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COURT OF APPEALS
DIVISION II

03 DEC -5 AM 11:46

STATE OF WASHINGTON

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No. 37986-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Andrew Skyberg,

Appellant.

Lewis County Superior Court Cause No. 08-1-00313-7

The Honorable Judge Richard Brosey

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Skyberg's conviction violated his Fourteenth Amendment right to due process because it was based on insufficient evidence.
2. Deficiencies in the Information violated Mr. Skyberg's right to notice under the Sixth and Fourteenth Amendments.
3. Mr. Skyberg's conviction violated his Fourteenth Amendment right to due process because of problems with the jury instructions.
4. The "to convict" instruction omitted essential elements of the charged crime and relieved the state of its burden of proof.
5. The court's three conflicting instructions defining Bail Jumping misled the jury and prejudiced Mr. Skyberg.
6. The court's instructions improperly allowed the jury to impute knowledge to Mr. Skyberg instead of requiring proof of actual knowledge.
7. The trial court erred by giving Instruction No. 10:

A person commits the crime of bail jumping when he knowingly fails to appear as required after having been released by court order admitted to bail with the requirement of a subsequent personal appearance before a court.
Court's Instructions to Jury, No. 10, Supp. CP.
8. The trial court erred by giving Instruction No. 11:

Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.
Bail jumping is a class C felony if the person was held for, charged with, or convicted of a class C felony.
Court's Instructions to Jury, No. 11, Supp. CP.
9. The trial court erred by giving Instruction No. 13:

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

- (1) That on or about the 12th day of May 2008, the defendant knowingly failed to appear before a court;
- (2) The defendant was charged with possession of a controlled substance to wit: methamphetamine, a class C felony; and
- (3) That the defendant had been released by court order or admitted to bail in Lewis County Superior Court Cause Number 08-1-00127-4 with the requirement of a subsequent personal appearance before the court; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.
Court's Instructions to Jury, No. 13, Supp. CP.

10. The trial court erred by giving Instruction No. 19:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

Court's Instructions to Jury, No. 19, Supp. CP.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Bail Jumping requires proof that the accused person was released by court order with knowledge of the requirement of a subsequent personal court appearance. The state failed to prove

that Mr. Skyberg was released by court order with the requisite knowledge. Did the conviction for Bail Jumping violate Mr. Skyberg's Fourteenth Amendment right to due process because it was based on insufficient evidence?

2. A charging document must notify the accused person of every essential element of the charged crime. The Information failed to allege that Mr. Skyberg was released by court order with knowledge of the requirement of a subsequent personal court appearance. Did the deficient Information violate Mr. Skyberg's right to adequate notice under the Sixth and Fourteenth Amendments?

3. A "to convict" instruction must set forth all essential elements of the charged crime. The court's "to convict" instruction failed to require proof that Mr. Skyberg was released by court order "with knowledge of the requirement of a subsequent personal court appearance," and that he failed to appear "as required." Did the incomplete "to convict" instruction relieve the state of its burden and violate Mr. Skyberg's Fourteenth Amendment right to due process?

4. Where inconsistencies in a court's instructions stem from a clear misstatement of law, prejudice is presumed. The court gave three inconsistent instructions defining Bail Jumping, two of which included clear misstatements of law. Did the court's inconsistent instructions mislead the jury and violate Mr. Skyberg's Fourteenth Amendment right to due process?

5. Mandatory presumptions are unconstitutional. The trial court's instructions included a mandatory presumption requiring the jury to impute knowledge from Mr. Skyberg's intentional actions. Did the improper mandatory presumption relieve the state of its burden and violate Mr. Skyberg's Fourteenth Amendment right to due process?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Andrew Skyberg was charged with two counts of felony Harassment and one count of Bail Jumping in Lewis County Superior Court.¹ CP 26-28. The Bail Jumping charge read as follows:

And I, the Prosecuting Attorney aforesaid, further do accuse the defendant of the crime of BAIL JUMPING, which is a violation of RCW 9A.76.170(1)&(3)(c), the maximum penalty for which is 5 years in prison and a \$10,000 fine, in that defendant on or about May 12, 2008, in Lewis County, Washington, then and there, having been charged with Possession of a Controlled Substance to wit: methamphetamine, a class C felony, and having been released by court order or having been admitted to bail in Lewis County Superior Court Cause Number 08-1-00127-4 with a requirement of a subsequent appearance before the Lewis County Superior Court, did knowingly fail to appear as required contrary to the peace and dignity of the State of Washington.
CP 27.

