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

STATE OF WASHINGTON,

Respondent,

v.

ALVENO O'BRIEN,

Appellant.

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

The Honorable Vickie I. Churchill, Judge
Superior Court Cause No. 10-1-00109-4

BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUES

A. Whether the State provided sufficient evidence of all elements of bail jumping.

B. Whether the trial court properly exercised its discretion in finding insufficient factual bases for providing the appellant's proposed affirmative defense jury instructions.

C. Whether the appellant's convictions should be affirmed when each charge was based upon the appellant's failure to surrender for sentence on a separate underlying charge.

II. STATEMENT OF THE CASE

A. Substantive Facts

The appellant was convicted of four class B and C felonies between 1998 and 2004. Exhibits 1-4. He was ordered to appear on all four cases on September 30, 2008, to show cause why sanctions should not have been imposed based on allegations that he failed to comply with the conditions of his sentences. Exhibits 5-8. At that hearing, the judge found the appellant had violated the terms and conditions of the sentences previously imposed on all four cases. *Id.* The court ordered the appellant to serve seven days in custody on each case, to be served consecutively.

Id. However, the court released the appellant on the hearing date with an order to report to the Island County jail on July 1, 2009, for service of sentence. *Id.* The appellant did not report as ordered on July 1, 2009. RP 110.

B. Statement of Procedural History

The appellant was charged with four counts of bail jumping. CP 65-67. At trial, the State produced documentary evidence of the appellant's prior convictions, release, and orders to surrender for sentence. RP 112-13. The State also presented testimony by Island County Corrections Deputy David Lind, who testified that the appellant did not report for his sentence as ordered. RP 110.

The appellant offered a letter from the Washington Department of Corrections purporting to show that he was in custody on other charges on July 1, 2009. RP 113-18. The State offered rebuttal evidence in the form of a judgment and sentence showing the appellant was arrested for Making False or Misleading Statements to Law Enforcement on April 15, 2010 and was convicted on that charge May 4, 2010.¹ RP 118-23.

The State proposed jury instructions which included to-convict instructions for each count of bail jumping. CP 24-27. Those instructions

¹ The State's rebuttal evidence was not offered for admission because it became irrelevant when the trial court declined to provide the appellant's offered affirmative defense jury instructions. RP 131.

required the State to prove, “[t]hat on or about the 1st day of July, 2009, the defendant failed to surrender for service of sentence.” *Id.* The appellant did not object to the state’s proposed to-convict instructions. RP 132.

The appellant proposed jury instructions for the affirmative defenses of uncontrollable circumstances and duress. CP 44-47. The trial court initially proposed jury instructions that included instructions for uncontrollable circumstances, but did not include the defendant’s proposed duress instructions. RP 123. The appellant did not object to the exclusion of his duress instructions. RP 123-32.

Following arguments by both parties, the trial court noted that the appellant’s instructions could only be provided to the jury if there was some sort of proof on all of the elements of the defenses. RP 130. The trial court then found the appellant had provided no proof that he surrendered as soon as his uncontrollable circumstances ceased to exist. RP 130-31. The trial court, therefore, also declined to provide the appellant’s proposed instructions regarding uncontrollable circumstances. RP 131.

The appellant was convicted by jury of four counts of bail jumping. CP 37-40. The trial court calculated the appellant’s offender score as seven, noting seven prior felony offenses and finding the four current charges all encompassed the same criminal conduct. CP 4-5. The

trial court sentenced the appellant to 33 months in custody, within the standard sentencing range. CP 3-13. The appellant now timely appeals. CP 1-2.

III. ARGUMENT

A. **The State presented sufficient evidence for a rational trier of fact to find the essential elements of bail jumping beyond a reasonable doubt.**

The appellant's conviction should be affirmed because the evidence presented in this case proved all elements of the crime charged. When reviewing an appeal on sufficiency of evidence, the court must determine whether the evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The court must assume the truth of the State's evidence, and all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). To limit the court's intrusion on the discretion of the jury, a claim of insufficient evidence must be denied when, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *State v. Green*, 94 Wn.2d 216, 616 P.2d 628

(1980). The evidence provided in this case reasonably supported a finding that the appellant committed the crime of bail jumping.

