019. A copy of the opinion is attached.

**III. ISSUE PRESENTED FOR REVIEW**

An accused person has a due process right to have the jury instructed on each element of an offense. Does the pattern to-convict instruction for bail jumping (WPIC 120.41) violate due process rights by allowing conviction without proof that the conduct of the accused met the statutory element that s/he had failed to appear in court “as required”?

**IV. STATEMENT OF THE CASE**

The state called a deputy prosecuting attorney to provide evidence at Mr. Jeffries’s trial that he had committed the offense of bail jumping. RP (5/19/16) 140-58.

The witness explained (and authenticated documents demonstrating) that Mr. Jeffries had been ordered to appear in courtroom 270 at 1:00 pm on the date in question. Ex. 7; RP (5/19/16) 141. But he

only testified that, on the date of the hearing, Mr. Jeffries was not present in some unspecified courtroom at 3:10 pm. RP (5/19/16) 153.

The witness also testified that similar hearings were going on in other courtrooms in the courthouse at the same time and that accused persons were meeting with their attorneys in adjoining rooms while the hearings took place. RP (5/19/17) 142, 152-53. The witness did not say anything regarding whether Mr. Jeffries had been present in one of those meeting rooms or in another courtroom or whether he had been present in the courtroom at 1:00 pm on the date in question. RP (5/19/16) 140-58.

The court used the pattern to-convict instruction for the bail jumping charge, which listed the elements of that offense as follows:

- (1) That on or about January 12, 2016, the defendant failed to appear before a court;
- (2) That the defendant was charged with Assault in the Third Degree;
- (3) That the defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court; and
- (4) That any of these acts occurred in the State of Washington. CP 30; WPIC 120.41.

The jury found Mr. Jeffries guilty of bail jumping. CP 34-35.

Mr. Jeffries timely appealed. CP 127-28. The Court of Appeals affirmed his convictions. *See* Opinion.

**V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

A. The Supreme Court should accept review and hold that the pattern to-convict jury instruction for bail jumping violates due process by relieving the state of its burden to prove each element of the charge. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).

1. The court's to-convict instruction failed to inform the jury of the requirement that the state prove that Mr. Jeffries had failed to appear "as required" in order to convict for bail jumping.

To convict for bail jumping, the state must prove both a requirement of subsequent personal appearance and that the accused failed to appear "as required." *State v. Williams*, 162 Wn.2d 177, 184, 170 P.3d 30 (2007); RCW 9A.76.170(1). Absent such a showing, the jury could convict for activity that is not illegal: such as missing a non-mandatory hearing or simply failing to be in the courthouse on a random day on which no hearing is held.

The pattern to-convict instruction for bail jumping, used in Mr. Jeffries's case, did not tell the jury that it had to find he had failed to appear "as required." CP 58; WPIC 120.41. Rather, it required proof only that Mr. Jeffries "failed to appear before a court" on a specified date. CP 30.

WPIC 120.41 violates due process by relieving the state of its burden to prove an element of the offense of bail jumping.

A trial court's failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). A "to convict" instruction must contain all the elements of the crime, because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004).

Jurors have the right to regard the court's elements instruction as a complete statement of the law. Any conviction based on an incomplete "to convict" instruction must be reversed. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). This is so even if the missing element is supplied by other instructions. *Id*; *Lorenz*, 152 Wn.2d at 31; *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

WPIC 120.41 relieves the state of its burden to prove each element of bail jumping beyond a reasonable doubt.<sup>1</sup>

In order to convict a person for bail jumping, the state must prove that s/he: (1) was held for, charged with, or convicted of a particular

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<sup>1</sup> Alleged constitutional violations are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3). Instruction No. 14 creates a manifest error affecting a constitutional right, and thus may be reviewed for the first time on appeal. RAP 2.5(a)(3). Jury instructions are also reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).



crime; (2) was released by court order or admitted to bail with knowledge of a required subsequent personal appearance; and (3) failed to appear as required. *Williams I*, 162 Wn.2d at 184; RCW 9A.76.170(1).

But WPIC 120.41 permits conviction even if the accused did not fail to appear “as required.” WPIC 120.41; CP 30. The instruction was not available to the jury at Mr. Jeffries’s trial as an accurate “yardstick,” and thus did not make the state’s burden manifestly clear to the average juror. *State v. Kylo*, 166 Wn.2d at 864.

Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). Constitutional error is harmless only if it is trivial, formal, or merely academic, if it is not prejudicial to the accused person’s substantial rights, and if it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

Absent a showing that the accused failed to appear “as required,” the jury could convict for activity that is not illegal: such as missing a non-mandatory hearing or simply failing to be in the courthouse on a random day on which no hearing is held.