At trial, the state submitted several documents to support the Bail Jumping charge. Exhibits 1, 2, 3, 4, 5, 6, Supp. CP. Two Orders Setting Conditions of Release required appearance specifically on March 6, 2008 and May 1, 2008, respectively. Ex. 1, 3, Supp. CP. A Notice of Trial Setting set court for May 12, 2008, but didn't mention confinement or release. Ex. 4, Supp. CP.

¹ The Bail Jumping stemmed from a previous case. Mr. Skyberg was acquitted of the Harassment charges.

Mr. Skyberg provided evidence that the "victims" of the alleged harassment (and their associates) assaulted him a few days before his court date. RP (7/2/08) 50-55, 71-73, 79-80. He testified that on the morning his case was scheduled for court, he went to the hospital because of ongoing pain from this assault. RP (7/2/08) 54-56, 67, 73-74. He called his attorney from the hospital and the police arrested him at the hospital within two hours of the court time. RP (7/2/08) 55-56.

The court gave the jury three instructions defining Bail Jumping:²

A person commits the crime of bail jumping when he knowingly fails to appear as required after having been released by court order admitted to bail with the requirement of a subsequent personal appearance before a court.

Court's Instructions to Jury, No. 10, Supp. CP.

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

Bail jumping is a class C felony if the person was held for, charged with, or convicted of a class C felony.

Court's Instructions to Jury, No. 11, Supp. CP.

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

² The defense did not object to the instructions.

- (1) That on or about the 12th day of May 2008, the defendant knowingly failed to appear before a court;
- (2) The defendant was charged with possession of a controlled substance to wit: methamphetamine, a class C felony; and
- (3) That the defendant had been released by court order or admitted to bail in Lewis County Superior Court Cause Number 08-1-00127-4 with the requirement of a subsequent personal appearance before the court; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Court's Instructions to Jury, No. 13, Supp. CP.

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

Court's Instructions to Jury, No. 19, Supp. CP.

The jury acquitted Mr. Skyberg of both Harassment charges, and convicted him of Bail Jumping. CP 15. After his sentencing, he timely appealed. CP 15, 4-14.

ARGUMENT

I. MR. SKYBERG'S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE AN ESSENTIAL ELEMENT OF BAIL JUMPING.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The sufficiency of the evidence may be raised for the first time on appeal. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). Evidence is sufficient to support a conviction when, viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Colquitt*, at 796. The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); *Colquitt*, *supra*.

The elements of an offense are determined with reference to the language of the statute. See *State v. Leyda*, 157 Wn.2d 335, 346, 138 P.3d 610 (2006); *State v. Stevens*, 127 Wn. App. 269, 274, 110 P.3d 1179 (2005). Questions of statutory construction are addressed *de novo*. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005); *State Owned Forests*

v. *Sutherland*, 124 Wn.App. 400, 409, 101 P.3d 880 (2004). The court's inquiry "always begins with the plain language of the statute." *State v. Christensen*, 153 Wn.2d 186, 194, 102 P.3d 789, (2004). The court must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous. *Sutherland*, at 410.

- A. Bail Jumping requires proof that the accused person was released by court order with knowledge of the requirement of a subsequent personal court appearance.

The crime of Bail Jumping is defined in RCW 9A.76.170(1), which reads (in relevant part) as follows: "Any person having been released by court order...with knowledge of the requirement of a subsequent personal appearance before any court of this state... who fails to appear... as required is guilty of bail jumping." RCW 9A.76.170(1). Under the plain language of the statute, the accused person must be "released by court order... with knowledge of the requirement of a subsequent personal appearance..." RCW 9A.76.170(1). In other words, the accused must know—at the time of the release—of the requirement of a *specific* subsequent personal appearance. This is so because the release occurs "with" knowledge (indicating *contemporaneous* knowledge) of "the" requirement (indicating a *specific* requirement) of "a" subsequent personal appearance (indicating a *singular* appearance). RCW 9A.76.170(1). This interpretation is confirmed by the last portion of the

definition: guilt is predicated on a failure to appear “as required;” this phrase refers back to “the requirement” of “a subsequent personal appearance;” that is, a required appearance known to the accused person at the time of release. RCW 9A.76.170(1).