The appellant's argument appears to concede the sufficiency of the State's evidence for the actual elements of bail jumping. See Appellant's Brief at 7.² The elements of bail jumping are satisfied if the defendant was convicted of a particular crime, had knowledge of the requirement of a subsequent personal appearance, and failed to appear as required. *State v. Downing*, 122 Wn.App. 185, 192, 93 P.3d 900 (Div. 2, 2004) (citing RCW 9A.76.170(1)). The appellant's concession is well taken as the evidence provided in this case clearly showed the appellant knew of the requirement that he surrender for service of his sentences and that he failed to do so.

The trial court admitted judgments and sentences and Orders on Violation of the Conditions of Sentences from the appellant's prior convictions without objection. RP 112-13. In addition, Island County Corrections Deputy David Lind testified that the appellant did not surrender for his sentence as ordered. RP 110. Taken together, the judgments and sentences showed the appellant's prior convictions, the orders showed his release with knowledge of a subsequent appearance, and Dep. Lind's testimony showed he failed to report as ordered. Viewed

² "Taking the evidence in the light most favorable to the State, Mr. O'Brien's incarceration prevented him from reporting for service of his sentence on or about July 1, 2009."

in the light most favorable to the State, that evidence was sufficient for a reasonable jury to find the defendant committed all the elements of bail jumping.

Instead, the appellant attempts to alter the State's burden of proof by arguing the offense date for his charges should be tied to his claimed affirmative defense rather than to the court's order to surrender. The appellant, however, cites no legal support for his contention, which runs contrary to the correct analysis. *See State v. Carver*, 122 Wn.App. 300, 306, 93 P.3d 947 (Div. 2, 2004) (the State must prove only that a defendant was given notice of his court date); *Downing*, 122 Wn.App. at 193-94 (state allowed to amend information to "correct" date defendant was ordered to appear). The appellant's argument would improperly add an element of the statutory affirmative defense to the State's burden of proof. Such a shift would ignore the plain language of the statute and the proper burden of proof for the statutory affirmative defense.

The appellant's argument ignores the plain language of the statute by shifting an element of the affirmative defense into the state's burden of proof. A defendant is guilty of bail jumping if he, having been released by court order with knowledge of the requirement to report to a correctional facility for service of sentence, fails to surrender for service of sentence as required. RCW 9A.76.170(1). Thus, proof of the charge requires a

showing that the defendant was ordered to report for service and failed to report on the date ordered. Therefore, based on the plain language of the statute, the offense date is the date upon which the defendant is ordered to report.

On the other hand, the date of the appellant's release from custody in another jurisdiction is only relevant in consideration of his claimed affirmative defense. The bail jumping statute includes an affirmative defense where uncontrollable circumstances prevented a defendant from surrendering, the defendant did not contribute to the creation of the circumstance, and the defendant surrendered as soon as such circumstances ceased to exist. RCW 9A.76.170(2). Assuming his incarceration can be considered an uncontrollable circumstance, the appellant's release date is only significant when considering whether the incarceration prevented him from surrendering and whether he surrendered immediately upon his release from custody elsewhere.

The appellant states plainly that his argument would add a requirement that the state disprove his claimed affirmative defense. See Appellant's Brief at 7 ("[t]he State therefore failed to disprove the affirmative defense."). However, the burden of proof for the affirmative defense lies solely with the appellant. *State v. Fredrick*, 123 Wn.App. 347, 353-54, 97 P.3d 47 (Div. 2, 2004). In fact, there is no law supporting a

contention that the State must disprove the affirmative defense to bail jumping. *Id.* at 352. Indeed, the burden of proof must be on the appellant as the relevant facts, such as the date and location of his incarceration, his date of release, and any attempts made to surrender or otherwise address his obligations, are peculiarly within the appellant's ability to assert. *See id.* at 354. Thus, the appellant's attempt to incorporate an element of his affirmative defense into the State's burden of proof is mistaken.

