No. 38684-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CALVIN CARDWELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Anne Hirsch, Judge
Cause No. 05-1-02325-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Cardwell can raise the issue of an unconstitutional search for the first time on appeal and, if not, whether the failure of his trial counsel to raise the issue below constitutes ineffective assistance of counsel.

2. Whether the State presented sufficient evidence to permit a rational trier of fact to find beyond a reasonable doubt that Cardwell was guilty of bail jumping.

3. Whether the prosecutor, during closing argument, misstated the law regarding bail jumping, and if so, whether this violated Cardwell's Fourteenth Amendment right to due process. Further, whether defense counsel's failure to object to the State's closing argument constituted ineffective assistance of counsel.

4. Whether Instruction No. 18 omitted an essential element of the offense of bail jumping, and whether defense counsel was ineffective for failing to object to it.

B. STATEMENT OF THE CASE.

The State accepts Cardwell's Statement of the Case with one exception: On page four of his brief, Cardwell asserts that he told the officer that he was homeless and the marijuana was for his personal use. While he did tell the officer that he lived in his vehicle, and admitted the marijuana was his, the officer did not testify that Cardwell said the marijuana was for his personal use. [12/10/08 RP 44-45]

C. ARGUMENT.

1. Cardwell did not bring a motion to suppress evidence in the trial court and is thus barred from raising the issue of an unconstitutional search for the first time on appeal. His trial counsel was not ineffective for failing to bring such a motion because at the time of this trial the search was valid under the search pursuant to a valid arrest exception to the warrant requirement.

Cardwell's car was searched incident to his arrest on December 3, 2005, for driving with a suspended license as well as on an outstanding warrant. [12/10/08 RP 31-32] A considerable amount of marijuana, a scale, and $297 in cash were located in a backpack that was lying on the seat next to Cardwell on the car seat. [12/10/08 RP 30, 34-35, 42-43] On April 21, 2009, the United States Supreme Court issued an opinion in Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), in which the court held that police may search a vehicle incident to the arrest of an occupant only if the person arrested is within reaching distance of the passenger compartment at the time of the search or there is reason to believe that the vehicle contains evidence of the crime for which the person was arrested. Gant, 129 S. Ct. at 1723-24.

Cardwell did not bring a motion to suppress in the trial court. He now challenges the search of his vehicle for the first time on appeal on the basis of the holding in Gant. Because he did not

seek suppression of the evidence below, he cannot raise a challenge to the constitutionality of the search on appeal. This court has recently held, in State v. Millan, ___ Wn. App. ___, ____ P.3d ____ (2009), No. 37172-3-II (August 7, 2009), 2009 Wash. App. LEXIS 1975, that the failure to file a motion to suppress in the trial court, or otherwise object to the admissibility of evidence on other grounds, constitutes a waiver of any error in the admission of the evidence at trial. Because there was no suppression hearing below, the State did not have the opportunity to present evidence of the circumstances surrounding the search and the trial court did not have the opportunity to rule. *See also* In re Pers. Restraint of Nichols, _____ Wn. App. _____, 211 P.3d 462 (2009).

Cardwell further argues that if he is deemed to have waived a challenge to the search of his vehicle, then he received ineffective assistance of counsel because counsel failed to ascertain that the United States Supreme Court had accepted review of that issue. [Appellant's brief 22] To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls

below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989).

A defendant must overcome the presumption of effective representation and demonstrate (1) that his lawyers' performance was so deficient that he was deprived of "counsel" for Sixth Amendment purposes and (2) that there is a reasonable probability

that the deficient performance prejudiced his defense. Strickland v. Washington; State v. Hendrickson; State v. McFarland, *supra*.

Case law before the Gant decision held that the search of Cardwell's vehicle incident to arrest was valid. Millan, 2009 Wash. App. LEXIS 1975, at 17."[U]nder these circumstances, it was not deficient performance for defense counsel not to anticipate changes in the law." Id. Trial counsel had no reason to anticipate Gant in either 2005 or 2008, and therefore there was no ineffective assistance of counsel.

2. The State presented sufficient evidence that a rational trier of fact could find, beyond a reasonable doubt, that Cardwell was guilty of bail jumping. The State is not required to prove that he actually received notice of his court date, only that it was sent and not returned.

Cardwell argues that the State was required to prove that he actually received the notice of his arraignment on December 14, 2005, one of the documents that the State mailed to him. [Exhibit 4] The State is not required to prove that he actually received notice.

Bail jumping is prohibited by RCW 9A.76.170, which reads:

> Bail jumping. (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, 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

In order to meet the knowledge requirement of the statute, the State is required to prove that a defendant has been given notice of the required court dates. State v. Fredrick, 123 Wn. App. 347, 353, 97 P.3d 47 (2004) (citing to State v. Carver, 122 Wn. App. 300, 93 P.3d 947, 950 (2004)). "[W]e have held under both the old and new statutes that knowledge of the required date is not an element of the offense." Fredrick, 123 Wn. App. at 354.