Even if this language were determined to be capable of more than one interpretation, the rule of lenity requires that it be interpreted in favor of the accused. *State v. Gonzales Flores*, 164 Wn.2d 1, 16, 186 P.3d 1038 (2008). Applying this rule of statutory construction, RCW 9A.76.170(1) must be interpreted to require proof that the release by court order be accompanied by knowledge of the requirement of a subsequent court appearance. *Gonzales Flores*.

Individual legislators may have believed they were voting to adopt a statute that criminalized all instances in which a defendant knows of and misses a required court appearance; however, such was not the intent of the legislature as set forth in the statute’s plain language. Courts must give effect to a statute’s plain meaning as an expression of legislative intent. *Sutherland*, at 409; *see also State v. Punsalan*, 156 Wn.2d 875, 133 P.3d 934 (2006) (“Plain language does not require construction.” *Punsalan*, at 879 (citations omitted)). Had the legislature as a whole wished to penalize a defendant every time she or he knew of and missed a required court appearance, it could have done so with very few changes to

the current statute: "Any person having been released by court order, who, with knowledge of the requirement of a subsequent personal appearance before any court of this state, fails to appear as required is guilty of bail jumping."

B. The state failed to prove that Mr. Skyberg was released by court order with knowledge that he was required to personally appear on May 12th.

In this case, the prosecutor failed to prove that Mr. Skyberg's court ordered release was accompanied by knowledge of the requirement that he personally appear in court on May 12th. The state submitted two separate orders authorizing release; neither specified that he was required to appear in court on May 12th.³ Exhibits 1, 3, Supp. CP. Similarly, the directive to appear in court on May 12th was not accompanied by an order releasing him; instead, it was a Notice of Trial Setting that said nothing about his confinement or release.⁴ Exhibit 4, Supp. CP.

Because the prosecutor failed to prove that Mr. Skyberg was released by court order with knowledge that he was required to appear on

³ The initial order releasing Mr. Skyberg did require that he return to court "as directed," but this language was not sufficient to prove that he was released or admitted to bail "with knowledge" of the May 12th hearing. Exhibit 1, Supp. CP.

⁴ Although it did not use the word "order," the Notice of Trial Setting included the language "The defendant shall appear for all of the above scheduled court hearings," and was signed by the judge. Exhibit 4, Supp. CP.

May 12th, the conviction was based on insufficient evidence. This violated Mr. Skyberg's constitutional right to due process under the Fourteenth Amendment. His conviction must be reversed and the case dismissed with prejudice. *Smalis, supra*.

II. THE STATE VIOLATED MR. SKYBERG'S RIGHT TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION UNDER THE SIXTH AND FOURTEENTH AMENDMENTS BY FAILING TO ALLEGE AN ESSENTIAL ELEMENT OF BAIL JUMPING.

The Sixth Amendment to the Federal Constitution guarantees an accused person the right "to be informed of the nature and cause of the accusation." U.S. Const. Amend. VI. Through the action of the Fourteenth Amendment's Due Process Clause, this right is also guaranteed to people charged in state court. U.S. Const. Amend. XIV; *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948). A similar right is secured by the Washington State Constitution. Wash. Const. Article I, Section 22.

A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Kjorsvik*, at 105. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Kjorsvik*, at 105-106. If

the Information is deficient, no prejudice need be shown, and the case must be dismissed without prejudice.⁵ *State v. Franks*, 105 Wn.App. 950, 22 P.3d 269 (2001).

A conviction for Bail Jumping requires proof that the accused person failed to appear, having been released by court order “with knowledge of the requirement of a subsequent personal appearance.” RCW 9A.76.170(1). This knowledge element is the only mental state required for conviction. The statute does not require that the defendant knowingly fail to appear; instead, assuming knowledge is established at the time of the release, the defendant is strictly liable for a failure to appear, and nonappearance is not excused by poor memory or mistake. *State v. Carver*, 122 Wn. App. 300, 93 P.3d 947 (2004).

