

Original

NO. 36451-4

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MARK ALLEN CURTIS, APPELLANT

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
08 MAR 27 PM 1:52
BY DEPUTY
[Signature]

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 06-1-02177-2

BRIEF OF RESPONDENT

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Appendix A

Appendix B

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to properly preserve his claim of error with regard to excluded evidence by failing to make an offer of proof in the trial court as to the nature of the evidence?
2. Has defendant failed to show that the excluded evidence was properly admissible under the rules of evidence?
3. Did the trial court properly exercise its discretion in instructing the jury on the affirmative defense to bail jumping when defendant's testimony presented an explanation or excuse as to why he had failed to appear for two different scheduled court hearings?
4. Does a review of the record demonstrate that any error in instructing the jury on the affirmative defense to bail jumping would be harmless beyond a reasonable doubt when the defendant admitted the essential elements of bail jumping when he testified?

B. STATEMENT OF THE CASE.

1. Procedure

On May 15, 2006, the Pierce County Prosecutor's Office filed an information charging appellant, Mark Allen Curtis, with possession of a controlled substance and driving with license suspended in the third degree. CP 1-3. The information was amended three times. The first

amendment added a count of trafficking in vehicles with altered identification numbers, a count of bail jumping, and a count of unlawful use of drug paraphernalia. CP 5-7. The second amended information added an additional count of bail jumping. CP 9-13. The third amended information dismissed the charge pertaining to trafficking in vehicles with altered identification numbers. CP 14-16.

The matter came on for hearing before the Honorable Brian Tollefson. RP 4. Following a CrR 3.5 hearing, the court ruled that most of defendant's custodial statements would be admissible in the State's case-in-chief. CP 92-96. After hearing the evidence the jury found defendant guilty of unlawful possession, driving with license suspended and two counts of bail jumping. RP 324-325. The jury found defendant not guilty of unlawful use of drug paraphernalia. RP 325.

At the sentencing hearing, the court imposed a standard range sentence of 11 months on each of the three felonies based upon an offender score of "3," all to be served concurrently. RP 346-356; CP 101-113. The court imposed 90 days on the misdemeanor driving with license suspended to be served concurrently with the felony sentences. CP 116-120.

Defendant filed a timely notice of appeal from entry of this judgment. CP 97.

2. Facts

Pierce County Sheriff's Deputy Scott Mock testified that on May 14, 2006, while on routine patrol he came in contact with the defendant while he was driving a white Pontiac Firebird in the City of Edgewood, Washington. RP 49-50, 230. Deputy Mock had run a license plate check on the vehicle and discovered that the plate number on the Pontiac was registered to a white Ford Escort. RP 50. Deputy Mock stopped the defendant to investigate this discrepancy. RP 50-51. By the time Officer Mock had stopped defendant, he had pulled the Pontiac into the driveway of a home. RP 51-52. Deputy Mock asked defendant for his license, registration and proof of insurance; defendant handed the deputy a copy of his Washington driver's license. RP 52. Defendant indicated that he did not have any of the other paperwork that the deputy had requested and that he thought his license was suspended. RP 53. Deputy Mock detained the defendant and placed him in the back seat of his patrol vehicle while he continued to investigate the mixed license plates and suspension of license situations. RP 53-54.

Deputy Mock found the VIN number on the Pontiac then did a check with the department of licensing regarding the VIN number and the status of defendant's license. RP 54. Officer Mock learned that the defendant's license was suspended in the third degree and that the Pontiac was clear as to a stolen status. RP 54. Officer Mock arrested defendant for driving with a suspended license. RP 54.

In a search of the passenger compartment of the Pontiac incident to arrest, Deputy Mock found a green Altoids can under the driver's seat that contained a white rocky substance. RP 54-55. In the center console area near the gearshift, Deputy Mock found a small plastic baggy, commonly referred to as a dime baggy in the street drug trade, that had a white rocky substance in it; there was also a glass pipe, which is commonly used for smoking narcotics. RP 55. Deputy Mock recognized the white rocky substance as possibly being an illegal narcotic such as crack cocaine. RP 55, 58.

