

COURT OF APPEALS  
DIVISION II  
COUNTY -7 FILED -1  
STATE OF WASHINGTON  
BY *KSR*  
DEPUTY

No. 38684-4-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Calvin Cardwell,**

Appellant.

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Thurston County Superior Court Cause No. 05-1-02325-6

The Honorable Judge Anne Hirsch

**Appellant's Opening Brief**

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*12-25-11*

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## ASSIGNMENTS OF ERROR

1. The warrantless search of Mr. Cardwell's vehicle violated his right to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments.
2. Mr. Cardwell's conviction for Possession of Marijuana with Intent to Deliver was entered in violation of his right to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments.
3. If Mr. Cardwell's Fourth Amendment issue is not preserved for review, he was denied the effective assistance of counsel.
4. Mr. Cardwell's Bail Jumping conviction infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.
5. The prosecutor committed misconduct so flagrant and ill-intentioned that reversal is required even absent an objection.
6. If Mr. Cardwell's prosecutorial misconduct issue is not preserved for review, he was denied the effective assistance of counsel.
7. Mr. Cardwell's conviction for Bail Jumping was entered in violation of his Fourteenth Amendment right to due process.
8. The court's instructions allowed the jury to convict Mr. Cardwell of Bail Jumping without proof of the essential elements.
9. The trial court erred by giving Instruction No. 17.
10. The trial court erred by giving Instruction No. 18.
11. If Mr. Cardwell's instructional error issue is not preserved for review then he was denied the effective assistance of counsel.

## ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A vehicle search performed incident to the arrest of the driver is unlawful unless, at the time of the search, the driver is in a

position to grab a weapon or evidence from the vehicle's interior. The officer searched Mr. Cardwell's truck after Mr. Cardwell was secured in the back of the patrol car. Did the warrantless search of the truck violate Mr. Cardwell's right to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments?

2. Bail Jumping requires proof that the accused person was notified of the exact date and time he was required to appear in court. The state did not introduce evidence that Mr. Cardwell received notice of the exact date and time he was required to appear in court. Did Mr. Cardwell's conviction violate his Fourteenth Amendment right to due process because it was based on insufficient evidence?

3. Bail Jumping requires proof that the accused person knew the exact date and time he was required to appear in court. The prosecutor told the jury that it could convict even if Mr. Cardwell was unaware that he had been charged with a crime and was unaware that he was required to appear in court on a specific date. Did the prosecutor's misconduct violate Mr. Cardwell's Fourteenth Amendment right to due process?

4. A court's instructions to the jury violate an accused person's Fourteenth Amendment right to due process if they permit conviction without proof of every essential element of the charged crime. The court's instructions allowed the jury to convict even if the state failed to prove the essential elements of Bail Jumping beyond a reasonable doubt. Did the court's instructions violate Mr. Cardwell's Fourteenth Amendment right to due process?

5. An accused person is guaranteed the effective assistance of counsel by the Sixth and Fourteenth Amendments. Mr. Cardwell's attorney did not move to suppress the evidence seized following a warrantless search of the vehicle, did not object to the prosecutor's misconduct, and did not object to the court's instructions to the jury. If these issues are not preserved for review, was Mr.

Cardwell denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Calvin Cardwell was driving in Olympia with defective equipment. RP (12/10/08) 27. An officer pulled him over. RP (12/10/08) 28. The officer learned from dispatch that the registered owner of the vehicle had an arrest warrant out, as well as a suspended license. RP (12/10/08) 29-32. After obtaining identification from Mr. Cardwell, which confirmed that he was the registered owner, the officer got him out of the car and arrested him. RP (12/10/08) 32.

The officer put Mr. Cardwell into his patrol vehicle. RP (12/10/08) 32. Then he searched the car, finding two bags of suspected marijuana, as well as a small scale.<sup>1</sup> RP (12/10/08) 33-36. Mr. Cardwell told the officer that he was homeless and the marijuana was for his personal use. RP (12/10/08) 44-45.