An allegation of knowledge, such as that contained in the Bail Jumping statute, cannot be transferred from one part of a charge to another. *See, e.g., State v. Simon*, 120 Wn.2d 196, 840 P.2d 172 (1992). In *Simon*, the defendant was charged with promoting prostitution. The charging document alleged that the defendant “did knowingly advance and profit by compelling [the victim] by threat and force to engage in

⁵ If the missing element can be found by fair construction of the charging document, the appellant must show prejudice. *Kjorsvik, supra*.

prostitution; and did advance and profit from the prostitution of [the victim], a person who was less than 18 years old.” *Simon*, at 199. The Supreme Court held that this language was inadequate:

By simple rules of sentence structure and punctuation, the term ‘knowingly,’ as used in the information, does not refer to the second means of committing the crime... No one of common understanding reading the information would know that knowledge of age is an element of the charge of promoting prostitution of a person under 18.
Simon, at 199.

In this case, the Information alleged that Mr. Skyberg, “having been released by court order or having been admitted to bail... with a requirement of a subsequent appearance... did knowingly fail to appear as required.” CP 27. This language—based on the previous version of the bail jumping statute⁶—does not track the elements set forth in RCW 9A.76.170(1) and omits the allegation that Mr. Skyberg was released by court order “with knowledge of the requirement of a subsequent personal appearance.” RCW 9A.76.170(1). Even when construed liberally, the necessary facts—that Mr. Skyberg had knowledge of the May 12th court date at the time he was released by court order—do not appear and cannot be found by fair construction in the language of the Information, as required under *Kjorsvik*.

⁶ See former RCW 9A.76.170(1) (2000).

The word “knowingly” in the phrase “knowingly failed to appear” cannot be stretched to include the knowledge required under the statute—knowledge of the mandatory May 12th court date. *Simon, supra*. Nor is the Information saved by appending the phrase “as required” to the erroneous language. The placement of “knowingly” immediately before “failed” suggests only that the failure to appear was knowing, not that the requirement of personal appearance and the scheduled date were known; likewise, the placement of “as required” immediately after “appear” conveys only that the appearance was mandatory, not that the requirement was known. Furthermore, even if the word “knowingly” is interpreted to encompass the requirement to appear on a specific date, nothing in the Information can be read to allege the requirement that Mr. Skyberg knew of the May 12th date when he was released by court order.

For these reasons, the Information was defective. Mr. Skyberg’s conviction must be vacated, and the case dismissed without prejudice.

Franks, supra.

III. MR. SKYBERG’S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT’S INSTRUCTIONS WERE INCONSISTENT AND RELIEVED THE STATE OF ITS BURDEN TO PROVE ALL THE ESSENTIAL ELEMENTS OF BAIL JUMPING.

Due process requires a state to prove all the elements of a crime beyond a reasonable doubt. U.S. Const. Amend. XIV; *Bunkley v. Florida*,

538 U.S. 835, 840, 123 S. Ct. 2020, 155 L. Ed. 2d 1046 (2003); *Winship, supra*. An accused person is deprived of due process if jury instructions relieve the state of its burden to prove each element. *Polk v. Sandoval*, 503 F.3d 903, 910 (9th Cir. 2007).

As noted above, Bail Jumping requires proof that the accused person was “(1) released by court order with knowledge of the requirement of a subsequent personal court appearance, and (2) a failure to appear “as required.” RCW 9A.76.170(1). The instructions here were deficient for three reasons. First, the trial court’s “to convict” instruction did not track the language of the statute, and omitted essential elements of the offense. Second, the court gave three inconsistent instructions defining the offense. Third, the court’s definition of “knowledge” included an unconstitutional mandatory presumption.

A. The court’s “to convict” instruction omitted essential elements of the offense, relieved the state of its burden, and violated Mr. Skyberg’s right to due process under the Fourteenth Amendment.