Without the missing element (that Mr. Jeffries failed to appear “as required,”) the jury could have found him guilty based on non-appearance

in court at some irrelevant date and time. The jury could have convicted Mr. Jeffries even if it found that there was insufficient evidence that the January 12<sup>th</sup> hearing was required.

The evidence against Mr. Jeffries was not overwhelming. The state's evidence demonstrated, at most, that Mr. Jeffries was not in some un-specified courtroom at 3:10 pm. RP (5/19/17) 153; Ex. 8. But he had been ordered to report to a specific courtroom (in a busy courthouse) at 1:00 pm. RP (5/19/17) 141; Ex. 7. There was no evidence that Mr. Jeffries was absent from the courthouse at 1:00 pm. *See* RP (5/19/17) 150-58.

The state also failed to present any evidence at trial that Mr. Jeffries had not been present in the specific courtroom to which he had been ordered on the appointed date and time. *See* RP (5/19/17) 140-58. Mr. Jeffries was ordered to appear in courtroom 270. Ex. 7. But the state presented evidence that similar hearings were going on in various courtrooms contemporaneously and that accused persons were meeting with their attorneys in adjoining rooms while the hearings took place. RP (5/19/17) 142, 152-53. The state's witness did not clarify which courtroom had been polled for Mr. Jeffries. *See* RP (5/19/17) 140-58. The relevant exhibits are also silent on the matter. *See* Ex. 8-10. Absent some evidence that Mr. Jeffries had been absent from room 270, specifically, or that all of the courtrooms and meeting rooms had also been polled for Mr. Jeffries,

the state failed to prove beyond a reasonable doubt that he was not present on the appointed date and time.

Under these circumstances, and the state cannot prove that the use of a constitutionally deficient to-convict instruction constituted harmless error under the stringent test for constitutional error. *Watt*, 160 Wn.2d at 635. Accordingly, The Court of Appeals should have reversed Mr. Jeffries's bail jumping conviction. *Id.*

2. This Court must overrule the Court of Appeals' decision in *Hart*, because that decision was wrongly decided and is harmful.

The Court of Appeals affirmed Mr. Jeffries's bail jumping conviction, relying exclusively on its prior decision in *State v. Hart*. Opinion, pp. 7-10 (*citing State v. Hart*, 195 Wn. App. 449, 456, 381 P.3d 142 (2016), *review denied*, 187 Wn.2d 1011, 388 P.3d 480 (2017), *abrogated on other grounds by State v. Burns*, --- Wn.2d ---, 438 P.3d 1183 (2019)).

This Court should overrule *Hart* because it wrong wrongly decided and is harmful – leading to the use of a constitutionally-deficient to-convict instruction at virtually all bail jumping trials in the state. *State v. W.R., Jr.*, 181 Wn.2d 757, 760, 336 P.3d 1134 (2014).

The *Hart* court upheld the constitutionality of WPIC 120.41 because it “required the State to prove beyond a reasonable doubt that Hart

‘had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court.’” *Id.* at 456.

But the reasoning in *Hart* is counter-logical because it conflates two elements of bail jumping. The statutory element of bail jumping requiring proof that the accused failed to appear in court “as required” is textually and logically distinct from the element requiring proof that the court ordered a hearing, which the accused was required to attend. The first is proved through evidence that the hearing was held on the appointed date and time and that the accused was not present. The latter is proved through evidence that the court – on some previous date – scheduled the hearing and required the presence of the accused.

Indeed, the evidence establishing the two elements necessarily occurs at different times through the actions of different parties. Even so, *Hart* holds that the element that of failure to appear “as required” was established through the state’s proof that he “had been released by court order or admitted to bail with the knowledge of the requirement of a subsequent personal appearance before the court.” *Id.* at 456.

Mr. Jeffries does not challenge the court’s instruction regarding the element that he was aware of a required appearance in court. Rather, the

court did nothing to inform the jury that it had to also find that he – at some later date – actually failed to appear as he had been ordered to do.

The *Hart* court’s reasoning is flawed because it renders superfluous the language of the bail jumping statute requiring proof that the accused failed to appear “as required” by equating it with the language requiring proof that s/he was released by the court “with knowledge of the requirement of a subsequent court appearance.” *See* RCW 9A.76.170(1); *State v. LaPointe*, 1 Wn. App. 2d 261, 269, 404 P.3d 610 (2017) (statutes should not be construed in a manner rendering any of the language meaningless or superfluous).