> [I]f a reasonable person would have known of the hearing on [date], then the evidence is sufficient for a jury to conclude that [the defendant] knew, i.e., had subjective knowledge, despite [the defendant's] testimony to the contrary.

State v. Bryant, 89 Wn. App. 857, 871, 950 P.2d 1004 (1998).

Carol Jones, a paralegal in the prosecutor's office, testified that she mailed a notice of the hearing date to the address that Cardwell had provided to Pretrial Services. [12/10/08 RP 95-96] It was not returned. [12/10/08 RP 98, 116] On cross-examination, Cardwell's attorney made much of the fact that the Zip Code on the mailed notice differed by one digit from the Zip Code that Cardwell had provided. [12/10/08 RP 109] Jones testified that while she could not, three years later, recall this specific mailing, her normal

practice was to use one or more computer data bases to verify that the address was in fact a valid one. [12/10/08 RP 110-15]

In State v. Kitchen, 75 Wn. App. 295, 877 P.2d 730 (1994), a case involving a speedy trial issue based on whether Kitchen received his summons, the court said this:

> The State may assume, and the trial courts should presume, that a letter sent by regular first-class mail to the defendant's correct address and not returned to the sender was delivered, and that the defendant was given notice of the charge filed against him. . . . A nonappearance at the scheduled arraignment will then normally implicate fault on the part of the defendant.

Id., at 298 (internal cite omitted). The presumption, however, is rebuttable, and if the defendant can show that he had not received notice, or not received it on time, he would not be liable. It is the defendant's burden to overcome the presumption of adequate notice. In this regard, the courts should be slow to accept a simple denial by a defendant that the notice was received as sufficient to overcome the presumption that such notice was received when properly mailed. Id.

Here, Cardwell never claimed that he did not receive the notice. It was undisputed that the mailing was never returned to the prosecutor's office.[1]

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

> "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt.* (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

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[1] While Cardwell failed to appear for arraignment, his father did show up in court that day. He advised the court that his son did not live with him and that he had not heard from Cardwell for several months. [12/14/08 RP 3] For the father to have known to go to the courthouse on December 14, the only logical inference is that the notice was delivered to his address.

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

The evidence showed that Cardwell was mailed a notice of his arraignment date, the notice was not returned, and Cardwell failed to appear at the hearing. The elements of bail jumping were met and a rational trier of fact could find him guilty beyond a reasonable doubt of bail jumping.

3. The prosecutor did not misstate the law regarding bail jumping; there was no constitutional violation, nor was trial counsel ineffective for failing to object to the State's argument.

Cardwell's claim that the prosecutor misstated the law is to some extent based on his erroneous conclusion that the State was required to prove that Cardwell had actual notice of the hearing. As argued above, the State had only to prove it mailed notice of the court date to the address the defendant provided. In other instances, the remark has been taken out of context, making it appear the prosecutor was arguing something he was not.

Cardwell first complains that the prosecutor told the jury it could convict if it found Cardwell was charged with a Class C felony and didn't show up. [Appellant's brief 16; 12/11/08 RP 145-46] In context, the prosecutor said:

> Finally, we have the bail jumping charge. I want you to pay close attention to these elements. As we talked about during voir dire, several people who have been on juries before say it's really important to read those instructions, and this instruction I will tell you is probably the most important for you to read, because the words here are very specific. I must show that, "On or about December 14, the defendant failed to appear before a court." All I have to show is that he didn't show up. That's element number one, and that was proven to you, and I will show you the document later, by that order for bench warrant. It says in that document the defendant did not appear on December 14th. I don't have to prove why. I don't have to prove

> any of that. All I have to prove is that he didn't appear.

[12/11/08 RP 145-46] It is apparent from the totality of the argument that the prosecutor was talking only about the first element of bail jumping, and he was correct. The State was not required to prove the reason Cardwell failed to appear in order to establish the first element. [Instruction No. 18; CP 44] The prosecutor then went on to deal with other elements. ("Secondly, I have to prove that the defendant was charged with unlawful possession with intent to deliver a controlled substance, marijuana, a Class C felony.") [12/11/08 RP 146]

Next, Cardwell complains that the prosecutor made remarks indicating that he was guilty only if he knew he had some general obligation to return to court, but not a specific time and date. Again, this is taken out of context. The prosecutor was discussing element number three of the jury instruction: "That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court." [CP 44, 12/11/08 RP 146-47]] The State is required to prove that when a defendant is released by court order, he must be informed that he has the obligation to appear for future hearings (in this case on three days notice, Exhibit 1), but he does not have to be informed

at the time of release of the specific dates of future hearings. The prosecutor also argued;

> 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 sent them this paperwork to the address they gave us.

[12/11/08 RP 176] A short time later the prosecutor noted that in its order for bench warrant, the court had found that "after proper notice, the defendant has failed to appear for the scheduled arraignment. The Court made the finding that he received proper notice." [12/11/08 RP 177] The prosecutor pointed out that the bond, which Cardwell signed, specified that he appear at the next regular or special term of the Superior Court. [12/11/08 RP 178] He also discussed the definition of knowledge. [12/11/08 RP 147-48]

The prosecutor argued from the jury instruction, one element at a time, and it is clear from the totality of the argument that he did not claim that Cardwell could be found guilty if a hearing was set but no effort made to notify him.

"Allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." State v.

Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994) (citing to State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990); State v. Green, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986)). The defendant bears the burden of demonstrating any impropriety of a prosecutor's remarks as well as their prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991) "Failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Id.

In this case Cardwell did not object to the prosecutor's argument. He made his own argument. The jury was instructed that the remarks and arguments of counsel were not evidence and it was to disregard any statements not supported by the law as set forth in the instructions. [Instruction No. 1, CP 27]

The prosecutor's argument did not misstate the law, and thus there was no error. Even if there were, Cardwell failed to object and request a curative instruction, and there is certainly nothing in the State's argument that is so "flagrant and ill intentioned" that a curative instruction could not have fixed any error.

Even if the prosecutor had argued that the State was not required to give notice, such error would be harmless. The jury was presented with evidence that notice had been sent to the address that Cardwell gave. They heard the testimony about the inconsistent Zip Code, and could consider the likelihood that such an inconsistency would have resulted in the non-delivery of the notice. Since the State presented evidence that notice was sent, the jury did not have to consider whether they could convict in the absence of such notice. "[I]mproper argument does not require reversal unless the error was prejudicial to the defendant." State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988).

Cardwell also complains that his counsel was ineffective for failing to object to the State's closing argument. The standard of review has been previously addressed in the argument above. Under the test of Strickland, counsel is strongly presumed to have provided adequate representation, and used reasonable professional judgment in making decisions. Strickland, 466 U.S. at 690. Argument is just that—argument—and each side has the opportunity to explain the law from its perspective. The prosecutor did not misstate the law, and Cardwell's attorney had no grounds to object. If an attorney objected every time he disagreed with

opposing counsel, closing arguments would be nothing more than a shouting match. Nothing about defense counsel's performance fell below the professional norm.

4. The to-convict instruction for bail jumping did not omit an essential element, and defense counsel was not ineffective because he failed to object to it.

The to-convict instruction given for the bail jumping charge mirrored the statute, RCW 9A.76.170, and was taken directly from Washington Pattern Jury Instructions, Criminal (WPIC) 120.41. An appellate court reviews jury instructions de novo, considering the context of the instructions as a whole. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006); State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

Instruction No. 18 reads as follows:

> 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, (sic) 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 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.

[CP 44]

Cardwell did not take exception to this instruction. [12/10/08 RP 121; 12/11/08 RP 126-27]

Here again Cardwell's argument is based upon his erroneous conclusion that the State was required to prove that he actually received notice of the date of the hearing at which he failed to appear. Again, the State was only required to prove that notice was sent and not returned, not that Cardwell actually received the notice. If actual notice is not required, then it is not error for that "element" to be omitted from the jury instruction. The instruction was correct, as was the prosecutor's argument concerning it.

The State did have to prove that a reasonable effort was made to notify Cardwell of the court date at which he failed to appear, and that requirement was not made clear in the to-convict instruction; however, Cardwell does not argue that. Further, the jury was presented with proof that notice was mailed and not

returned, and based upon Kitchen, the jury could infer that either he did actually receive it, or was at fault if he did not. Even if the jury could have believed it could find Cardwell guilty even if no one had attempted to notify him of the court date, the evidence before it prevented it from actually reaching that conclusion.

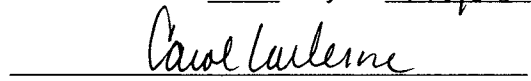
Washington Pattern Jury Instruction: Criminal 120.41 (3d ed. 2008 (WPIC) is a pattern jury instruction. Pattern jury instructions are drafted and approved by the Washington Pattern Jury Instructions Committee, which is not the same as being approved by the Supreme Court. However, "pattern instructions generally have the advantage of thoughtful adoption and provide some uniformity in instructions throughout the state." State v. Bennett, 161 Wn.2d 303, 307-08, 165 P.3d 1241 (2007) The State has found no appellate case which disapproves WPIC 120.41. It was not error for this trial court to give the pattern instruction.

Nor was it ineffective assistance of counsel for Cardwell's attorney to agree to it. Counsel does not fall below acceptable standards by agreeing to a jury instruction that has not been disapproved. State v. Summers, 107 Wn. App. 373, 383, 28 P.3d 780 (2001); State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

D. CONCLUSION.

Cardwell cannot challenge the search of his vehicle because he failed to do so in the trial court. The to-convict instruction was constitutionally adequate and the prosecutor's argument was not improper. Defense counsel was not ineffective. The State respectfully asks this court to affirm the convictions.

Respectfully submitted this 17th day of August, 2009.



Carol La Verne, WSBA# 19229
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- [x] US Mail Postage Prepaid
- [ ] ABC/Legal Messenger
- [ ] Hand delivered by

_____

TO: MANEK R. MISTRY
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STATE OF WASHINGTON
BY
DEPUTY

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

Dated this 17 day of August, 2009, at Olympia, Washington.

CAROLINE M. JONES