Deputy Mock advised defendant of his *Miranda* rights and defendant indicated that he was willing to waive his rights and talk to he deputy. RP 55-57. Deputy Mock testified that the defendant told him that the white rocky substance was a diet supplement that he purchased from a gas station and that he was using it to make it look like he was consuming drugs because he was hanging out with some dooper people and wanted to keep up this image so that he could stay with them. RP 57. Defendant told Deputy Mock that he knew he shouldn't have been driving but wanted to get to his mom's house for Mother's Day. RP 57. Defendant also admitted to Deputy Mock that he did not know the people who lived at the house he stopped at, but that he had pulled into the driveway in the hope that the deputy would drive on by. RP 57-58. Deputy Mock testified that at no time during the stop did defendant indicate that the diet supplement

belonged to someone else or that someone else had put it into the car. RP 58. Deputy Mock transported the defendant to jail. RP 72.

Deputy Mock placed the white rocky substance and glass pipe he found in defendant's car into evidence. RP 60-72. Maureena Dudschus, a forensic scientist with the Washington State Patrol Crime Laboratory, testing the residue on the glass pipe and found that it was positive for methamphetamine. RP 98-99, 101-106. She also tested the 4.4 grams of white rocky substance that was found in the console area of defendant's car and found that it tested positive for the presence of methamphetamine. RP 68, 107-110. She did not do any testing of the white rocky substance that was found under the driver's seat. RP 69, 114-116.

The State admitted certified records from the department of licensing indicating that on May 14, 2006, the defendant's license to drive was suspended in the third degree and that the department had notified defendant of the suspension. RP 97-98.

Thomas Howe testified that he is a deputy prosecuting attorney employed by the Pierce County Prosecutor's Office and that he was familiar with the court documents that are commonly maintained by the Superior Court Clerk's Office. RP 142. Mr. Howe testified that certified court documents showed that on May 15, 2006, defendant was arraigned on an information filed in Pierce County Cause Number 06-1-02177-2, charging him with several crimes including unlawful possession of a controlled substance, which is a Class C felony. RP 145-147. He testified

further that court documents showed defendant was released upon the posting of bail and that he was warned that if he failed to reappear for his next court date that he could be criminally prosecuted. RP 147-152. The defendant's signature was almost immediately below this warning. RP 149-150. At arraignment, the court signed a scheduling order directing defendant to appear for a pretrial hearing on May 30, 2006, and for a trial date of June 27, 2006. RP 152-153. Court records showed that on May 30, 2006, defendant failed to appear for his pretrial hearing and a bench warrant issued for his arrest. RP 161-170. The warrant was quashed at a hearing on June 9, 2006. RP 171-172. The State admitted court documents showing that defendant was order to appear for a hearing on October 24, 2006 and that the court issued a bench warrant for defendant's arrest when he failed to appear on that date. RP 174-178. That warrant was quashed in a hearing on November 3, 2006. RP 178-179.

In the defense case, defendant called Megan Erickson to the stand to testify that she has been a friend of the defendant for three years and that on Mother's Day she was helping him clean out the inside of a Pontiac Firebird that he bought from somebody a short time before. RP 230-232. She indicated that the car had been sitting in a field for three years and that they had moved it inside a barn to clean out the garbage that was inside. RP 231-232. She testified that she, the defendant, and a man named "Paul" were cleaning out the car. RP 233. She was taking the garbage out of the car and putting it into garbage bags. RP 233. She

recalls Paul taking a white bottle out of from underneath the seat of the car and then grabbing an Altoid container and putting some of the stuff from the bottle into the Altoid container. RP 234-235. Ms. Erickson testified that she thought the Altoids container was white and red with a flip lid. RP 238-239. She testified that the stuff in the bottle was a solid and looked white and “kind of crystallly.” RP 237-238. He then melted the stuff in the tin by lighting it on fire. RP 234, 238. The white bottle had a label on it that said MSM or MSN. RP 235, 238. He was told to throw it away. RP 235, 238. Ms. Erickson went on cleaning and didn’t see what happened after that, she left shortly after. RP 238. Ms. Erickson was convicted of theft twice in 2002. RP 235-236, 241.