Hart must be overruled. *W.R., Jr.*, 181 Wn.2d at 760.

The court’s use of the pattern to-convict jury instruction for bail jumping violated Mr. Jeffries’s right to due process by relieving the state of its burden of proof. *Lorenz*, 152 Wn.2d at 31. The Court of Appeals should have reversed Mr. Jeffries’s bail jumping conviction. *Id.*

This issue of whether WPIC 120.41 relieves the state of its burden of proof presents a significant question of constitutional law. Also, because the pattern instruction is used at virtually all bail jumping trials, the question of whether it violates due process is of substantial public interest. This Court should grant review. RAP 13.4(b)(3) and (4).

**VI. CONCLUSION**

The issue of whether WPIC 120.41 is constitutionally deficient is significant under the State and Federal Constitutions. Furthermore, because it could impact all bail jumping cases, the question is of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted July 25, 2019.



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Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review,  
postage pre-paid, to:

Lamar Jeffries  
504 Garfield St  
Parkland, WA 98444

and I sent an electronic copy to

Pierce County Prosecuting Attorney  
pcpatcecf@co.pierce.wa.us

through the Court's online filing system, with the permission of the  
recipient(s).

In addition, I electronically filed the original with the Court of  
Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE  
LAWS OF THE STATE OF WASHINGTON THAT THE  
FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on July 25, 2019.



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Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant/Petitioner

**APPENDIX:**



June 25, 2019

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

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

LAMAR HOWARD JEFFRIES,

Appellant.

No. 50636-0-II

UNPUBLISHED OPINION

GLASGOW, J. — Lamar Howard Jeffries got into an argument with a Pierce Transit bus driver, and the transit communications center requested law enforcement assistance. Jeffries then argued with the responding officer, and eventually Jeffries scuffled with the officer, bit the officer's arm, and grabbed onto his gun belt. The State charged Jeffries with various crimes as a result of this incident. Jeffries failed to appear in court for a required pretrial conference while he was out on bail.

Jeffries now appeals his convictions for obstruction of a law enforcement officer and bail jumping.<sup>1</sup> He also appeals certain legal financial obligations imposed as part of his sentence.

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<sup>1</sup> Jeffries later pleaded guilty to a second bail jumping charge, although he does not appeal the validity of his second bail jumping conviction.

Jeffries argues that the bail jumping to-convict jury instruction omitted an essential element of the offense. In addition, Jeffries argues that the State presented insufficient evidence to convict him of bail jumping and that he received ineffective assistance of counsel affecting both convictions. Finally, Jeffries argues that the sentencing court erred when it ordered him to pay certain legal financial obligations. We affirm Jeffries's convictions for bail jumping and obstruction, but we remand for the trial court to strike the challenged legal financial obligations and associated interest from his judgment and sentence.

#### FACTS

On Thanksgiving evening 2015, a Pierce Transit bus driver parked his bus while on a break. He closed and secured the doors before he left. When the driver returned, he noticed the bus doors ajar, multiple plastic bags inside, and Jeffries waiting outside the bus. He asked Jeffries not to board parked and unoccupied buses in the future. Jeffries responded with vulgar language and hand gestures. The driver then informed Jeffries that it was the end of his shift, he was taking the bus back to the garage, and that he was not taking passengers at that time.

As Jeffries was leaving, he kicked the bus door, so the driver reported the disturbance to the transit communications center, which notified the sheriff's department. The communications center told the bus driver to return the bus to the garage to avoid further safety concerns.

Pierce County Sheriff's Deputy Michael Csapo responded and contacted Jeffries. Jeffries denied cursing at the driver or kicking the bus. Csapo initially advised Jeffries that he was not under arrest, but he proceeded to write Jeffries a civil citation excluding him from Pierce Transit for a period of time. Jeffries was initially peaceful, but he appeared to be heavily intoxicated. When another bus arrived, he started yelling and cursing at the bus driver. Csapo ordered

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Jeffries to stop approaching the bus, but Jeffries ignored him. Csapo placed Jeffries under arrest for unlawful transit conduct and put him, handcuffed, in the back of his car. Even then, Csapo told Jeffries he planned to issue the civil citation and let him go.

Csapo explained to Jeffries the citation and his appeal rights. But when Csapo started the process of releasing Jeffries from the handcuffs, Jeffries refused to cooperate with instructions to put his free hand on top of his head to ensure the officer's safety. According to Csapo, Jeffries then struggled, grabbed onto Csapo's gun belt, and bit Csapo in the arm.