The appellant's argument misstates the proper evaluation of the sufficiency of the State's evidence. The correct analysis for sufficient evidence assumes the truth of the State's evidence and requires only sufficient proof that a rational trier of fact could have found the essential elements of the crime. For a charge of bail jumping, the essential elements require proof that the appellant had knowledge of the requirement of a subsequent personal appearance and failed to appear as required. The State bears no burden of proof regarding the appellant's statutory affirmative defense. In this case, the State provided sufficient proof of the actual elements of bail jumping. This court should, therefore, affirm the appellant's conviction.

B. The trial court correctly refused to provide a jury instruction for the appellant's claimed affirmative defenses.

1. Standard of Review

The standard of review applied to a trial court's refusal to grant jury instructions depends on whether the decision was based upon a matter of law or fact. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A trial court's refusal to give instructions to a jury, when based on a factual dispute, is reviewable only for abuse of discretion. *Id.* at 772. An abuse of discretion exists when the trial court's decision is exercised on untenable grounds or for untenable reasons. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

2. The trial court did not abuse its discretion in finding there was not sufficient factual evidence to provide instructions for statutory affirmative defenses.

The appellant's conviction should be affirmed because he did not provide sufficient evidence to allow provision of instructions on his claimed affirmative defense. While a defendant is entitled to jury instructions allowing him to argue his case theory, those instructions must be supported by sufficient evidence. *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003); *State v. Janes*, 121 Wn.2d 220, 236-37, 850 P.2d 495 (1993). If any element of a defense is missing, the defense should not be presented to the jury in the instructions. *State v. Chase*, 134 Wn.App. 792, 803, 142 P.3d 630 (Div. 1, 2006) (quoting *State v. Bell*, 60

Wn.App. 561, 566, 805 P.2d 815 (Div.2, 1991)). In this case, the trial court did not abuse its discretion in finding there was not a sufficient factual basis to provide affirmative defense instructions.

The statutory definition of bail jumping includes an affirmative defense that uncontrollable circumstances prevented a defendant from surrendering as ordered. RCW 9A.76.170(2). The defense is only available, however, where the defendant was prevented from surrendering by uncontrollable circumstances, the defendant did not recklessly contribute to the creation of the circumstances, and the defendant surrendered as soon as the circumstances ceased to exist. *Id.* The burden of proof for the affirmative defense lies with the defendant, not with the state. *State v. Fredrick*, 123 Wn.App. 347, 353-54, 97 P.3d 47 (Div. 2, 2004). Therefore, it is the defendant's responsibility to provide an offer of sufficient proof for all three elements of the affirmative defense. The trial court did not abuse its discretion in this case because the appellant's offer failed to provide evidence of all the elements of his affirmative defense.

The trial court found the appellant's incarceration in another jurisdiction at the time he was ordered to report in Island County could be considered an uncontrollable circumstance. RP 130. Assuming, without conceding, that the trial court was correct in that determination, the appellant did not show that he did not contribute to his incarceration and

he did not show that he surrendered as soon as he was released from custody.

The statutory affirmative defense is not available if the defendant contributed to the creation of his circumstances in reckless disregard of the requirement to surrender. RCW 9A.76.170(2). The appellant failed to provide any evidence to rebut the obvious conclusion that he contributed to his incarceration knowing that would interfere with his ability to comply with the court's order.

By definition, an incarceration is an event caused by the actions of a defendant. Thus, the appellant clearly contributed to his claimed uncontrollable circumstance. In addition, the evidence in this case showed the appellant must have known of his date to report for his sentences when he was readmitted to prison. The Orders on Violation of Sentence, which instructed the appellant to report for surrender, were entered on September 30, 2008, and the appellant was not readmitted to prison until April 21, 2009. Exhibits 5-8, 12. Thus, the clear implication was the appellant's contribution to his incarceration was reckless because it came at a time when he knew he was also obligated to report for custody in Island County.