The state charged him with Unlawful Possession of Marijuana (over 40 grams) and Possession of Marijuana with Intent to Deliver. CP 2. The state alleged that he missed court on December 14, 2005, and added the charge of Bail Jumping. CP 2.

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<sup>1</sup> No packaging materials were found in the car. RP (12/10/08) 56.

At trial, the state sought to prove the Bail Jumping charge with documentation created by the court's Pretrial Services. RP (12/10/08) 76-89. According to the staff person, Mr. Cardwell told them that he lived in a cabin with no mailing address, but his father's mailing address was 2235 Lister, Olympia, WA 98506; this address was put onto Mr. Cardwell's Conditions of Release. RP (12/10/08) 80-83. This Conditions of Release order indicated that it would expire if charges were not filed by December 7, 2005. RP (12/10/08) 85, 94.

The prosecuting attorney also called his own paralegal as a witness. RP (12/10/08) 90. She said that she sent Mr. Cardwell's notice of hearing to 2235 Lister, Olympia, WA 98516 [sic]. RP (12/10/08) 109.

The court gave the following elements instruction on the charge of Bail Jumping, without defense objection:

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

(1) That on or about December 14, 2005, the defendant failed to appear before a court;

(2) That the defendant was charged with Unlawful Possession with Intent to Deliver, a Controlled Substance, Marijuana, Class C Felony;

(3) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and

(4) That these 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, Court's Instructions to the Jury, Supp. CP.

During closing argument, the state made the following arguments:

Next and most importantly, because Mr. Shackleton misstated his to you during opening statement, this is the crucial part of the charge, "the defendant has been released by a court order with knowledge of the requirement of a subsequent personal appearance." It does not say that he had to know the date that he had to return. It says all I have to prove is that he knew at some point that he had to come back to court. I don't have to prove that he knew it, that he had to be there on December 14th.

Now, I'm going to discuss circumstantial evidence of that, and that includes the notice that was sent to him, but Mr. Shakleton said to you in opening statement that I had to prove that he knew he had to be there on that date, and I do not, and that's what this instruction says.

I have tried many of these cases, and that is the number one mistake that people argue is that I have to prove the date, and I don't. I just have to prove that he had knowledge of the requirement of a subsequent personal appearance, and then finally that these acts occurred in the state of Washington.

RP (12/11/08) 146-147.

Well, again, I don't have to prove that he received it. It's not even really that important, because all I have to prove is he knew he had to come back, and his documents tell you that when you look at them.

The other thing is that notice was not returned. So even if they argue, well, it wasn't sent to the right address, well, if it wasn't, it never got returned. How come it never got returned? It never got returned because it went to the right address.

Now, the defendant didn't appear for his arraignment on December 14th, and nothing else happens for almost three years. He is arrested on September 10, 2008.

Now, reasonableness, this is where it is, you have been arrested, you have been placed in jail, you have been in Court, you

have posted \$2,500 into the court system to get out of jail, and for the next three years you don't think a thing about it?

You don't inquire, hey, I wonder what happened with that charge? Hey, maybe I should contact my attorney who was in court with me on December 5th. Maybe I should look at my court order, State's Exhibit No. 1. I'm required to appear in court on three days notice. I must maintain weekly contact with my attorney, and here is my attorney's phone number. I signed this document right here on December 5th. So, that's circumstantial evidence. That is reasonableness.

Would a reasonable person do what Mr. Cardwell did? Well, if I stick my head in the sand and ignore it, I guess it will all just go away. I won't have to deal with it. ...

So there is an obligation. The defendant has an obligation to appear in court. He has an obligation to find out what he is supposed to do. We do not have to hold his hand and treat him like a kindergartner to get him here in court. I don't think any of you would expect the criminal justice system to do that. And that's about personal accountability, nothing more and nothing less. You have to be accountable for yourself.

RP (12/11/08) 155-157.

As I told you earlier, I suspected that we would revisit this issue. Here are the elements. Mr. Shackleton in his closing remarks just one minute ago said that I had to give Mr. Cardwell notice of a specific date of arraignment. You will see in this instruction that does not say specific date. It does not say give him notice. It doesn't say any of the things he just talked about, and this is why I made such a point of it, because this happens every time.