As a result of this incident, the State originally charged Jeffries with one count of third degree assault, one count of unlawful transit conduct, and one count of resisting arrest. The trial court released Jeffries on bail with certain conditions, including that he not violate the law, that he maintain contact with his defense attorney, that he not possess weapons or firearms, that he not consume or possess alcohol or non-prescription drugs, and that he not have hostile contact with law enforcement.

The trial court also entered an order, which Jeffries signed, requiring Jeffries to be "present and report to" courtroom 270 for a pretrial conference on January 12, 2016, at 1:00 p.m. On January 12, the court polled the gallery at 3:10 p.m., and a prosecutor checked the courtroom and hallway, but Jeffries was not present. The trial court entered an order authorizing a bench warrant because it found Jeffries failed to appear as required.

The State then amended the information to add a charge of bail jumping. The amended information also added a charge of obstructing a law enforcement officer and dropped the prior charges of unlawful transit conduct and resisting arrest.

At a subsequent pretrial hearing, Jeffries informed the trial court (with defense counsel present) that he had been diagnosed with post-traumatic stress disorder (PTSD). Jeffries requested a competency evaluation under chapter 10.77 RCW. The trial court considered whether to hold a hearing under chapter 10.77 RCW, but denied the motion for evaluation. The trial court found Jeffries competent to stand trial. The trial court advised Jeffries that, to the extent he wanted to pursue a diminished capacity defense, he should discuss that with defense counsel. The court noted, however, that if Jeffries was under the influence of drugs or alcohol, “you probably don’t get a diminished capacity instruction.” 1 Verbatim Report of Proceedings (VRP) at 9.

At trial, Csapo testified that he had been assigned to the Pierce Transit patrol division for the past six years, and that the division’s primary focus was the bus system in and around Pierce County, with an emphasis on the safety of employees and passengers. He testified: “When we first took over the contract in 2009 it was chaotic. There was a lot of crime, a lot of strong-arm robberies, a lot of assaults on the buses. We came in and took over, working full-time focusing on the bus system.” 3 VRP at 78. Csapo explained that the strategy worked, they were able to “clean up the [bus] system, and now it functions fairly well.” 3 VRP at 79.

The prosecutor asked whether there was a “[d]ifferent kinds of clientele for different types of routes?” Csapo replied:

We don’t have the normal, like in Seattle, you have the people that take the bus to and from work. We don’t really have that. . . . [W]e have the infirm[], we have the mentally ill. We have people that have lost their driver’s privileges for whatever reason, . . . and we have the elderly. That’s primarily our clientele that use the bus system.

3 VRP at 79. The prosecutor asked whether the clientele he mentioned were vulnerable on the buses, and Caspo replied: “Well, they’re targeted, to be honest, because they’re people that can’t defend themselves or they’re just easy prey for people that look for victims.” 3 VRP at 80.

Csapo discussed the division’s approach to policing Pierce Transit, which he termed “the theory of broken windows of law enforcement,” explaining that “[i]f you fix the little things, the larger events are not allowed to develop and percolate.” 3 VRP at 80. He testified that civil infractions excluding people from the bus system for a period of time were their primary way of getting people to change their behavior when they were not complying with transit rules. The total number of civil infractions had declined over recent years.

All of this testimony was elicited as background before Csapo discussed the specific incident involving Jeffries. Defense counsel did not object to any of this background questioning or testimony.

Regarding the charge of bail jumping, the trial court admitted into evidence the order establishing Jeffries’s conditions of release. Defense counsel did not object to the admission of this exhibit or seek redaction. Pierce County Deputy Prosecuting Attorney Lloyd Oaks testified that he polled the gallery at 3:10 p.m. on January 12, when Jeffries had been ordered to appear. Oaks testified it is his practice to contact the parties in the gallery and check the hallways to confirm whether someone has appeared. Oaks testified Jeffries did not appear on January 12.

Defense counsel did not argue diminished capacity at trial.

The jury found Jeffries guilty of obstructing a law enforcement officer and bail jumping. The jury could not reach a verdict on the count of third degree assault. The trial court released

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Jeffries on bail and ordered him to appear for sentencing on June 3. Jeffries signed another order establishing conditions of release and requiring him to appear on June 3.

On June 3, Jeffries failed to appear for sentencing as required. The court again authorized a bench warrant. After the police arrested Jeffries, the State chose to retry him on the count of third degree assault and added another count of bail jumping for his failure to appear at the sentencing hearing.

During his second round of proceedings, Jeffries again indicated that he wanted to pursue a diminished capacity defense. His newly appointed defense counsel advised the trial court that he did not believe there was “a factual or legal basis to” assert a diminished capacity defense. Jeffries said that he wanted to proceed pro se in order to assert diminished capacity.