A “to convict” instruction must contain all elements essential to the conviction, and the reviewing court may not rely on other instructions to supply the missing element. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). This is so because “the jury treats the instruction as a ‘yardstick’ by which to measure a defendant’s guilt or innocence.” *Mills*, at 7. The adequacy of a “to convict” instruction is reviewed *de novo*. *Mills*, at 7. A

“to convict” instruction that relieves the state of its burden to prove every element of a crime requires automatic reversal. *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

The court’s “to convict” instruction did not require proof that Mr. Skyberg knew of the requirement that he personally appear in court on May 12; instead, the instruction permitted conviction if the jury found that Mr. Skyberg “knowingly failed to appear before a court.”⁷ Instruction No. 13, Supp. CP. But the Bail Jumping statute is not violated whenever a person knowingly fails to appear in court; instead, conviction requires proof that a person failed to appear as required (whether such failure was knowing or not) *and* had knowledge of the mandatory court date. RCW 9A.76.170(1).⁸ The omission of the knowledge element violated Mr.

⁷ This language was apparently based, in part, on a prior version of the statute. *See former RCW 9A.76.170 (1) (2000)*.

⁸ The problem with Instruction No. 13 may be illustrated with the following example involving Jane Austen and Harry Potter. Both Jane and Harry were required to appear in court on January 1st. Jane was unaware that she had been ordered to appear, and did not go to court as required. Harry was properly notified of his court date, but was in a coma on January 1st, and also did not attend as required. Under the statute as written, Jane would be acquitted after the state rested its case, while Harry would be forced to present his affirmative defense. This is so because Jane failed to appear as required but lacked the requisite knowledge, while Harry failed to appear and had the requisite knowledge. However, Instruction No. 13 produces a different result. Jane would be convicted, because she was required to appear, and knowingly stayed home. Harry would be acquitted without resort to the affirmative defense, because he did not knowingly fail to appear since he was unconscious on January 1st.

Skyberg's constitutional right to due process under the Fourteenth Amendment.

Similarly, under Instruction No. 13, the jury was permitted to convict even without proof that Mr. Skyberg failed to appear "as required." Instead, the instruction allowed jurors to vote guilty if they found that Mr. Skyberg knowingly failed to appear before a court, and that he was released by court order with the requirement of a subsequent personal appearance. Instruction No. 13, Supp. CP. This omission relieved the state of its burden to prove each element beyond a reasonable doubt, in violation of Mr. Skyberg's right to due process under the Fourteenth Amendment.

These deficiencies in the "to convict" instruction require automatic reversal. *Brown, supra*. Accordingly, Mr. Skyberg's conviction must be reversed and the case remanded to the trial court for a new trial with proper instructions.

B. The trial court's three inconsistent instructions defining Bail Jumping misled the jury and violated Mr. Skyberg's right to due process under the Fourteenth Amendment.

Where inconsistency in a court's instructions results from a clear misstatement of the law, the inconsistency is presumed to have misled jurors in a manner prejudicial to the defendant. *State v. Walden*, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997), citing *State v. Wanrow*, 88 Wn.2d

221, 239, 559 P.2d 548 (1977); *see also State v. Carter*, 127 Wn. App. 713, 718, 112 P.3d 561 (2005). In such circumstances, the defendant is entitled to a new trial unless the error can be shown to be harmless beyond a reasonable doubt. *Walden, supra*, at 478. Instructional error is harmless only if it is trivial, formal, or merely academic, and only if it did not prejudice the substantial rights of accused, and in no way affected the final outcome of the case. *Walden*, at 478.

In this case, the court gave three inconsistent instructions defining Bail Jumping. Instruction No. 11 correctly defined Bail Jumping in accordance with the statute. Instruction No. 11, Supp. CP. Instruction No. 13 omitted two elements as outlined above (the knowledge requirement and the requirement of a failure to appear "as required.>"). Instruction No. 10 gave an incorrect definition of Bail Jumping that tracked the language of the charging document and the prior statute. *Former RCW 9A.76.170(1)* (2000); Instruction No. 10, Supp. CP; *see also CP 27*.