All I have to show is that he was released by court order with knowledge of the requirement of subsequent appearance. That's it. That's all I have to show.

So, let's go forward for a minute, and Mr. Shackleton was showing you this document, which is State's Exhibit No. 1, and he says, well, down here there is a notice or a box for appearance. Now, he spent a lot of time saying, well, wasn't hasn't been proven to you. Did you hear anyone testify that that is the procedure, that they give them notice at that time to when to come back? No. The only thing you heard testimony about was from the paralegal who said, well, here is how we do it, we have to send them notice and a

summons, and we send them this paperwork to the address they gave us.

So now, we know Mr. Cardwell had an attorney, because here is his attorney's signature. We know Mr. Cardwell signed it; there is his signature. We know the judge signed it right there.

Well, let's take a little more closer look at the terms of this order. This order expires if charges are not filed by December 7th. We don't have any requirement to tell the defendant that we did or did not file charges. It's up to him. He has got to find out.

How could he find out? Well, the Court made certain orders. It says you got to appear on three days notice. You have to maintain your weekly contact with your attorney. Here is the number. You have got to do certain other things that really aren't applicable here as well as posting the \$2,500 bond.

Well, then we have this document. This is called the "Determination of Probable Cause." Again, it was signed by the judge in court on December 5th that found that there was probable cause for these charges and that the filing of an Information is authorized.

Now we have an equally as important order. This is the order for bench warrant, State's Exhibit No. 6. I'm going to highlight this for you. This says, "Whereas this matter came before the above-entitled court on the 14th day of December 2005, the State represented by Dominique Jinhong, Deputy Prosecuting Attorney, and the above defendant, not being present but being represented," again attorney, "and the Court now finding that after proper notice, the defendant has failed to appear for the scheduled arraignment." The Court made the finding that he received proper notice. "It is hereby ordered," and then it goes on to say, "no-bail bench warrant."

Why weren't there any other dates set? Well, if you don't show up for your arraignment, there is nothing else we can do. That is how it works. Mr. Shackleton wants to make you think, well you know, they just - nothing else happened, he didn't appear for his arraignment. That is because nothing else can happen if you don't appear for your arraignment. A bench warrant is ordered for your arrest.

Down at the bottom portion, you can read it for yourself, but it basically says because you haven't appeared, we are striking all other court dates. It's on the order. Can you read it. So, I think you need to read these orders carefully, because there certainly is a

disagreement between Mr. Shackleton's version of what he told you and what I believe these documents show, and you can read that for yourself.

He says, well, this is the bond document, State's Exhibit No. 10. Someone else posted a bond for Mr. Cardwell. Well, here is the receipt of that money by the sheriff's office, \$2,500. Now, there is also another document that accompanies that. A bonding company posts the bond. This is their bond. It says it down here.

Mr. Cardell signed it, and this document upon closer look says to Mr. Cardwell, "The condition of this obligation is such that Calvin Cardwell, the principle, shall appear at the next regular or special term of the Superior Court." It doesn't have a date, because no one knows what that date will be, but it tells this defendant – he signed for it – you got to come back to Court. He didn't. He never did until he was arrested on September 10th, 2008.

Mr. Shackleton made several comments, one of which he said, well, someone shouldn't have to know intuitively when they have to come back to court.

Okay. I want to take a step back and say, what did we stay about knowledge? If someone has certain facts, knows certain facts or things exist, knowledge is imputed to them. Whether he cares to know it or not, a reasonable person would understand, given all these documents, given his court appearances, given his bail, given his bond, that he has to appear, and the evidence is he did nothing.

I can't prove what he did or didn't do in that two and a half years. That's not my obligation. Again, I don't have to prove that. I have shown you what I have to prove. All I have to prove is that he knew he had to come back to court and that he didn't.

RP (12/11/08) 175-179.

The jury found Mr. Cardwell guilty of all three charges. After sentencing, he timely appealed. CP 3-11, 12-21.