Apparently in order to determine whether Jeffries could competently waive his right to counsel, the trial court ordered a competency evaluation. Julia McLawsen, Ph.D., completed a forensic psychological report. McLawsen opined that Jeffries was competent. The trial court agreed.

Jeffries maintained that he wished to pursue his diminished capacity defense pro se. Defense counsel again advised the trial court that he had counseled Jeffries, “[b]ased upon the general rules of ethics and what I believe I lack in regard to presenting that [diminished capacity] defense, I have expressed to him that I could not pursue that.” VRP (July 6, 2017) at 2. Because McLawsen concluded that Jeffries was competent, and because he unequivocally asserted that he wished to proceed pro se, the trial court granted Jeffries’s motion to proceed pro se with defense counsel on standby.

Jeffries ultimately pleaded guilty to the additional count of bail jumping, and the State dropped the third degree assault charge. The trial court found Jeffries was indigent. The trial court imposed a \$200 criminal filing fee and a \$100 DNA collection fee.

Jeffries appeals his convictions and sentence on the first count of bail jumping and obstruction of a law enforcement officer.

## ANALYSIS

### I. TO-CONVICT JURY INSTRUCTION

At trial, the jury was presented with the following instruction on bail jumping:

[T]o convict the defendant of the crime of bail jumping, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about January 12, 2016, the defendant failed to appear before a court;
- (2) That the defendant was charged with Assault in the Third Degree;
- (3) That the defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court.

Clerk's Papers (CP) at 30. This instruction is modeled after 11A Washington Practice:

Washington Pattern Jury Instructions: Criminal 120.41 (4th ed. 2016) (WPIC). Jeffries argues that this instruction relieved the State of its burden to prove the essential element that he knowingly failed to appear "as required," thereby violating his due process rights. Br. of Appellant at 10-13. We disagree.

As an initial matter, the State argues Jeffries failed to preserve the alleged error because he failed to object at trial. However, a party may raise for the first time on appeal a manifest error affecting a constitutional right. RAP 2.5(a)(3). A to-convict instruction "carries with it a special weight because the jury treats the instruction as a 'yardstick' by which to measure a defendant's guilt or innocence." *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). "The issue

of omission of an element from that instruction is of sufficient constitutional magnitude to warrant review when raised for the first time on appeal.” *Id.*

We review the sufficiency of a to-convict instruction de novo. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). To convict a defendant of bail jumping under RCW 9A.76.170(1), the State must prove beyond a reasonable doubt that the defendant (1) “was held for, charged with, or convicted of a particular crime;” (2) “was released by court order or admitted to bail with the requirement of a subsequent personal appearance;” and (3) “knowingly failed to appear as required.” *Williams*, 162 Wn.2d at 183-84.

“Due process requires the trial court to accurately instruct the jury on every element required to convict a defendant of the crimes alleged.” *State v. Tyler*, 191 Wn.2d 205, 216, 422 P.3d 436 (2018). In the context of challenges to other types of instructions, our Supreme Court has recognized that a trial court can consider the context of the jury instructions as a whole. *State v. Johnson*, 180 Wn.2d 295, 306, 325 P.3d 135 (2014). But where a to-convict instruction is challenged, we must not look to other jury instructions to supplement a defective to-convict instruction. *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010).

The State argues that *State v. Hart* governs this appeal. 195 Wn. App. 449, 455-56, 381 P.3d 142 (2016), *review denied*, 187 Wn.2d 1011 (2017), *abrogated on other grounds by State v. Burns*, --- Wn.2d ---, 438 P.3d 1183 (2019). Hart argued, as Jeffries does, that his bail jumping to-convict instruction relieved the State of its burden to prove the element that he had failed to appear at a court hearing “as required.” *Id.* We disagreed, reasoning that

the trial court’s bail jumping to-convict instruction, which mirrors the to-convict instruction in 11A *Washington Practice: Washington Pattern Jury Instructions: Criminal* 120.41 at 517 (3d ed. 2008), required the State to prove beyond a reasonable doubt that Hart had been released by court order or admitted to bail with



knowledge *of the requirement* of a subsequent personal appearance before that court.

195 Wn. App. at 456 (record citation omitted). We concluded, therefore, that “the trial court’s to-convict instruction included the element of a *required* subsequent appearance.” *Id.* As a result, the instruction was proper. *Id.*

We decline to depart from *Hart*, and we apply its reasoning to this case. As in *Hart*, the trial court here modeled the to-convict instruction on WPIC 120.41. Jeffries’s to-convict instruction required his “knowledge of the requirement of a subsequent personal appearance before that court.” CP at 30. Here, as in *Hart*, the to-convict instruction was not misleading and it properly informed the jury of all essential elements of bail jumping, including that Jeffries was required to appear but did not.

