

FILED
COURT OF APPEALS
DIVISION II

09 FEB 17 AM 9:39

STATE OF WASHINGTON

DEPUTY

NO. 38258-0-II

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

STATE OF WASHINGTON, Respondent

v.

DYLAN YEATES, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN P. WULLE
CLARK COUNTY SUPERIOR COURT CAUSE NO. 07-1-00767-9

BRIEF OF RESPONDENT

Attorneys for Respondent:

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I. STATEMENT OF THE FACTS

The State accepts the statement of the facts as set forth by the Appellant.

II. RESPONSE TO ASSIGNMENT OF ERROR

The sole assignment of error in this case is a claim that the trial court erred in giving an affirmative defense instruction to the charge of Bail Jumping. The defense maintains that they did not ask for this defense instruction and it was not part of their planned defense, which was a lack of knowledge defense.

The court instructed the jury on the affirmative defense. The Court's Instructions to the Jury (CP 119) is attached hereto and by this reference incorporated herein. As part of that packet is Instruction No. 17, which is the elements of the crime. It reads as follows:

To convict the defendant of the crime of bail jumping as charged in Count 4, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 3rd day of January, 2008, the defendant failed to appear before a court as required;
- (2) That the defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court;

(3) That the defendant was being held for, or was charged with the crime of Possession of a Controlled Substance – Methamphetamine; 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 the Jury, CP 119,
Instructions No. 17)

And also Instruction 18A. That instruction reads as follows:

It is a defense to the crime of 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 this defense by a preponderance of the evidence.

“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.

-(Court's Instructions to the Jury, CP 119,
Instruction No. 18A.

When the jury instructions were being presented to the court, the State offered the affirmative defense instruction, 18A. The defense objected to it, but the court made the following observation:

PM (Prosecuting Attorney): Your Honor, the instruction tells the jury what the law is on a defense – the defense to the charge of bail jumping and the defendant is not precluded from making an argument that he – that we haven't proven another element of the crime, i.e., the element of knowledge or the requirement of a subsequent appearance. He can argue that.

JUDGE: I'm gonna give the instruction because there's – I think the jury would be confused otherwise.

BW (Defense Attorney): What – Judge, what – this will confuse the jury because –

JUDGE: Counsel –

BW: - The State wants –

JUDGE: - Counsel! Your client testified to medical conditions, hospitalizations – things of that sort. I think the jury needs to know how that fits in the law. I'm gonna give the instruction. Where do you propose to put it? Eighteen "A"?

PM: Yes, Your Honor.

-(RP 206, L-20)

The defense argued that the use of this instruction would give a false impression that there was only one defense to Bail Jump. (RP 207, L12-14). The court indicated that it was not preventing him from arguing the case the way he sees it, but noted that because the defense raised the

issue of medical condition, that that “kind of puts it out there”. (RP 207, L21).

This issue came up during the direct examination of the defendant. He indicated that he thought that the appearance date for him was on January 7th, when in fact it was on January 3rd. (RP 173). The defense attorney then questioned him about his situation around that period of time:

QUESTION (Defense Attorney): Was there anything around that time – around the end of the year or that time that – that caused you distraction or confusion?

ANSWER (Defendant): Yeah.

QUESTION: What was that?

ANSWER: I was hospitalized on the 26th of December until the – New Year’s Eve – the 1st I believe with my – I have severe ulcerated colitis and gastro-paresis (ph).

QUESTION: What is that?

ANSWER: It’s a – when food I eat doesn’t digest to my intestine, it sits there and it lodges and doesn’t digest. Therefore it gives me food poisoning. And so I have really bad – severe vomiting and really sick and have to go into the hospital and have it drained out.

QUESTION: Okay.

ANSWER: It’s happened – it’s happened six – seven times in the last year.

QUESTION: Okay. Is it caused by drug use?

ANSWER: Oh no, not at all.

QUESTION: How – how long have you had that condition?

ANSWER: Oh, severe colitis I've had for since I was about twenty-two. The gastro-paresis is just new. They just diagnosed that with me about six-seven months ago.

QUESTION: Okay. And – so you were in the hospital on December 26th?

ANSWER: Yes sir.

QUESTION: And you got out on New Year's Eve?

ANSWER: Yes sir.

QUESTION: Okay. Now court wasn't until January 3rd. How – how did you feel when you got out?

ANSWER: I was ill for a couple days afterwards so – I mean – recovering.

QUESTION: So you primarily focused on that?

ANSWER: Yeah. That's what – I mean – I didn't – like – like I said at that time the 7th had stuck in my head and that's when I was preparing to come to court...

-(RP 174, L3 – 175, L15)

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. Flint v. Hart, 82 Wn. App. 209, 223, 917 P.2d 590 (1996). The jury is presumed to read the court's instructions as a whole. The jury is also to presume each

instruction has meaning. State v. McLoyd, 87 Wn. App. 66, 71, 939 P.2d 1255 (1979).

The defendant in our case argued that the trial court erred in giving Instruction 18A (CP 119, Instruction No. 18A) which explains the affirmative defense to Bail Jumping. The defendant has objected at trial, arguing, it appears, that this would confuse the jury by making it think that there was only one defense to this crime. Yet, that does not appear in any of the instructions nor does it appear anywhere in any argument made by the attorneys. The judge in the case made it clear that he was attempting to prevent any confusion to the jury by giving of this instruction. (RP 206, L9-10).

