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COURT OF APPEALS  
DIVISION II

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

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NO. 37986-4 II

STATE OF WASHINGTON,

Respondent.

vs.

ANDREW SKYBERG,  
Appellant.

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On Appeal from the Superior Court of Lewis County

**STATE'S RESPONSE BRIEF**

**MICHAEL GOLDEN  
PROSECUTING ATTORNEY**

Law and Justice Center  
345 W. Main St. 2nd Floor  
Chehalis, WA 98532  
360-740-1240

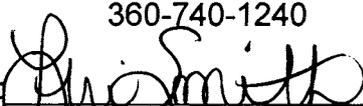
By   
Lori Smith, WSBA 27961

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## STATEMENT OF THE CASE

Appellant's statement of the case is adequate for purposes of responding to this appeal.

## ARGUMENT

### **A. THE CHARGING DOCUMENT CONTAINED ALL OF THE ESSENTIAL ELEMENTS OF THE CRIME OF BAIL JUMPING.**

Skyberg argues that the charging document was insufficient because it fails to allege all of the essential elements of the crime of Bail Jumping. This argument is without merit.

A challenge to the sufficiency of the charging document is reviewed de novo. State v. Campbell, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995). When a charging document is challenged for the first time on appeal, it must be construed liberally, "[t]hus, we need only determine if the necessary facts appear *in any* form in the charging document." State v. Williams, 162 Wn.2d 177, 170 P.3d 30 (2007). When a defendant challenges an information after entry of a verdict, the reviewing court asks: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" State v. Kjorsvik, 117

Wn.2d 93, 105-06, 812 P.2d 86 (1991) (emphasis added). The information does not need to state the statutory elements of an offense in the exact language of the statute, but may instead use words conveying the same meaning and import as the statutory language. State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). "The rationale behind including 'essential elements' rather than only 'statutory elements' is to give the accused proper notice of the nature of the crime so that the accused can prepare an adequate defense." Williams, supra. The bail jumping statute states that, "[a]ny person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state . . . and who fails to appear . . . as required is guilty of bail jumping." RCW 9A.76.170(1). Skyberg argues that because the information did not allege that Skyberg had "knowledge of the requirement of a subsequent personal appearance," that this was error. Brief of Appellant, 6. Skyberg is mistaken.

Because Skyberg is challenging the charging language for the first time on appeal, the document is to be construed liberally. Williams, supra. Keeping this liberal standard in mind, the charging document in this case contained the following charging language:

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 08-1-001227-4 *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 (emphasis added). While this language may have been inartful, nonetheless, liberally construed, the charging language was sufficient as it notified Skyberg that the State had charged him with violation of RCW 9A.76.170(a) because he knew that his subsequent appearance was required and he failed to appear as required. Thus, each essential element of bail jumping was alleged in the information. Kjorsvik, *supra*. Put differently, there was sufficient language in the bail jumping charge to inform Skyberg that he was being charged with having failed to make a court appearance of which he had knowledge. Once again, the charging document in this case is being challenged after the verdict so it must be construed liberally. "Thus, we need only determine if the necessary facts appear *in any* form in the charging document." Williams, *supra*. Accordingly, while the language of the charging

document in this case could have been phrased more precisely, this court should find that the charging document nonetheless meets the liberal construction test. Again, the language used in the charging document here was sufficient to inform Skyberg that he was being charged with having failed to make a court appearance of which he had knowledge. RCW 9A.76.170(1). So, when we ask "do the necessary facts appear in any form, or by fair construction can they be found, in the charging document?, the answer is "yes." Kjorsvik, supra. Accordingly--contrary to how Skyberg interprets the sufficiency of these words-- under a liberal construction the language of the bail jumping statute does "appear in any form" in the charging document, and the language used certainly conveys notice to the defendant as to what conduct it is proscribing. CP 27; Kjorsvik, supra.

In any case, Skyberg cannot "show that he . . . was actually prejudiced by the inartful language which caused a lack of notice." Kjorsvik, supra. Because the "necessary facts appear in any form" in the charging document as to the bail jumping charge, and because the charging language gave Skyberg adequate notice of the proscribed conduct, and, because Skyberg has not shown that he was prejudiced by any alleged deficiency in the charging

document, his claims are without merit and his conviction for bail jumping should be affirmed.

**B. THE JURY INSTRUCTIONS FOR BAIL JUMPING,  
WHEN READ AS A WHOLE, PROPERLY  
INFORMED THE JURY OF THE APPLICABLE LAW.**

Skyberg further claims that various jury instructions, including the “to convict” instruction pertaining to the bail jumping charge were all incorrect. The State disagrees.