To the extent that Jeffries also argues that it is inherently improper not to recite precise statutory language in a jury instruction, we disagree. An instruction that uses statutory language is “appropriate only if the statute is applicable, reasonably clear, and not misleading.” *Bell v. State*, 147 Wn.2d 166, 177, 52 P.3d 503 (2002); *see also State v. Schierman*, 192 Wn.2d 577, 651, 415 P.3d 106 (2018) (“A jury instruction is proper if it permits each party to argue its theory of the case, is not misleading, and properly informs the jury of the applicable law.”). Omitting the words—“as required”—from the element of the to-convict jury instruction asking whether “the defendant failed to appear before a court” did not render the instruction legally erroneous, so long as the to-convict instruction conveyed the requirement in another way. *Hart*, 195 Wn. App. at 456.

We hold the challenged to-convict instruction did not relieve the State of its burden to prove all of the essential elements of bail jumping and, therefore, it did not violate Jeffries's due process rights.

## II. SUFFICIENCY OF THE EVIDENCE

Jeffries argues that the State did not present sufficient evidence to convict him of bail jumping because there was no evidence that he was absent from the courtroom at the specific time that he had been ordered to appear. We disagree.

The standard for evaluating the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *Hart*, 195 Wn. App. at 456. All reasonable inferences from the evidence must be drawn in favor of the State. *Id.* Circumstantial evidence and direct evidence are equally reliable. *Id.* We defer to the jury's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of evidence. *Id.*

Jeffries relies on *State v. Coleman*, 155 Wn. App. 951, 963-64, 231 P.3d 212 (2010), to argue that the State must prove beyond a reasonable doubt that he was absent at the specific time at which he was notified the hearing would occur. But *Coleman* presented different facts, and this case is more like *Hart*, where we found sufficient evidence of bail jumping.

In *Coleman*, the trial court polled the gallery for the defendant at 8:30 a.m., *before* 9:00 when he was actually ordered to appear. 155 Wn. App. at 963-64. Division One of our court concluded that the State presented insufficient evidence to prove bail jumping in that case. In contrast, in *Hart*, we held that the bail jumping statute does not require the State to present evidence that a defendant was not in the court precisely at the specified time he was ordered to

appear. 195 Wn. App. at 457-58. We concluded that the bail jumping statute is satisfied if (1) the trial court polls for the defendant *after* the specified time he was ordered to appear, and (2) the defendant is not present in the courtroom at that time. *See id.*

Here, the State presented documentary evidence, including a number of exhibits establishing that Jeffries was directed to appear at 1:00 p.m. on January 12 in courtroom 270. He signed the order directing him to appear. And the State presented testimony that the prosecutor polled for the defendant in the courtroom and in the hallways after 1:00 p.m. Any rational trier of fact could have viewed this evidence and found that the elements of bail jumping had been proved beyond a reasonable doubt.

Jeffries finally argues that there was no evidence that the poll was taken in room 270, where he was ordered to appear. But the prosecutor testified that he was assigned to that courtroom.

After viewing the evidence in the light most favorable to the State, we conclude that the State presented sufficient evidence to convict Jeffries of bail jumping.

#### IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Jeffries argues he received ineffective assistance of counsel. We disagree.

Criminal defendants have a constitutional right to effective assistance of counsel. U.S. CONST., amends. VI, XIV; WASH. CONST., art. I, §§ 3, 22. To prove ineffective assistance, the defendant must show that (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced him to the extent that there is a reasonable probability the deficient performance deprived him of a fair trial. *State v. Humphries*, 181 Wn.2d 708, 719, 336 P.3d 1121 (2014) (applying *Strickland v.*

*Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700.

We consider the totality of the evidence on the record. *Strickland*, 466 U.S. at 695; *State v. Townsend*, 142 Wn.2d 838, 843, 15 P.3d 145 (2001).

Judicial scrutiny of counsel’s performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.

*Strickland*, 466 U.S. at 669. The defendant faces a strong presumption that counsel’s representation falls within the broad range of reasonably effective assistance. *Strickland*, 466 U.S. at 689; *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

A. Failure to Object to Particular Portions of Csapo’s Testimony

Jeffries first argues he received ineffective assistance because counsel failed to object to certain portions of Csapo’s testimony that he claims were inadmissible and highly prejudicial. Jeffries argues that Csapo’s testimony concerning Pierce Transit’s vulnerable clientele and about the sheriff’s department’s strategy of “broken windows” policing to protect vulnerable bus riders from being “preyed” upon was irrelevant and inadmissible. 3 VRP at 80. He also contends that this testimony encouraged the jury to convict Jeffries in order to deter future lawbreaking rather than based on guilt. We disagree.