Defendant testified on his own behalf. RP 244. He testified that he obtained possession of his 1986 Pontiac Firebird Trans Am three or four days prior to Mother’s Day, 2006. RP 248. The car had been sitting in a field and he moved it to a shop in Federal Way so he could get it running. RP 248-249. He testified that by Mother’s Day, he got the car running and had sanded and painted the outside but he had not cleaned out all of the garbage from the inside. RP 249. Defendant testified that he had two people helping him with his car, Ms. Erickson, and a man named “Paul” who was “just there [at the shop] that day and ...offered to help with the car.” RP 249. Defendant testified that he never met “Paul” before that day; nor has he seen him since. RP 261. He does not know his last name. RP 261. He paid him \$20.00 to help clean out the car.

Defendant testified that while the three of them were cleaning garbage out of the car and throwing the garbage into cans, Paul found a big white bottle with MSM on the label; Paul poured some of the contents into an Altoids tin then lit it with his lighter. RP 250. After it melted down, he crunched it up and put some of it in a baggy, stating “Doesn’t this look like dope.” RP 250-251. Defendant testified that he told Paul to throw it away but did not see what Paul did with these items. RP 255-256. Defendant testified that they did not finish cleaning out the car that day; he drove off to pick up a Mother’s Day gift and deliver it to his mother. RP 251. He testified that he did not know that the baggy and the Altoids tin were still in his car and that he did not know that there was a glass pipe in his car and had not seen it before. RP 255.

Defendant testified that he was just leaving his mother’s house when he got stopped. RP 251. Defendant testified that, after he saw the deputy, he pulled into the driveway of a nearby house because he knew he was driving without a license and thought that the deputy might just drive on by. RP 252. Defendant acknowledged that he knew he was suspended. RP 262. Defendant’s testimony regarding what he said to the deputy differed from the testimony of the deputy. RP 252-254, 262-264. Defendant testified that he told the deputy the white stuff was a dietary supplement, but did not say that: 1) it was his; 2) he bought it at a gas station; 3) he smoked it in the pipe, or 4) he did this to fit in with a dooper crowd. *Id.*

Defendant acknowledged that he did not appear for his court hearings at 8:30 a.m. on May 30th or on October 24, 2006, as ordered by the court. RP 256-258, 267-268. He testified that he was confused about what date it was on May 30th and thought that it was May 29th, when he realized his error, he came to court but the court was closed for the lunch time recess. RP 256-258. He testified that he missed the second date on October 24 because he was confused by the written order and thought that he did not have to appear until October 26, 2006. RP 258-260.

C. ARGUMENT.

1. DEFENDANT FAILED TO PROPERLY PRESERVE HIS EVIDENTIARY CLAIM IN THE TRIAL COURT WITH AN OFFER OF PROOF; MOREOVER, DEFENDANT HAS FAILED TO SHOW ANY BASIS FOR THE ADMISSION OF THE EXCLUDED EVIDENCE UNDER THE EVIDENCE RULES.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651, *review denied*, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of

discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.” ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).

A defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. *State v. Rehak*, 67 Wn. App. at 162; *In re Twining*, 77 Wn. App. 882, 893, 894 P.2d 1331, *review denied*, 127 Wn.2d 1018 (1995). The right to present evidence is not absolute, however, and must yield to a state’s legitimate interest in excluding inherently unreliable testimony. *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Baird*, 83 Wn. App. 477, 482, 922 P.2d 157 (1996), *review denied*, 131 Wn.2d 1012 (1997).

Limitations on the right to introduce evidence are not unconstitutional unless they affect fundamental principles of justice. *Montana v. Engelhoff*, 518 U.S. 37, 116 S. Ct. 2013, 2017, 135 L. Ed. 2d 361 (1996) (stating that the “accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence” (quoting *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988))). Similarly, the Supreme Court has stated that the defendant’s right to present relevant evidence may be limited by compelling government purposes. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983) (discussing Washington’s rape shield law).

Under ER 103(a)(2), error may not be asserted based upon a ruling that excludes evidence unless a substantial right of the party is affected, and the substance of the evidence was made know to the court by offer or was apparent from the context of the record. “An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review.” *State v. Ray*, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). The party offering the evidence has the duty to make clear to the trial court: 1) what it is that he offers in proof; and, 2) the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. *Ray*, 116

Wn.2d at 539, citing *Mad River Orchard Co. v. Krack Corp.*, 89 Wn.2d 535, 537, 573 P.2d 796 (1978). Finally, if the ruling was a tentative ruling on a motion in limine, a defendant who does not seek a final ruling waives any objection to the exclusion of the evidence. *State v. Riker*, 123 Wn.2d 351, 369, 869 P.2d 43 (1994), citing *State v. Carlson*, 61 Wn. App. 865, 875, 812 P.2d 536 (1991).

