

FILED
COURT OF APPEALS

JAN 19 PM 12:27

STATE OF WASHINGTON
BY 

No. 40278-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Mario Charles,

Appellant.

Thurston County Superior Court Cause No. 09-1-01228-1

The Honorable Judge Gary R. Tabor

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 339-4870
FAX: (866) 499-7475

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 5

ARGUMENT..... 9

I. The trial court violated Mr. Charles’s Fourteenth Amendment right to due process by excluding relevant and admissible evidence. 9

A. Standard of Review..... 9

B. Due process guaranteed Mr. Charles a meaningful opportunity to present his defense. 10

C. The trial court erroneously excluded admissible evidence relevant to Mr. Charles’s defense against the Bail Jumping charge. 12

II. Mr. Charles’s Bail Jumping conviction violated his Fourteenth Amendment right to due process because the evidence was insufficient. 14

A. Standard of Review..... 14

B. The Fourteenth Amendment’s due process clause requires the state to prove the crime charged beyond a reasonable doubt. 14

C.	The state did not prove beyond a reasonable doubt that Mr. Charles failed to “appear” within the meaning of the statute.	16
D.	The state did not prove beyond a reasonable doubt that Mr. Charles failed to appear “as required” within the meaning of the statute.	18
III.	Mr. Charles’s Bail Jumping conviction violated his Fourteenth Amendment right to due process because the court’s instructions relieved the state of its burden to prove the essential elements of Bail Jumping.	19
A.	Standard of Review.....	19
B.	The court’s instructions relieved the prosecution of its obligation to prove that Mr. Charles failed to appear “as required.”	20
C.	The error was prejudicial and requires reversal.....	22
IV.	Mr. Charles’s convictions were obtained in violation of his right to a jury trial under the Sixth and Fourteenth Amendments and Article I, Section 21 of the Washington Constitution.	23
A.	Standard of Review.....	23
B.	Impermissible opinion testimony on an accused person’s guilt violates the constitutional right to a jury trial. 23	
C.	Prosecutor Scott Jackson’s testimony included a “nearly explicit” or “almost explicit” opinion that Prosecutor Jackson believed Mr. Charles was guilty of Bail Jumping.....	24
D.	Trooper Howson and of Sergeant Martin both expressed inadmissible opinions that Mr. Charles was guilty of Attempting to Elude.	25

E.	The violation of Mr. Charles’s constitutional right to a jury trial was not harmless beyond a reasonable doubt. ...	26
V.	Mr. Charles was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.	27
A.	Standard of Review.....	27
B.	Mr. Charles was entitled to the effective assistance of counsel.	27
C.	Defense counsel was ineffective for failing to object to improper opinion testimony.....	29
VI.	The SRA, as amended in 2008, violates the Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination by shifting the burden of proof at sentencing.	30
	CONCLUSION	33

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Chambers v. Mississippi</i> , 410 U.S. 284, 294-95, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).....	11
<i>Duncan v. Louisiana</i> , 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).....	24
<i>Estelle v. Smith</i> , 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) ..	30
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	27
<i>Holmes v. South Carolina</i> , 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).....	11
<i>In re Winship</i> , 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	14, 18
<i>Keller v. Washington</i> , 534 U.S. 1130, 122 S.Ct. 1070, 151 L.Ed.2d 972 (2002).....	16
<i>Mitchell v. United States</i> , 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999).....	30
<i>Smalis v. Pennsylvania</i> , 476 U.S. 140, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).....	16, 18, 19
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	28
<i>United States v. Salemo</i> , 61 F.3d 214 (3 rd Cir. 1995)	27
<i>Washington v. Texas</i> , 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)	11

WASHINGTON CASES

City of Bellevue v. Lorang, 140 Wn.2d 19, 992 P.2d 496 (2000) 10, 14, 22, 23, 26

Delyria v. State, 165 Wn.2d 559, 199 P.3d 980 (2009)..... 16, 17

In re A.V.D., 62 Wn.App. 562, 815 P.2d 277 (1991)..... 15

In re Detention of Martin, 163 Wn.2d 501, 182 P.3d 951 (2008) . 2, 3, 7, 9, 14, 23, 25