“The decision to object, or to refrain from objecting even if testimony is not admissible, is a tactical decision not to highlight the evidence to the jury. It is [generally] not a basis for

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finding counsel ineffective.” *State v. Kloepper*, 179 Wn. App. 343, 355, 317 P.3d 1088 (2014).

To prove the failure to object rendered counsel ineffective, the defendant must show that not objecting fell below prevailing professional norms, the proposed objection would likely have been sustained, and the result of the trial would have been different if the evidence had not been admitted. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). To prevail on this issue, the defendant must rebut the presumption that counsel’s failure to object can be characterized as legitimate trial strategy or tactics. *Id.* Where the defendant cannot establish on the record the reasons for counsel’s decision, the defendant has not met their burden and the appropriate avenue for presenting additional evidence is through a personal restraint petition. *State v. Linville*, 191 Wn.2d 513, 525, 423 P.3d 842 (2018).

Jeffries points to *State v. Ramos*, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011), which relied on *United States v. Solivan*, 937 F.2d 1146, 1153 (6th Cir. 1991). In *Solivan*, the Sixth Circuit explained it is improper for a prosecutor to “urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking” because it risks a conviction “for reasons wholly irrelevant to [the defendant’s] own guilt or innocence.” *Solivan*, 937 F.2d at 1153.

Jeffries’s reliance on *Ramos* and *Solivan* is misplaced. Csapo’s testimony provided background establishing that he was performing his official duties, which was relevant to the obstruction charge. Under RCW 9A.76.020(1), “[a] person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.” Csapo’s testimony established that he was discharging his “official powers or duties” when he responded to the call from Pierce

Transit reporting a disturbance. During trial, Csapo testified that he had been assigned to the Pierce Transit patrol division for the past six years, and the division's primary focus was the bus system in and around Pierce County, with an emphasis on the safety of employees and passengers. Csapo's testimony was relevant to show the sheriff department's approach to handling reported disturbances on Pierce Transit buses and why Csapo was inclined to issue Jeffries a citation.

Under these circumstances, it was a legitimate trial tactic to decline to object to this testimony. An objection based on *Ramos* and *Solivan* would not have been sustained, and counsel likely legitimately concluded that it was best not to focus the jury's attention on this testimony. Jeffries's ineffective assistance of counsel claim on this ground fails.

B. Failure to Object to Admission of the Order Establishing Jeffries's Conditions of Release

Jeffries argues he received ineffective assistance of counsel because his counsel failed to object to the admission of the order establishing his conditions of release or insist on redaction of some conditions. We disagree.

At trial, the State presented an order that established Jeffries's conditions of release, and the trial court admitted the order without objection. The order provided, among other things, that Jeffries "shall not possess weapons or firearms," "shall not consume or possess alcohol or non-prescription drugs," and shall have "[n]o hostile contact with law enforcement." Ex. 6. Jeffries argues counsel should have objected or at least sought redaction of this exhibit because these conditions were inadmissible under ER 401 and 402 because they were irrelevant to the crimes charged. He also argues that the probative value of the order was substantially outweighed by the danger of unfair prejudice under ER 403, and the conditions of release specified in the order

encouraged the jury to find that Jeffries was violent, had a drinking problem, and was hostile toward law enforcement.

However, the State offered this exhibit to show that the trial court released Jeffries while requiring that he appear personally in court on a certain date, an essential element of bail jumping. The order also reflected that Jeffries had signed it. For those reasons, the order was relevant under ER 401 and 402. The probative value of the order for purposes of proving elements of bail jumping also outweighed any prejudicial effect under ER 403.

To the extent Jeffries argues that counsel was deficient for his failure to seek redaction of specific conditions of release, this argument also fails. The order includes several conditions as standard options for the trial court to adopt by checking a box, including the condition requiring the defendant not to possess firearms and not to consume alcohol while out on bail. The condition of release requiring Jeffries to avoid altercations with law enforcement is not surprising given the circumstances surrounding his crime. And there may have been good reasons for counsel to avoid redaction, including that redaction might cause the jury to speculate about what information was being withheld. On this record, we are unable to deduce whether that supposition—or any others—is correct. *See Linville*, 191 Wn.2d at 525. Jeffries has failed to meet his burden to show counsel was deficient for failing to seek redaction of the order.