## ARGUMENT

### **I. MR. CARDWELL'S MARIJUANA CONVICTION WAS OBTAINED IN VIOLATION OF HIS FOURTH AND FOURTEENTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.**

The Fourth Amendment to the Federal Constitution provides

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. Under the Fourth Amendment,<sup>2</sup> searches conducted without authority of a search warrant “are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Arizona v. Gant*, \_\_\_ U.S. \_\_\_, \_\_\_, \_\_\_ S.Ct. \_\_\_, \_\_\_ L.Ed.2d \_\_\_ (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)). The burden is always on the state to prove one of these narrow exceptions. *State v. Kypreos*, 110 Wn.App. 612, 624, 39 P.3d 371 (2002). Where the state asserts an exception, it must produce the facts necessary to support the exception. *State v. Johnston*, 107 Wn.App. 280, 284, 28 P.3d

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<sup>2</sup> The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

775 (2001). The validity of a warrantless search is reviewed *de novo*.  
*Kypreos*, at 616 (2002).

One exception to the search warrant requirement is where the search is performed incident to arrest. *Gant*, at \_\_\_\_ (citing *Weeks v. United States*, 232 U.S. 383, 392, 34 S.Ct. 341, 58 L.Ed. 652 (1914)). This exception “derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations.” *Gant*, at \_\_\_\_; *see also Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Accordingly, police are authorized “to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” *Gant*, at \_\_\_\_.

In this case, Mr. Cardwell was arrested and secured in the officer’s patrol car at the time of the search. RP (12/10/08) 32-33. Accordingly, the search was unreasonable, and the evidence should not have been admitted at trial.<sup>3</sup> Mr. Cardwell’s conviction for Possession of Marijuana with Intent to Deliver violated his Fourth and Fourteenth Amendment

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<sup>3</sup> Although Mr. Cardwell did not move to suppress the evidence at trial, the violation of his Fourth and Fourteenth Amendment right to be free from unreasonable searches and seizures presents a manifest error affecting a constitutional right, and may be raised for the first time on review. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995).

right to be free from unreasonable searches and seizures. *Gant, supra*.

The conviction must be reversed, and the case dismissed with prejudice.

*Gant, supra*.

**II. MR. CARDWELL'S BAIL JUMPING CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS BEYOND A REASONABLE DOUBT.**

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). Evidence is insufficient to support a conviction unless, 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. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). 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*.

Under RCW 9A.76.170(1), "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... who fails to appear... as required is guilty of bail jumping." Bail Jumping is a class

C felony if the person's original charge is a class C felony. RCW 9A.76.170(3). Bail Jumping requires proof "that the defendant has been given notice of the required court dates." *State v. Fredrick*, 123 Wn.App. 347, 353, 97 P.3d 47 (2004). *See also State v. Carver*, 122 Wn.App. 300, 306, 93 P.3d 947 (2004) ("[W]e expressly hold that the State must prove only that Carver was given notice of his court date"); *State v. Liden*, 118 Wn. App. 734, 740, 77 P.3d 668 (2003) ("Taking the evidence and all reasonable inferences in the State's favor, we fail to see how the State proved that Liden knew the exact date on when to appear for his trial"); *State v. Ball*, 97 Wn.App. 534, 536, 987 P.2d 632 (1999) ("This means that the State 'must prove beyond a reasonable doubt that [the defendant] knew, or was aware that he was required to appear at the [scheduled] hearing ...'" (quoting *State v. Bryant*, 89 Wn.App. 857, 870, 950 P.2d 1004 (1998), *review denied*, 137 Wn.2d 1017, 978 P.2d 1100 (1999)) (alterations in original).

Here, the evidence was insufficient to prove beyond a reasonable doubt that Mr. Cardwell received notice of his court date. After his arrest, he provided the court his father's mailing address (since he lived in a cabin), and signed Conditions of Release that expired on 12/7/05 if charges were not filed. RP (12/10/08) 80-81, 94; Exhibit 1, Supp. CP. An Information and Summons (for 12/14/05) were mailed to his father's

mailing address, using a different zip code than that provided. RP (12/10/08) 109; Exhibits 3, 4, and 5, Supp. CP.