The State submits that the defendant did present evidence of uncontrollable circumstances that prevented him from appearing. However, he chose, rather than using that as his attack, to argue essentially that his absence should be excused. That appears to be what he was asking the jury to do: excuse his absence. Based on this type of testimony, the State argued that the instruction was necessary to properly inform the jury as to what circumstances were legally sufficient to excuse the defendant from failing to appear. Without such instruction, the jury may have erroneously believed that the defendant's forgetfulness and confusion as to his hearing date constituted a legally sufficient excuse yet, case law is

clear that the “I forgot” is not a defense to Bail Jumping. State v. Carver, 122 Wn. App. 300, 305, 93 P.3d 947 (2004).

Juxtaposed against the State’s right to argue its theory of the case, however, is the defendant’s constitutional right to control his own defense. “Every competent 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). Thus, giving the instruction, even though the evidence is clearly in the record, over the defendant’s objection possibly infringed on the constitutional right to conduct his own defense. McSorley, 128 Wn. App. at 604.

In light of these competing interests, the appellate court assumes error and looks to see if it was nevertheless harmless. 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); Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed.2d 705 (1967).

In our case, the error is harmless because the defendant admitted that he failed to appear on the court date after knowing that he was required to appear. As the Court’s Instructions to the Jury clearly set out, to convict the defendant of the crime of Bail Jumping, the State had to prove all of the elements as set forth in Instruction No. 17 (see above). The

defendant's own testimony leaves no reasonable doubt that he committed this offense. He admitted that he was not in court on the date that he was supposed to be there. And further that he didn't appear until at least January 23 (even though the time that he was supposed to have appeared was January 3). (RP 176). Further, he testified that he recognized the copies of court orders showing that he had a court date and he acknowledged signing the documentation and that he understood that he had to be in court for a morning session. He attempts to argue that he thought it was the 7th instead of the 3rd and part of that was because of confusion dealing with hospitalization. (RP 173-175).

The State submits that if it was error to have instructed that it was harmless beyond any reasonable doubt.

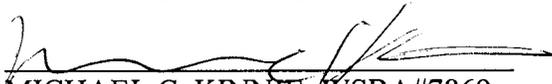
III. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 11 day of Feb, 2009.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By: 
MICHAEL C. KINNIE, WSBA#7869
Senior Deputy Prosecuting Attorney

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

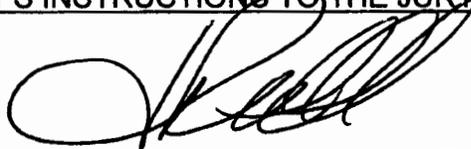
v.

DYLAN ROBERT YEATES,

Defendant.

No. 07-1-00767-9

COURT'S INSTRUCTIONS TO THE JURY



SUPERIOR COURT JUDGE *John P. Wulle*

7-22-08

DATE

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INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 4

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 5

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 6

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 7

It is a crime for any person to possess a controlled substance.

INSTRUCTION NO. 8

To convict the defendant of the crime of possession of a controlled substance as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 26th day of April, 2007, the defendant possessed a controlled substance; and
- (2) 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 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.

INSTRUCTION NO. 9

Methamphetamine is a controlled substance.

INSTRUCTION NO. 10

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance. Dominion and control need not be exclusive to establish constructive possession.

INSTRUCTION NO. 11

The law does not require that a minimum amount of drug be possessed, but that possession of any amount is sufficient to support a conviction.

Jury Instruction No. 12

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

INSTRUCTION NO. 13

It is unlawful for any person to use drug paraphernalia to contain or conceal a controlled substance.

INSTRUCTION NO. 14

"Drug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance.

INSTRUCTION NO. 15

To convict the defendant of the crime of Unlawful Use of Drug Paraphernalia as charged in Count 3, each of the following elements of the crime must be proved beyond a reasonable doubt.

- (1.) That on or about the 26th day of April, 2007, the defendant used drug paraphernalia to contain or conceal a controlled substance; and
- (2.) 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 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.

INSTRUCTION NO. 16

A person commits the crime of bail jumping when, having been held for or charged with a crime, and having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court of this state, he or she fails to appear as required..

INSTRUCTION NO. 17

To convict the defendant of the crime of bail jumping as charged in Count 4, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 3rd day of January, 2008, the defendant failed to appear before a court as required;
- (2) That the defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court;
- (3) That the defendant was being held for, or was charged with the crime of Possession of a Controlled Substance - Methamphetamine; 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.

INSTRUCTION NO. 18

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is 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.

INSTRUCTION NO. 18A

It is a defense to the crime of 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 this defense by a preponderance of the evidence.

“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.

INSTRUCTION NO. 19

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted into evidence, these instructions, and verdict forms for recording your verdicts. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.



Because this is a criminal case, all twelve of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdicts.

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COURT OF APPEALS
DIVISION II

09 FEB 17 AM 9:39

STATE OF WASHINGTON
BY _____
DEPUTY

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

STATE OF WASHINGTON,
Respondent,

v.

DYLAN YEATES,
Appellant.

No. 38258-0-II

Clark Co. No. 07-1-00767-9

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

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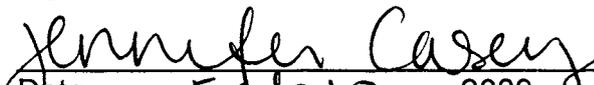
COUNTY OF CLARK)

On Feb 12, 2009, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO:	David Ponzoha, Clerk Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	Brian Walker Attorney at Law 100 E. 13 th St., Ste.111 Vancouver, WA 98660
	Dylan Yeates, Appellant c/o Appellate Attorney	

DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.


Date: Feb 12, 2009.
Place: Vancouver, Washington.