C. Failure to Investigate a Diminished Capacity Defense

Jeffries argues he received ineffective assistance of counsel because counsel failed to reasonably investigate his ability to assert a diminished capacity defense. This argument appears to be premised on the fact that counsel did not obtain an expert evaluation before deciding not to pursue this defense.

“A diminished capacity defense requires evidence of a mental condition [that] prevents the defendant from forming the requisite intent necessary to commit the crime charged.” *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003); *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). Diminished capacity is not a true affirmative defense, but an argument that a specific element of the offense—the defendant’s mental state—has not been proved. *State v. Gough*, 53 Wn. App. 619, 622, 768 P.2d 1028 (1989). The failure of defense counsel to present a diminished capacity defense is both deficient and prejudicial when the facts supported the defense. *Tilton*, 149 Wn.2d at 784.

During Jeffries’s first round of proceedings, Jeffries informed the trial court and defense counsel that he had been diagnosed with PTSD, which he claimed impacted his ability to form the requisite mental state for the crimes charged. He requested a competency evaluation under chapter 10.77 RCW. The trial court considered whether or not to hold a hearing under chapter 10.77 RCW but denied the motion for an evaluation because it found Jeffries was competent to stand trial. The trial court advised Jeffries, to the extent he wanted to pursue a diminished capacity defense, that he should discuss it with defense counsel. The court noted, however, that if Jeffries was under the influence of drugs or alcohol, “you probably don’t get a diminished capacity instruction.” 1 VRP at 9.

Here, Jeffries has not shown that counsel was deficient. Counsel was aware of Jeffries’s asserted PTSD diagnosis. The record does not disclose whether Jeffries’s PTSD impaired his ability to form the requisite intent to commit bail jumping. Equally important, the record does not disclose the reason why Jeffries’s counsel elected to not pursue a diminished capacity defense. The decision could have been made for legitimate strategic or tactical reasons.



Moreover, in Jeffries's subsequent proceeding on his second charge of bail jumping, his newly appointed defense counsel advised the trial court that he did not believe Jeffries had "a factual or legal basis to" assert a diminished capacity defense. 4 VRP at 3. And the trial court found Jeffries competent, based on a forensic psychological report, and allowed him to waive his right to counsel. These later determinations show that it is highly unlikely that Jeffries's prior counsel's decision not to seek a diminished capacity evaluation was deficient.

Jeffries has failed to show that his counsel's performance was deficient. His ineffective assistance claim therefore fails.

#### IV. LEGAL FINANCIAL OBLIGATIONS

Jeffries argues that the sentencing court erred when it ordered him to pay a \$200 criminal filing fee and a \$100 DNA collection fee. The State agrees.

In 2018, the legislature amended former RCW 36.18.020(2)(h) to prohibit trial courts from imposing a \$200 criminal filing fee on defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, § 7. The legislature also amended RCW 43.43.7541, which now requires imposition of the DNA collection fee "unless the state has previously collected the offender's DNA as a result of a prior conviction." RCW 43.43.7541; LAWS OF 2018, ch. 269, § 18. In *State v. Ramirez*, our Supreme Court held that these amendments apply prospectively to indigent defendants whose direct appeal is not yet final. 191 Wn.2d 732, 747-50, 426 P.3d 714 (2018).

The trial court found Jeffries indigent upon sentencing. In light of this finding and the State's concession, we remand to the trial court to strike the criminal filing fee. The State's records show that Jeffries's DNA had been previously collected and was on file with the

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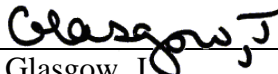
Washington State Patrol. Thus, we also direct the trial court to strike the DNA collection fee.

The trial court should also strike any accrued interest related to the imposition of these fees.

CONCLUSION

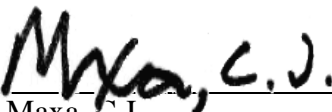
We affirm Jeffries's convictions. The trial court properly instructed the jury on the elements necessary to convict on bail jumping, and Jeffries has not shown his counsel provided ineffective assistance. We remand for the trial court to strike the criminal filing fee, the DNA collection fee, and any interest associated with those fees.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
Glasgow, J.

We concur:

  
Worswick, J.

  
Maxa, C.J.

# LAW OFFICE OF SKYLAR BRETT

July 24, 2019 - 5:54 PM

## Transmittal Information

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**Appellate Court Case Number:** 50636-0  
**Appellate Court Case Title:** State of Washington, Respondent v. Lamar Jefferies, Appellant  
**Superior Court Case Number:** 15-1-04739-8

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