This evidence, even when taken in a light most favorable to the state, is insufficient to convince a jury beyond a reasonable doubt that Mr. Cardwell ever received notice of the December 14 court date. Because of this, his conviction for Bail Jumping must be reversed and the charge dismissed with prejudice. *Smalis, supra*.

**III. THE PROSECUTOR'S MISCONDUCT IN CLOSING VIOLATED MR. CARDWELL'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.**

A prosecuting attorney is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P. 3d 899 (2005). Prosecutorial misconduct requires reversal whenever the prosecutor's improper actions prejudice the accused person's right to a fair trial. *Boehning*, at 518. Misconduct may be raised for the first time on appeal when it amounts to a manifest error affecting a constitutional right.<sup>4</sup> RAP 2.5(a); *State v. Jones*, 71 Wn.App. 798, 809-810, 863 P.2d 85 (1993); *but see State v. Gregory*, 158 Wn.2d 759, 808 n. 24, 147 P.3d 1201 (2006) ("There has been some disagreement

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<sup>4</sup> Prosecutorial misconduct may also be reviewed absent a defense objection if it is "so flagrant and ill-intentioned" that no curative instruction would have negated its prejudicial effect. *State v. Henderson*, 100 Wn. App. 794, 800, 998 P.2d 907 (2000).

as to the impact of a failure to object at trial upon a claim on appeal that a prosecutor's argument amounted to an improper comment on a constitutional right.”) A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).<sup>5</sup>

Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed. *State v. Flores*, 164 Wn.2d 1, 25, 186 P.3d 1038 (2008). 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. *Flores*, at 25. The state must show that any reasonable jury would reach the same result absent the error and that 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).

It is misconduct for a prosecutor to misstate the law in closing arguments. *State v. Gotcher*, 52 Wn.App. 350, 355, 759 P.2d 1216 (1988). A misstatement encouraging conviction without proof of all essential elements relieves the state of its burden and creates a manifest

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<sup>5</sup> The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

error affecting an accused person's constitutional right to due process under the Fourteenth Amendment.

In this case, the prosecuting attorney committed multiple instances of misconduct that affected Mr. Cardwell's constitutional right to due process. As noted above, the state was required to prove that Mr. Cardwell was provided notice of the exact date he was required to appear in court. *Liden*, at 740. The prosecutor claimed the opposite was true.

First, the prosecutor argued that the jury could convict if it found Mr. Cardwell was "charged with ... a Class C felony" and "didn't show up." RP (12/11/08) 146. Second, the prosecutor repeatedly claimed that jurors could vote to convict if Mr. Cardwell knew he needed to return to court in general, without proof that he knew he needed to appear at a specific date and time. RP (12/11/08) 147, 155, 175. Third, the prosecutor argued that Mr. Cardwell could be convicted even if he hadn't received notice that he'd been charged with a crime. RP (12/11/08) 176.

The prosecutor bolstered these improper arguments with claims that he'd prosecuted Bail Jumping cases on numerous occasions, and that defendants (and their attorneys) "always" made the mistake of thinking conviction requires proof that the accused person knew of a requirement to return to court at a specific date and time. RP (12/11/08) 147, 175.

These arguments misstated the law and relieved the state of its burden to prove the elements of Bail Jumping beyond a reasonable doubt. *See Fredrick, supra; Liden*, at 740. This violated Mr. Cardwell's Fourteenth Amendment right to due process.<sup>6</sup> *Winship, supra*. Jurors persuaded by the prosecutor's arguments (and his inappropriate claims of experience) would have voted to convict Mr. Cardwell even without proof that he ever knew he was required to appear in court on December 14, 2005. Accordingly, Mr. Cardwell's conviction for Bail Jumping must be reversed, and the case remanded for a new trial. *Flores, supra*.

**IV. THE COURT'S INSTRUCTIONS VIOLATED MR. CARDWELL'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY ALLOWING CONVICTION WITHOUT PROOF OF EACH ESSENTIAL ELEMENT OF BAIL JUMPING.**

Jury instructions that relieve the state of its burden to prove every element of an offense violate due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997). Such instructions also create a manifest error affecting a constitutional right, and thus can be raised for the first time on appeal. RAP 2.5(a); *State v. Chino*, 117 Wn.App. 531, 538, 72 P.3d 256 (2003).