These inconsistencies result from a clear misstatement of the law. Instruction No. 13 omitted two essential elements (knowledge and the failure to appear "as required"); Instruction No. 10 misstated the knowledge element by failing to require proof that Mr. Skyberg knew of the requirement to appear on May 12th at the time of his court-ordered release. Accordingly, the inconsistencies are presumed to have misled the

jury in a manner prejudicial to Mr. Skyberg. The conviction must be reversed and the case remanded to the superior court for a new trial with proper instructions. *Walden, supra*.

C. The court's instructions created a mandatory presumption requiring jurors to impute knowledge to Mr. Skyberg, thus relieving the state of its burden to prove every essential element and violating Mr. Skyberg's Fourteenth Amendment right to due process.

1. Mandatory presumptions are unconstitutional.

Jury instructions must be "manifestly clear," since juries lack the tools of statutory construction available to courts. *See, e.g., State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004). Furthermore, due process prohibits the use of conclusive presumptions in jury instructions. Such presumptions conflict with the presumption of innocence and invade the factfinding function of the jury. *State v. Savage*, 94 Wn.2d 569, 573, 618 P.2d 82 (1980), *citing Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). A conclusive presumption is one that requires the jury to find the existence of an elemental fact upon proof of the predicate fact(s). *Seattle v. Gellein*, 112 Wn.2d 58, 63, 768 P.2d 470 (1989).

An instruction creates a conclusive presumption whenever “a reasonable juror might interpret the presumption as mandatory.” *State v. Deal*, 128 Wn.2d 693, 701, 911 P.2d 996 (1996). The Washington Supreme Court has “unequivocally rejected the [use of] any conclusive presumption to find an element of a crime,” because conclusive presumptions conflict with the presumption of innocence and invade the province of the jury. *State v. Mertens*, 148 Wn.2d 820, 834, 64 P.3d 633 (2003). Conclusive presumptions are unconstitutional, whether they are judicially created or derived from statute. *Mertens*, at 834.

2. Instruction No. 19 was ambiguous and created a mandatory presumption requiring jurors to impute knowledge to Mr. Skyberg.

RCW 9A.08.010 (“General requirements of culpability”) defines the mental states used in the criminal code. Under certain circumstances, proof of one mental state can substitute for proof of a lesser mental state. Thus, “[w]hen acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.” RCW 9A.08.010(2).

If applied improperly, the substitution allowed under RCW 9A.08.010(2) requires reversal. *See, e.g., State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). In *Goble*, the accused was charged with

assaulting a person whom he knew to be a law enforcement officer.⁹ The trial court's "knowledge" instruction informed the jury that "[a]cting knowingly or with knowledge also is established if a person acts intentionally." *Goble*, at 202. This language was found to be ambiguous, in that the jury could believe an intentional assault established Mr. Goble's knowledge, regardless of whether or not he actually knew the victim's status as a police officer. *Goble*, at 203.¹⁰

The substitution allowed under RCW 9A.08.010(2) should apply only when the state can prove a higher mental state than required for conviction, and should not be applied if proof of a higher mental state is meaningless. For example, it would be nonsensical to argue that a person is guilty of leaving a child in the care of a sex offender if she or he "leaves the child in the care or custody of another person... [intending] that the person is registered or required to register as a sex offender..." RCW

⁹ Although not a statutory element of Assault in the Third Degree, knowledge that the victim was a law enforcement officer performing official duties was included in the "to convict" instruction and thus became an element under the law of the case in *Goble*. *Goble*, at 201.

¹⁰ The rule set forth in *Goble* has been limited to crimes that include more than one *mens rea* as an element in the "to convict" instruction. *State v. Gerdtz*, 136 Wn. App. 720, 150 P.3d 627 (2007). Furthermore, the problem created by the ambiguous language can be corrected by instructions that are "clear, accurate, and separately listed [sic]." *State v. Keend*, 140 Wn. App. 858, 868, 166 P.3d 1268 (2007). The instructions upheld in *Keend* did not differ significantly from those in *Goble*, which led this Court to reverse. *Compare Goble*, at 200-202 with *Keend*, at 863-864, 867. Thus *Keend* appears to have overruled *Goble sub silentio*.

9A.42.110, *modified*. Similarly, it makes no sense to argue that a person is guilty of rendering criminal assistance by concealing another person “who he [intends to have] committed a crime or juvenile offense...” See RCW 9A.76.050, *modified*.