The appellant did not argue and provided no information that suggested that his readmission was ordered before the Island County court

orders were entered or that he had no opportunity to inform the Island County courts of his incarceration elsewhere. In fact, the appellant provided no information beyond the letter from the Department of Corrections. That letter, by itself, was not sufficient to show the appellant did not contribute to his incarceration in reckless disregard of his obligation to report for custody.

More damningly, the appellant provided no evidence to rebut the state's showing that he did not surrender as soon as his incarceration was completed. The statutory affirmative defense is also not available unless the defendant surrenders for service of sentence as soon as the uncontrollable circumstances cease. RCW 9A.76.170(2). While the appellant provided a letter claiming he was readmitted to prison in April, 2009, exhibit 12, the State offered rebuttal evidence showing he did not surrender upon his release from custody. RP 119. In rebuttal, the State offered a judgment and sentence for the appellant's conviction for a misdemeanor crime. RP 118-19. That conviction was based on an incident that occurred on April 15, 2010, well after the appellant's incarceration and his court-ordered date to report to Island County jail. RP 118-19. The trial court correctly noted that the offered judgment and sentence showed the appellant was not in custody at the time he committed the crime. RP 123. Because the appellant was out of custody by at least April 15, 2010

and he did not voluntarily report to Island County jail as ordered, he did not surrender as soon as his uncontrollable circumstance ceased.

The appellant also offered instructions for the affirmative defense of duress. Those instructions were not included by court, and the appellant made no objection to their exclusion. RP 123-32. In order to give the trial court the opportunity to correct any error, an appellant court will generally refuse to consider claimed errors in jury instructions without timely and well stated objections. *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). Review of jury instructions without trial objections may only occur when the claimed error is manifest and not harmless. *Id.* at 687.

The trial court did not abuse its discretion and its decision to not provide instructions on duress was certainly harmless as duress was not an available defense in this case. A defense of duress requires that the defendant acted under compulsion by another who by threat or use of force created an apprehension in the mind of the defendant that a refusal would likely result in immediate death or immediate grievous bodily injury. RCW 9A.16.060(1). Like the uncontrollable circumstances statutory defense, duress includes a requirement that the defendant did not recklessly place himself in a situation in which it is probable that he would be subject to duress. RCW 9A.16.060(3). The appellant's incarceration in this case did not constitute duress as the appellant provided no evidence

that he reasonably believed attempting to comply with his order to report in Island County would result in death or grievous bodily injury. In addition, as described above, the appellant provided no information to rebut the obvious inference that he recklessly placed himself in the situation through his actions that resulted in the incarceration. Thus, there was no factual basis for the appellant's duress instruction, and the trial court did not abuse its discretion in declining to provide it to the jury.

The trial court did not abuse its discretion in finding an insufficient factual basis for affirmative defense instructions. The appellant did not provide sufficient evidence of all three elements of the affirmative defense of uncontrollable circumstances. He provided no evidence that he did not contribute to his incarceration in reckless disregard of his obligation to comply with the Island County court's order to surrender. He also provided no evidence to rebut the State's showing that he did not surrender as soon as his incarceration was completed. Therefore, the trial court did not abuse its discretion when it refused to instruct the jury on the appellant's unsupported affirmative defense.

The appellant did not object when the trial court did not provide his proposed duress instructions to the jury, and he provided no evidence that would have supported the defense. With the limited information from the appellant and the State's clear rebuttal, the trial court correctly found

there was no factual basis for the affirmative defenses and refused to provide potentially confusing instructions to the jury. The appellant's convictions should, therefore, be affirmed.