The essence of defendant's claim is that he was wrongly precluded from adducing certain evidence in front of the jury. In order for the trial and appellate courts to properly assess this claim, it would need to know the substance of what defendant hoped to adduce. Defendant fails to identify where he preserved this claim in the trial court by making an offer of proof.

While defendant was testifying, his attorney asked him whether he was required to submit to random urinalysis (UA) as part of his employment. RP 245. The prosecutor objected on relevancy grounds. RP 246. In a hearing out side the presence of the jury, the defendant suggested that the evidence was relevant to show that the defendant was sober during his testimony and also as circumstantial evidence that he was not using controlled substances around the time that he was found in possession of a controlled substance. RP 246-247.

The record is unclear as to the exact scope of the evidence that defendant was intending to adduce and whether it included the results of any testing. Initially defense counsel indicated that he was not intending

to elicit the findings of any particular UA, just the fact that defendant was submitting to UAs to suggest the fact that he was not using. RP 247.

When the prosecutor objected on the grounds that this asking the jury to speculate that the defendant's UAs were clean, defense counsel stated:

Defense Counsel: Well, I do in fact have clean UAs from around that period of time which I intend to admit, but he would be fired if he did give a dirty UA –

RP 247. Defense counsel did not make an offer of proof which would have clarified the exact nature of the evidence that he hoped to adduce. With the confusing state of the record and without an offer of proof, it is impossible for this court to know the nature of the evidence that defendant asserts was improperly excluded. Defendant failed to properly preserve this evidentiary claim in the trial court.

Moreover, from the record before this court, it does not appear that defendant was proffering character evidence that was properly admissible under ER 404(a)(1) and ER 405(a). While character evidence may be used circumstantially to show that a person acted consistently with that character, it is not admissible for “the purpose of proving action in conformity therewith on a particular occasion.” ER 404(a). Under certain circumstances, an accused may offer “evidence of a pertinent trait of character.” ER 404(a)(1). When an accused offers evidence of a pertinent trait of character, ER 405(a) governs the allowable methods of proof. *State v. Kelly*, 102 Wn.2d 188, 194, 685 P.2d 564 (1984). ER 405(a)

requires that proof of the character trait “may be made by testimony as to reputation.”

In this case defendant was on the stand testifying as to whether his employer required him to submit to UAs. This type of testimony is not reputation evidence and is not evidence of a pertinent character trait. Rather it is evidence a specific past events. Defendant fails to articulate how this proposed testimony was properly admissible under ER 404(a)(1) and ER 405(a). The trial court did not err in excluding such evidence.

Defendant contends that excluding this evidence violated his constitutional right to present a defense. As articulated in the case law set forth above, limitations on the right to introduce evidence are not unconstitutional unless they affect fundamental principles of justice. *Montana v. Engelhoff*, 518 U.S. at 41-43. An “accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.” *Id.* at 42. Defendant has failed to show that the exclusion of evidence in this case is so contrary to the historical practice in criminal courts so as to implicate fundamental principles of justice. The evidence was properly excluded under the standard rules of evidence.

2. THE COURT DID NOT ABUSE ITS DISCRETION IN INSTRUCTING THE JURY ON THE AFFIRMATIVE DEFENSE TO BAIL JUMPING AS THE INSTRUCTIONS WERE SUPPORTED BY THE TESTIMONY OF THE DEFENDANT AND ALLOWED THE STATE TO ARGUE ITS THEORY OF THE CASE; MOREOVER ANY ERROR IN GIVING SUCH INSTRUCTION WAS HARMLESS BEYOND A REASONABLE DOUBT.