Conviction for Bail Jumping requires proof that the accused person was released by court order with knowledge of the requirement of a subsequent personal court appearance. RCW 9A.76.170. As with the examples above, it would be nonsensical to argue that a person is guilty of Bail Jumping after having been released by court order with “intent of” the requirement of a subsequent personal court appearance. Accordingly, the substitution permitted under RCW 9A.08.010(2) should not apply in Bail Jumping cases.

Although an attempt to *properly* apply RCW 9A.08.010(2) to Bail Jumping yields absurd results (as outlined above), an *improper* application of the statute would not be obviously nonsensical. For example, ambiguous instructions could reasonably lead a juror to believe that knowledge could be imputed to a defendant who intentionally left court without permission before the judge scheduled the next court date. A juror who believed it was proper to impute knowledge under these circumstances could vote to convict a defendant who lacked actual knowledge of the requirement to personally appear on the subsequent date.

Accordingly, a court must use caution when instructing the jury about the substitution permitted by RCW 9A.08.010(2).

In this case, the trial court's instruction defining knowledge included the following language: "Acting knowingly or with knowledge also is established if a person acts intentionally." Instruction No. 19, Supp. CP. This language may have been appropriate as it related to the harassment charges (of which Mr. Skyberg was acquitted). However, nothing in the instruction limited application of this language to those charges; thus, the jury was free to apply it to Mr. Skyberg's Bail Jumping charge. The incautious use of this language requires reversal.

The instruction also did not place any limitation on the intentional acts jurors could consider to establish the knowledge required under RCW 9A.76.170(1). Thus the jury was permitted (if not required) to presume from any intentional act that Mr. Skyberg had the knowledge required for conviction, whether or not he had actual knowledge. Because of the instruction's lack of guidance, it is impossible to determine what intentional acts jurors may have used to presume that Mr. Skyberg was released by court order with the requisite knowledge.

If jurors applied Instruction No. 19 to the Bail Jumping charge, they may have voted guilty even in the absence of sufficient proof of knowledge. Since juries lack the tools of statutory construction, the trial

court's failure to give an instruction that was manifestly clear requires reversal under a heightened test for constitutional error applicable in mandatory presumption cases.

Constitutional error is presumed prejudicial. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang*, at 32. A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

Instructions with conclusive presumptions require a more thorough harmless-error analysis than other unconstitutional instructions. The reviewing court must conclude that the error was "unimportant in relation to everything else the jury considered on the issue in question..." *Yates v. Evatt*, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), *overruled (in part) on other grounds by Estelle v. McGuire*, 502 U.S. 62, 12 S. Ct. 475, 116 L. Ed. 2d 385 (1991). In other words,

a court must take two quite distinct steps. First, it must ask what evidence the jury actually considered in reaching its verdict...[I]t must then weigh the probative force of that evidence as against the probative force of the presumption standing alone...[I]t will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue...is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption.

Yates, at 403-405 (footnotes and citations omitted). A court must examine the proof actually considered, and ask:

[W]hether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict *resting on that evidence* would have been the same in the absence of the presumption. It is only when the effect of the presumption is comparatively minimal to this degree that it can be said...that the presumption did not contribute to the verdict rendered.

Yates, at 403-405 (emphasis added). Thus, a reviewing court evaluating harmlessness cannot rely on evidence drawn from the entire record “because the terms of some presumptions so narrow the jury’s focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed.” *Yates*, at 405-406.¹¹

¹¹ In *Deal*, *supra*, this Court applied the standard test for constitutional harmless error, without reference to *Yates v. Evatt*. *Deal*, at 703. Presumably, this was because the defendant in *Deal* testified and acknowledged the facts that were the subject of the conclusive presumption. *Deal*, at 703.

Here, the conclusive presumption allowed the jury to find that Mr. Skyberg was released with knowledge of the requirement of a subsequent personal court appearance upon proof that he acted intentionally.

Instruction No. 19, Supp. CP. The instruction provided no guidance as to what intentional acts could be considered a predicate for the presumed fact (that Mr. Skyberg had the requisite knowledge). No limits were placed on what the jury could consider as predicate facts; under the instruction, jurors could presume guilty knowledge from proof of *any* intentional act.