C. The appellant's convictions for bail jumping on four separate underlying crimes did not violate double jeopardy.

The appellant's convictions should be affirmed because convictions for bail jumping on four separate underlying cases do not violate double jeopardy. One aspect of double jeopardy protects a defendant from being punished multiple times for the same offense. *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). Usually, to determine if a defendant has been punished multiple times for the same offense, courts examine whether his offenses are the same in law and fact. *Id.* Because that "same evidence" test cannot be satisfied when a defendant is convicted for multiple violations of the same statute, a court will instead determine what unit of prosecution the legislature intended within the particular criminal statute. *Id.* at 634. Claims of double jeopardy are questions of law which are reviewed de novo. *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009). Double jeopardy was not violated in this case because each of the appellant's four charges constituted a separate offense.

The language of the bail jumping statute shows unambiguously that each report date and each underlying charge constitutes a separate unit of prosecution. Bail jumping occurs when a person, having been released by court order with knowledge of a requirement of a subsequent personal appearance, fails to appear as required. RCW 9A.76.170(1). In addition, the punishment for bail jumping is determined by the severity of the underlying charge with which the person was held for, charged with, or convicted. RCW 9A.76.170(3). By adjusting the seriousness of an offense based on the severity of the underlying charges, the bail jumping statute includes a nexus between the crime for which the defendant was held, charged, or convicted and the later required appearance. *State v. Pope*, 100 Wn.App. 624, 627, 999 P.2d 51, *review denied*, 141 Wn.2d 1018, 10 P.3d 1074 (Div. 2, 2000). Thus, one of the elements of bail jumping is that the defendant was held for, charged with, or convicted of a particular crime. *Id.* at 629. In fact, failure to specify the underlying criminal charge in the to-convict jury instruction is a constitutional error that relieves the State of its burden of proving every essential element. *Id.* at 629-30.

In this case, the appellant was charged with four counts of bail jumping, with each count based upon failure to surrender for service of a sentence on a different underlying conviction. The appellant was convicted of four different felony crimes between 1998 and 2004. Exhibits

1-4. On September 30, 2008, the appellant was sentenced separately on each of the four underlying crimes and ordered to serve four consecutive seven-day sentences. Exhibits 5-8. The information in the current case specifically listed a separate underlying cause number for each of the appellant's four bail jumping charges. CP 65-67. The jury instructions included individual to-convict instructions for each charge that listed the crimes with which the appellant was convicted in each underlying case. CP 24-27.

The bail jumping statute clearly and unambiguously creates separate units of prosecution for each underlying criminal case as well as each date for which a defendant failed to report. The delineation of punishments for bail jumping based on the severity of the underlying cases creates an essential element in the statute that requires proof that the defendant was charged or convicted of a particular underlying crime. In this case, the appellant was charged with four counts of bail jumping for failure to surrender for sentences on four different underlying criminal cases. Based on the plain language of the bail jumping statute, those four charges constitute separate offenses. Therefore, double jeopardy was not violated when the appellant was convicted on all four counts. The appellant's convictions should, therefore, be affirmed.

IV. CONCLUSION

The State provided sufficient evidence of all the actual elements of bail jumping. Because the burden of proof for an affirmative defense is on the appellant, proper consideration of State's evidence is based on date he was ordered to surrender for sentence, not on the date he was released from custody in other jurisdiction. Further, the trial court did not abuse its discretion in refusing to provide proposed instructions on affirmative defenses when the appellant did not produce sufficient factual evidence to show all elements of the defenses. The appellant provided no evidence to support the requirements of uncontrollable circumstances that he did not contribute to his incarceration in reckless disregard of his obligations to Island County or that he surrendered as soon as his incarceration was complete. The appellant also provided no evidence to support the requirements of his proposed duress defense that he reasonable believed he was subject to a threat of death or grievous bodily injury or that he did not recklessly place himself in a position where such a threat would be likely. Finally, the appellant's convictions for four counts of bail jumping did not violate double jeopardy when each count was based on his failure to report for a sentence ordered on separate felony convictions.

Respectfully submitted this 4th day of March, 2011.

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