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<sup>6</sup> Furthermore, even if the prosecutor's improper arguments didn't create a manifest error affecting a constitutional right, they were so flagrant and ill-intentioned that no curative instruction could have cured the prejudice they engendered. *Henderson, supra*.

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.

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). Accordingly, a court’s instructions to the jury “must more than adequately convey the law. They must make the relevant legal standard ‘manifestly apparent to the average juror.’” *State v. Watkins*, 136 Wn.App. 240, 240-241, 148 P.3d 1112 (2006) (quoting *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)).

Jury instructions that misstate an element are not harmless unless it can be shown 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). 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. *State v. Woods*, 138 Wn.App. 191, 202, 156 P.3d 309 (2007).

To convict Mr. Cardwell, the state was required to prove that he was “released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance,” and that he failed to appear “as required.” RCW 9A.76.170(1). Under the statute, jurors were required to find beyond a reasonable doubt that Mr. Cardwell had been given notice of the exact date and time he was required to appear.

*Fredrick, at 353; Liden, at 740.*

The court’s “to convict” instruction omitted essential elements of the charge in two ways. First, the instruction allowed the jury to convict if “the defendant failed to appear before a court,” without proof that he failed to appear *as required*. Instruction No. 18, Supp. CP; RCW 9A.76.170(1). Second, the instruction encouraged the prosecutor’s erroneous argument, outlined above. Instead of requiring proof that Mr. Cardwell received notice of the exact date and time he was required to appear, the instruction permitted conviction if he was released “with knowledge of the requirement of a subsequent personal appearance,” without further elaboration. Instruction No. 18, Supp. CP (emphasis added); RCW 9A.76.170(1); *Liden, at 740.*

These errors are presumed prejudicial, and cannot be shown to be harmless beyond a reasonable doubt. *Woods, supra*. The errors went to the very heart of Mr. Cardwell’s strategy—that the state failed to prove

beyond a reasonable doubt that he'd received notice of the exact date he was required to appear in court. In addition, the prosecutor exploited the errors to repeatedly make erroneous and misleading arguments. RP (12/11/08) 141-157, 175-181.

The errors prejudiced Mr. Cardwell, and require reversal of the Bail Jumping conviction. The charge must be remanded to the trial court with instructions to correct the error upon retrial. *Woods, supra*.

**V. IF MR. CARDWELL'S ISSUES ON APPEAL ARE NOT PRESERVED FOR REVIEW, HE WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.**

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397

U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). It is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3<sup>rd</sup> Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland*); *see also State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

The errors outlined above are all manifest errors affecting Mr. Cardwell’s constitutional rights, and thus can be raised for the first time on appeal under RAP 2.5(a). However, if any of them do not qualify for review under RAP 2.5(a), Mr. Cardwell’s attorney denied his

constitutional right to the effective assistance of counsel by failing to object.<sup>7</sup>

- A. Defense counsel should have moved to suppress the evidence obtained following a warrantless search of Mr. Cardwell's vehicle.

Although counsel could not have known with certainty how *Gant* would be decided, he should have been aware that the U.S. Supreme Court had (in February, 2008) accepted review of a case involving the same issue presented in Mr. Cardwell's case: "Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?" *Arizona v. Gant*, *Petition for Certiorari granted at* \_\_\_ U.S. \_\_\_, 128 S.Ct. 1443, 170 L.Ed.2d 274 (2008).<sup>8</sup>

There was no possible advantage to Mr. Cardwell in permitting the seized items to be admitted. Without the evidence, the prosecution would have been unable to proceed. Because of this, there was no legitimate

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<sup>7</sup> Because sufficiency of the evidence may always be raised for the first time on appeal, it is not addressed here. *Colquitt*, at 796

<sup>8</sup> Oral argument in *Gant* occurred in October 2008, two months prior to Mr. Cardwell's trial.

strategic or tactical reason involved in defense counsel's failure to request a hearing pursuant to CrR 3.6. *Reichenbach, supra*.