The law concerning the giving of jury instructions may be summarized as:

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

State v. Fernandez-Medina, 94 Wn. App. 263, 266, 971 P.2d 521, *reversed on other grounds*, 141 Wn.2d 448, 6 P.3d 1150 (2000), citing *Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

The standard for review applied to a trial court's decisions on jury instructions depends on whether the trial court's ruling was based upon a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d

883 (1998). When a trial court's decision to refuse or give an instruction is based on a factual dispute, then its decision is reviewable only for abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997); *State v. Hernandez*, 99 Wn. App. 312, 997 P.2d 923 (1999) (trial court properly refused to instruct on manslaughter). When the trial court's decision to refuse or give an instruction is based upon a ruling of law, then its decision is reviewed de novo. *Id.*

In conjunction with the right to present a defense and to have the jury be fully instructed on the defense theory of the case, a defendant's also has a constitutional right to control the nature of that defense. *State v. Jones*, 99 Wn.2d 735, 740-41, 664 P.2d 1216 (1983) (“[A] defendant has a constitutional right to at least broadly control his own defense.”); *State v. McSorley*, 128 Wn. App. 598, 604, 116 P.3d 431 (2005). *See also Tremblay v. Overholser*, 199 F. Supp. 569, 570 (D.D.C. 1961) (It is a deprivation of due process to “force any defense on a defendant in a criminal case or to compel any defendant in a criminal case to present a particular defense which he does not desire to advance.”). Accordingly, courts may not force a defense on a criminal defendant where the defendant neither advances nor evidences a desire to raise such a defense. *Jones*, 99 Wn.2d at 743. In *Jones*, the Supreme Court, in reversing a trial court's imposition of a plea of not guilty by reason of insanity on an unwilling defendant, stated:

A defendant who is not guilty because of insanity is no more blameless than a defendant who has a valid alibi defense or who acted in legitimate self-defense. Yet courts do not impose these other defenses on unwilling defendants.

Jones, 99 Wn.2d at 743. In *McSorley*, the prosecution proposed instructions on the affirmative defense to child luring. *McSorley* “strenuously” objected to [the proposed instruction], in essence asserting that he had the right to control his defense, that the State could not force him to raise or rely on an affirmative defense, and that [the instruction] would confuse the jury by imposing on him the burden of proving facts not in issue. *McSorley*, 128 Wn. App. at 603. The appellate court reversed holding that neither State nor trial court may compel defendant to raise or rely on an affirmative defense not advanced by defendant. 128 Wn. App. at 604.

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court’s attention to the claimed

error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963).

On appeal defendant asserts the court erred in giving Instructions Nos. 17¹ and 18² which pertain to the affirmative defense to bail jumping. *See* Appellant's brief at pp 24-29.³ At trial the defendant objected to the giving of these instructions by stating:

DEFENSE COUNSEL: Your Honor, we're objecting to the inclusion of the affirmative defense of bail jumping in this case. I don't believe that the -- I think the WPIC indicates that the affirmative defense is generally to be presented if there's been some evidence presented that would support such affirmative defense. I'm not sure that that was in fact there. And in fact what I think what it does is basically the inclusion of it can only at this point move -- suggest to the jury a reason why they should -- additional reasons why they should ignore the actual elements of the offense and whether the proof of why the elements existed by suggesting that there's not something more.

RP 279-280. While not a model of clarity, this objection seems to be based solely on the grounds that there was a lack of substantial evidence supporting such instructions. The State does not dispute that there was no evidence of any event that would meet, or come close to the definition of uncontrollable circumstances as set forth in Instruction 18. The defendant did testify, however, and offered the jury reasons as to why he failed to

¹ *See* Appendix A.

² *See* Appendix B.

³ Defendant did not properly assign error to these instructions under RAP 10.3(g), but as the State can discern the nature of the argument from the associated briefing, it will respond on the merits.

appear as ordered by the court. Defendant introduced evidence that suggested to the jury that his failure to appear was excusable.⁴ The point of the challenged instructions was to properly inform the jury as to the law as to what type circumstances were sufficient to excuse defendant from his failure to appear. Without such instructions, the jury might erroneously believe that defendant's confusion as to dates constituted a legally sufficient excuse. Thus, the challenged instructions allowed the State to argue its theory of the case – that defendant's testimony regarding his confusion or forgetfulness is not a legally sufficient as an excuse for failing to appear for a court appearance. The court did not abuse its discretion in giving the proposed instructions.

If the court were to interpret the defense objection below as one objecting to the court instructing on an affirmative defense that the defendant did not want, then the giving of the instruction would be error. *McSorley*, 128 Wn. App. at 604. Most constitutional errors⁵ are subject to a harmless error test. *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct.