The absence of any limitation makes the conclusive presumption here worse than any of the instructions considered in the Supreme Court cases outlined above. *See, e.g., Sandstrom*, at 512 (“the law presumes that a person intends the ordinary consequences of his voluntary acts”); *Morissette, supra* (intent to steal presumed from the isolated act of taking); *Francis v. Franklin*, 471 U.S. 307, 309, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) (“[the] acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted,” and “[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted”); *Carella v. California*, 491 U.S. 263, 266, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) (“a person ‘shall be presumed to have embezzled’ a vehicle if it is not returned within 5 days of the

expiration of the rental agreement,” and “‘intent to commit theft by fraud is presumed’ from failure to return rented property within 20 days of demand”); *Yates*, at 401 (“‘malice is implied or presumed’ from the ‘willful, deliberate, and intentional doing of an unlawful act’ and from the ‘use of a deadly weapon.’”).

The lack of any limitation also makes it impossible to determine what portions of the record the jury considered in deciding that Mr. Skyberg had the requisite knowledge. Jurors could have focused on evidence of *any* intentional act (such as Mr. Skyberg’s decision to go to the hospital), and disregarded all other evidence bearing on his knowledge or lack thereof. Because it is impossible to make the determination required by *Yates, supra*, it cannot be said that the error was harmless beyond a reasonable doubt.

Furthermore, even considering the entire record (contrary to the requirement under *Yates, supra*), reversal is required. A reasonable juror could have acquitted Mr. Skyberg of Bail Jumping by deciding that he was aware of his court date, but unaware of the requirement that he personally appear. Although he stipulated that he had signed the paperwork presented at trial, he did not stipulate that he could read and understand the paperwork he signed. *See* Exhibit 9, Supp. CP. He also testified that he was aware of his court date, but he did not testify that he was aware he

was required to personally appear in court (as opposed to having counsel present his excuse for being unable to attend). RP (7/2/08) 55-56. Given the absence of evidence proving that he had read and understood the paperwork, or other testimony proving that he knew of the requirement of a subsequent personal appearance in court, a juror could have voted to acquit.

Accordingly, the error was not trivial, formal, or merely academic, and it cannot be said that the error was harmless beyond a reasonable doubt. *Lorang*, at 32. Because of this, Mr. Skyberg's conviction for Bail Jumping must be reversed and the case remanded for a new trial with proper instructions.

CONCLUSION

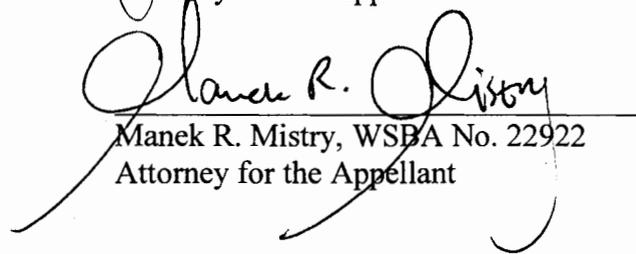
Mr. Skyberg's conviction must be reversed for insufficient evidence, and the case dismissed with prejudice. In the alternative, the case must be dismissed without prejudice because of deficiencies in the Information, or remanded to the trial court for a new trial with proper instructions.

Respectfully submitted on December 4, 2008.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Andrew Skyberg, DOC #798058
Washington Corrections Center
P.O. Box 900
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and to:

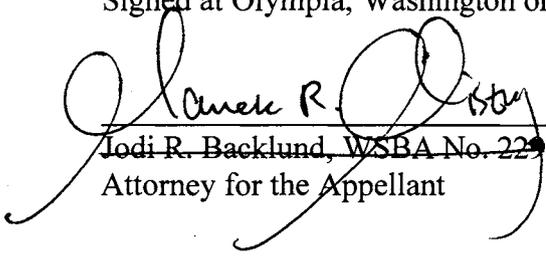
Lewis County Prosecuting Attorney
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 4, 2008.

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

Signed at Olympia, Washington on December 4, 2008.



Jodi R. Backlund, WSBA No. 22917
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