If Mr. Cardwell's suppression argument cannot be reviewed under RAP 2.5(a), he was denied the effective assistance of counsel.

*Reichenbach, supra*.

B. Defense counsel should have objected to the prosecutor's misconduct in closing.

A failure to object to improper closing arguments is objectively unreasonable "unless it 'might be considered sound trial strategy.'"

*Hodge v. Hurley*, 426 F.3d 368, 385 (C.A.6, 2005) (quoting *Strickland*, at 687-88). There is no reason to allow a prosecutor to misstate the law in closing. In fact,

At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

*Hurley*, at 386 (citation omitted).

Here, the prosecutor sought to persuade the jury to convict without proof that Mr. Cardwell received notice of the specific date and time he was required to appear in court, and testified to his own "experience"

prosecuting Bail Jumping cases. RP (12/11/08) 141-157, 175-181.

Defense counsel should have objected to this clear misconduct and requested a mistrial. If the error is not reviewable under RAP 2.5(a) (or under the “flagrant and ill-intentioned” standard), Mr. Cardwell was denied the effective assistance of counsel. *Hurley, supra*.

C. Defense counsel should have objected to the court’s instructions on Bail Jumping.<sup>9</sup>

Bail Jumping requires proof that the accused person failed to appear in court “as required,” after receiving notice of the exact date and time she or he was required to appear. RCW 9A.76.170(1); *Fredrick*, at 353; *Liden*, at 740. As outlined above, the court’s instructions allowed conviction without proof that Mr. Cardwell failed to appear “as required,” and without proof that he knew of the exact date and time he was required to appear. Instruction No. 18, Supp. CP.

It is objectively unreasonable to allow the jury to be instructed on the elements of an offense with instructions that omit essential elements. There can be no strategic reason to permit conviction without proof of all

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<sup>9</sup> Although the instructional error here should be reviewed under RAP 2.5(a), this additional argument is presented out of an abundance of caution. *See, e.g., State v. Pope*, 100 Wn.App. 624, 629 n. 4, 999 P.2d 51 (2000) (“To ensure his jury instruction claim is before the court despite the absence of an objection to the instruction at trial, Kaija presents an ineffective assistance of counsel claim.”)

essential elements. Counsel should therefore have objected to the court's instructions on Bail Jumping.

The error prejudiced Mr. Cardwell and requires reversal. The deficient instructions allowed the prosecutor to misstate the law, and allowed the jury to convict without proof that Mr. Cardwell knew he was required to appear in court on December 14, 2005.

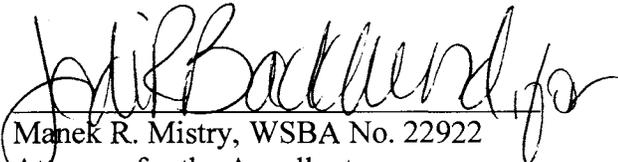
Accordingly, Mr. Cardwell was denied the effective assistance of counsel by his attorney's failure to object to the court's instructions. The conviction must be reversed and the case remanded for a new trial.

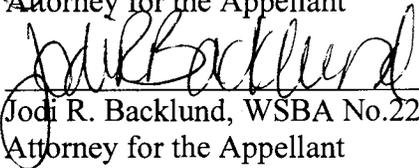
### **CONCLUSION**

For the foregoing reasons, Mr. Cardwell's convictions must be reversed and the charges dismissed. In the alternative, the case should be remanded to the trial court for a new trial.

Respectfully submitted on May 6, 2009.

#### **BACKLUND AND MISTRY**

  
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STATE OF WASHINGTON  
BY KAC  
DEPUTY

CERTIFICATE OF MAILING

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

Calvin Cardwell  
6630 Libby Rd. NE  
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and to:

Thurston County Prosecuting Attorney  
2000 Lakeridge Dr. S.W., Building 2  
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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 May 6, 2009.

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 May 6, 2009.



Jodi R. Backlund, WSBA No. 22917  
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