In re Detention of Post, 145 Wn.App. 728, 187 P.3d 803 (2008) 30

In re Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001)..... 27

McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006)..... 17

Rogers Potato v. Countrywide Potato, 152 Wn.2d 387, 97 P.3d 745 (2004) 15

Salas v. Hi-Tech Erectors, ___ Wn.2d ___, ___ P.3d ___ (2010)..... 12

State v. Aumick, 126 Wn.2d 422, 894 P.2d 1325 (1995) 20

State v. Berg, 147 Wn.App. 923, 198 P.3d 529 (2008) 20

State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987)..... 24

State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008)..... 10, 14, 22

State v. Carlson, 130 Wn. App. 589, 123 P.3d 891 (2005) 15

State v. Chester, 133 Wn.2d 15, 940 P.2d 1374 (1997)..... 16

State v. Colquitt, 133 Wn. App. 789, 137 P.3d 892 (2006) 14, 15, 16

State v. Contreras, 92 Wn. App. 307, 966 P.2d 915 (1998)..... 20

State v. Cramm, 114 Wn.App. 170, 56 P.3d 999 (2002) 16

State v. Depaz, 165 Wn.2d 842, 204 P.3d 217 (2009)..... 10

State v. DeVries, 149 Wn.2d 842, 72 P.3d 748 (2003) 15

<i>State v. Elliott</i> , 121 Wn.App. 404, 88 P.3d 435 (2004)	11
<i>State v. Farr-Lenzini</i> , 93 Wn.App. 453, 970 P.2d 313 (1999).....	25
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	10, 11
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	31, 32, 33
<i>State v. Gonzales Flores</i> , 164 Wn.2d 1, 186 P.3d 1038 (2008).....	17
<i>State v. Harris</i> , 122 Wn.App. 547, 90 P.3d 1133 (2004).....	20
<i>State v. Hayward</i> , 152 Wn.App. 632, 217 P.3d 354 (2009)	20
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	28
<i>State v. Hudson</i> , 150 Wn.App. 646, 208 P.3d 1236 (2009).....	10
<i>State v. Jackson</i> , 61 Wn.App. 86, 809 P.2d 221 (1991) ...	2, 3, 6, 17, 24, 25
<i>State v. Keller</i> , 143 Wn.2d 267, 19 P.3d 1030 (2001).....	16
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	24, 25
<i>State v. Kirwin</i> , 165 Wn.2d 818, 203 P.3d 1044 (2009).....	19, 22
<i>State v. Kyllo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	20
<i>State v. Lord</i> , 161 Wn.2d 276, 165 P.3d 1251 (2007)	11
<i>State v. Lorenz</i> , 152 Wn.2d 22, 93 P.3d 133 (2004).....	21
<i>State v. Maupin</i> , 128 Wn.2d 918, 913 P.2d 808 (1996).....	11
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	20
<i>State v. Mendoza</i> , 165 Wn.2d 913, 205 P.3d 113 (2009)	16, 32
<i>State v. Pittman</i> , 134 Wn. App. 376, 166 P.3d 720 (2006).....	28
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	28, 30
<i>State v. Saunders</i> , 91 Wn.App. 575, 958 P.2d 364 (1998)	29

<i>State v. Smith</i> , 131 Wn.2d 258, 930 P.2d 917 (1997).....	21
<i>State v. Toth</i> , 152 Wn.App. 610, 217 P.3d 377 (2009).....	9, 13, 14, 22, 26
<i>State v. Walsh</i> , 143 Wn.2d 1, 17 P.3d 591 (2001)	20

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V	2, 4, 30, 32
U.S. Const. Amend. VI.....	1, 2, 3, 23, 24, 25, 27
U.S. Const. Amend. XIV 1, 2, 3, 4, 9, 10, 14, 19, 21, 23, 24, 25, 27, 30, 32	
Wash. Const. Article I, Section 21.....	1, 23, 25
Wash. Const. Article I, Section 22	24, 27

WASHINGTON STATUTES

RCW 9.94A.500.....	31, 32
RCW 9.94A.530.....	31, 32
RCW 9A.76.170.....	12, 17, 18, 21, 25

OTHER AUTHORITIES

<i>Dictionary.com Unabridged, based on the Random House Dictionary,</i> Random House, Inc. 2010.....	17
ER 401	12
ER 402	12, 13
Laws of 2008, Chapter 231, Section 2	31
RAP 2.5.....	15, 19, 22, 24, 25

ASSIGNMENTS OF ERROR

1. The trial judge violated Mr. Charles's Sixth and Fourteenth Amendment right to present a defense by excluding evidence that was relevant and admissible.
2. The trial court violated Mr. Charles's constitutional right to due process.
3. The trial court violated Mr. Charles's constitutional right to compulsory process.
4. The trial court violated Mr. Charles's constitutional right to present a defense.
5. Mr. Charles's Bail Jumping conviction infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.
6. The prosecution did not prove beyond a reasonable doubt that Mr. Charles failed to "appear," an essential element of Bail Jumping.
7. The prosecution did not prove beyond a reasonable doubt that Mr. Charles failed to appear "as required," an essential element of Bail Jumping.
8. Mr. Charles's Bail Jumping conviction infringed his Fourteenth Amendment right to due process because the court's instructions relieved the state of its obligation to prove an essential element of the charged crime.
9. The court's instructions relieved the state of its burden to prove that Mr. Charles failed to appear "as required."
10. Mr. Charles's convictions were obtained in violation of his right to a jury trial under the Sixth and Fourteenth Amendments and Article I, Section 21 of the Washington Constitution.
11. Trooper Howson invaded the province of the jury by expressing his opinion on Mr. Charles's guilt.