⁴ His attorney asked the jury to find the defendant not guilty of the two counts of bail jumping. RP 308-310.

⁵ The court has found an error to be “structural,” and thus subject to automatic reversal, only in a “very limited class of cases.” *Johnson v. United States*, 520 U.S. 461, 468, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984) (denial of self-representation at trial); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 207, 124 L. Ed. 2d 1828 (1993) (defective reasonable-doubt instruction)).

1827, 144 L. Ed. 2d 35 (1999). An instructional error is harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)), *see also Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

Here the error is harmless because defendant admitted that he failed to appear for two court dates after being informed of the requirement of a subsequent personal appearance which are the essential elements of the crime of bail jumping. The other elements were proved by uncontroverted evidence. The jury was instructed that to convict defendant of the crime of bail jumping, the following elements must be proved beyond a reasonable doubt:

- 1) That on or about [May 30, 2006, for count IV or October 24, 2006 for count VI] the defendant failed to appear before a court.
- 2) That defendant was charged with unlawful possession of a controlled substance;
- 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 the court; and
- 4) That the acts occurred in the State of Washington.

CP 54-82, Instruction Nos. 19 and 20.

The defendant admitted that he was not in court at 8:30 on May 30, 2006, and did not appear at all on October 24, 2006. RP 256-258. He

testified that he recognized Exhibit No. 9, which was a certified copy of the court order that showed that he had a court date on May 30 at 8:30; he acknowledged that he had signed the bottom of this document and that he understood that he was to be in court at 8:30 in the morning. RP 265-266. He testified that while he knew that he was to appear on May 30, 2006, that on that day he became confused about the date and that by the time he realized his mistake and came to court, the courtrooms were closed for the lunch break. RP 256, 266. He testified that he recognized Exhibit No. 14, which was a certified copy of the court order that showed that he had court date on October 24 at 8:30; he acknowledged that he had signed the bottom of this document and that he understood that he was to be there at 8:30 in the morning. RP 258-259, 267-268.

The prosecutor also admitted a certified copy of the information that charged defendant with unlawful possession of a controlled substance and driving with license suspended as well as other court documents showing that the court set bail at \$10,000. RP 144-151; Ex. 6 and Ex. 7.

The defendant testified that his employer had put up some of his bail money thereby tacitly acknowledging that he had been released on bail. RP 269. The defendant's testimony was that both days he failed to appear as ordered that he was at work at Mountain Pacific Rail when he should have been at the Pierce County Superior Court.

Thus, the defendant's own testimony provides the necessary proof that he failed to appear for a court appearance having been released on bail

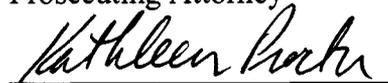
with knowledge of the requirement of a subsequent personal appearance. Uncontested evidence establishes that defendant was charged with unlawful possession of a controlled substance. This court can find beyond a reasonable doubt that the erroneous instructions on the affirmative defense to bail jumping, were harmless as defendant admitted to the essential elements of bail jumping with his own testimony. The erroneous instructions did not affect the verdicts of the jury and the convictions for bail jumping should be affirmed.

D. CONCLUSION.

For the foregoing reasons the, State asks this court to affirm the convictions below.

DATED: MARCH 26, 2008

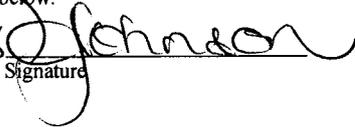
GERALD A. HORNE
Pierce County
Prosecuting Attorney



KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/24/08 
Date Signature

COURT OF APPEALS
DIVISION II
08 MAR 27 PM 1:52
STATE OF WASHINGTON
BY _____ DEPUTY

APPENDIX "A"

Instruction No. 17

INSTRUCTION NO. 17

It is an affirmative defense to a prosecution for Bail Jumping that uncontrollable circumstances prevented the person from appearing, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear, and that the person appeared as soon as such circumstances ceased to exist.

The defendant has the burden of proving by a preponderance of the evidence that uncontrollable circumstances prevented the defendant from appearing. Preponderance of the evidence means that you must be persuaded, considering all the evidence in this case, that it is more probably true than not true. If you find that the defendant has proved this defense by a preponderance of the evidence, it will be your duty to return a verdict of not guilty.

APPENDIX "B"

Instruction No. 18

INSTRUCTION NO. 18

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