On appeal, the reviewing court reviews instructional errors de novo. State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). A jury instruction must correctly state the applicable law. State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 73 (1980). “Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law.” State v. Irons, 101 Wn.App. 544, 549, 4 P.3d 174 (2000). The sufficiency of a to-convict instruction is reviewed de novo. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). Jury instructions are reviewed “in the context of the instructions as a whole,” State v. Pirtle, 127 Wn.2d at 656. Failure to instruct on an essential element is automatic reversible error. State v. Pope, 100 Wn.App. 624, 628, 999 P.2d 51 (2000). There has been no reversible error here.

Skyberg argues that the jury instructions on the bail jumping charge were “inconsistent.” Then, in a virtually unfathomable attempt to deconstruct the “knowledge” instruction, Skyberg also claims (complete with references to Jane Austin and Harry Potter) that the “to convict” instruction omitted the “knowledge element.” Skyberg then goes on to claim that three “inconsistent” instructions defining bail jumping misled the jury and violated Skyberg’s right to due process. Brief of Appellant 17. Skyberg further claims that the instructions here created a “mandatory presumption” because the instructions allegedly required jurors to “impute knowledge to Mr. Skyberg,” thereby relieving the State of its burden to prove all elements of the crime. Skyberg is mistaken.

In the first place, most of Skyberg’s argument addressing the so-called faults of the knowledge instruction seems to have been found meritless in another case. See e.g., State v. Gerdtz, 136 Wn.App. 720, 727-730, 150 P.3d 627 (2007). Further, the instructions given in this case as to the bail jumping charge-- when evaluated in the context of the instructions as a whole—properly informed the jury of the applicable law. For example, the “to convict” instruction states, in pertinent part, as follows:

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 12<sup>th</sup> day of May, 2008, the defendant knowingly failed to appear before a court; (2) That the defendant was charged with possession of a controlled substance to wit: methamphetamine. . . (3) That the defendant had been released by court order or admitted to bail in Lewis County Superior Court Cause Number 03-1-00127-4 with the requirement of a subsequent personal appearance before that court . . .

Instruction Number 13.

Instruction number 11 states as follows:

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

Instruction 11 (emphasis added). Instruction number 10 states, “A person commits the crime of bail jumping when he knowingly fails to appear as required after having been released by court order or admitted to bail with the requirement of a subsequent personal appearance before a court.” These instructions –when analyzed together and in the context of all of the other instructions-- correctly sets out the statutory elements of bail jumping. RCW 9A.76.170(1). See also RP 66, 67, where Skyberg admitted that he had signed “everyone of those hearings” [sic] and that one of those dates’ forms ordered him to appear on May 12, 2008. In sum, Skyberg’s

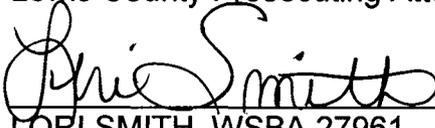
argument regarding the knowledge instruction is extremely confusing. At least it is to the State. But beyond that, it also appears that a similarly convoluted argument regarding a similarly-argued knowledge instruction was found to be without merit in State v. Gerdts, 136 Wn.App. 720, 727-730, 150 P.3d 627 (2007)(noting the defendant's "convoluted" argument and holding that the knowledge instruction properly informed the jury of the applicable law). This court should likewise find Skyberg's fuzzy logic regarding the knowledge instruction unpersuasive. Accordingly, all of Skyberg's claims regarding the jury instructions are without merit and his conviction should be affirmed.

### CONCLUSION

As set forth above, all of Skyberg's claims of error regarding the charging document and the jury instructions in this case are without merit. Accordingly, Skyberg's conviction should be affirmed.

RESPECTFULLY SUBMITTED this 9 day of March, 2009.

MICHAEL GOLDEN  
Lewis County Prosecuting Attorney

BY:   
LORI SMITH, WSBA 27961  
Deputy Prosecuting Attorney

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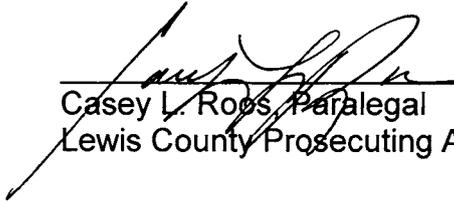
DECLARATION OF  
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STATE OF WASHINGTON  
BY *Casey L. Roos*  
DEPUTY  
COURT OF APPEALS  
DIVISION II

Ms. Casey Roos, paralegal for Lori Smith, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On March 9, 2009, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Jodi R. Backlund, Esq.  
Manek R. Mistry, Esq.  
203 East Fourth Ave, Suite 404  
Olympia WA 98501

DATED this 9<sup>th</sup> day of March 2009, at Chehalis, Washington.

  
\_\_\_\_\_  
Casey L. Roos, Paralegal  
Lewis County Prosecuting Attorney Office