12. Sergeant Martin invaded the province of the jury by expressing his opinion on Mr. Charles's guilt.
13. Scott Jackson invaded the province of the jury by expressing his opinion on Mr. Charles's guilt.
14. Mr. Charles was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
15. Defense counsel was ineffective for failing to object to Trooper Howson's improper opinion testimony that Mr. Charles was guilty of Attempting to Elude.
16. Defense counsel was ineffective for failing to object to Sergeant Martin's improper opinion testimony that Mr. Charles was guilty of Attempting to Elude.
17. Defense counsel was ineffective for failing to object to Scott Jackson's improper opinion testimony that Mr. Charles was guilty of Bail Jumping.
18. The trial court failed to properly determine Mr. Charles's criminal history and offender score.
19. The trial court erred by sentencing Mr. Charles with offender scores of seven (Bail Jumping) and ten (Attempting to Elude).
20. The trial court erred by adopting Finding 2.2 of the Judgment and Sentence, which purported to list Mr. Charles's criminal history.
21. The 2008 amendments to the SRA violate an offender's Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination by shifting the burden of proof at sentencing.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person has a constitutional right to present relevant, admissible evidence. Here, the trial judge refused to allow Mr. Charles to present evidence outlining the steps he took to attend court on the day appointed for his hearing. Did the trial judge violate Mr. Charles's Sixth and Fourteenth Amendment right to present a defense by excluding relevant, admissible evidence?

2. Conviction for Bail Jumping requires proof that the accused person failed to appear as required. The state did not present evidence establishing beyond a reasonable doubt that Mr. Charles failed to appear as required. Did Mr. Charles's Bail Jumping convictions violate his Fourteenth Amendment right to due process because it was based on insufficient evidence?

3. A trial court's instructions must inform the jury of the state's burden to prove every essential element of the charged crime. Here, the court's instructions relieved the state of its burden to show that Mr. Charles failed to appear "as required." Did the trial court's instructions relieve the state of its burden to prove the elements of Bail Jumping, in violation of Mr. Charles's Fourteenth Amendment right to due process?

4. A "nearly explicit" or "almost explicit" opinion on an accused person's guilt violates the accused person's constitutional right to a jury trial. Here, Trooper Howson and Sergeant Martin opined that Mr. Charles drove recklessly, that he eluded pursuing officers, and that he was trying to get away from the police. Did the officers' opinion testimony invade the province of the jury and violate Mr. Charles's constitutional right to a jury trial?

5. An "expert" opinion that an accused person is guilty violates the accused person's constitutional right to a jury trial. Here, deputy prosecutor Scott Jackson testified that Mr. Charles was charged with a crime, that he had been released on conditions of release, that he had been given notice of a hearing, that he Mr. Charles knew about the hearing, and that he was not present in the courtroom when the case was called. Did the "expert" opinion testimony invade the province of the jury and violate Mr. Charles's constitutional right to a jury trial?

6. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel failed to object to inadmissible opinion testimony on Mr. Charles's guilt. Was Mr. Charles denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

7. Under the Fifth and Fourteenth Amendments, an offender has a constitutional right to remain silent pending sentencing, and the state is constitutionally required to prove criminal history by a preponderance of the evidence. The 2008 amendments to the SRA permit the court to use a prosecutor's bare assertions as prima facie evidence of criminal history, and allow the court to draw adverse inferences from the offender's silence pending sentencing. Do the 2008 amendments to the SRA violate an offender's Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Mario Charles was found in the vicinity of an abandoned pickup truck after the truck was involved in a high-speed chase. RP (1/27/10) 22, 31, 62. Mr. Charles was arrested and charged with Attempting to Elude a Pursuing Police Vehicle. CP 2; RP (1/27/10) 20-64. The state added the charge of Bail Jumping, alleging that Mr. Charles had not appeared in court on November 25, 2009. CP 2-3.

At trial, the defense sought to call witnesses to challenge the Bail Jumping charge. Specifically, Mr. Charles's father, William Charles would testify that he brought Mr. Charles to the bus station in Seattle to go to Olympia for court on November 25, 2009. RP (1/27/10) 7. Then, his mother, Maria Charles, planned to testify that she picked him up at the bus stop in Tacoma and transported him.¹ Mr. Charles argued that this testimony was relevant to the issue of whether or he appeared as required. RP (1/27/10) 9-10, 68-69. He also argued that it was admissible because it related to the undefined term "appearance," and would not prejudice the state. RP (1/27/10) 68-69. The prosecutor objected, and asked the court

¹ RP (1/27/10) 7 indicates that Maria Charles took Mr. Charles to the courthouse, while RP (1/27/10) 67-69 asserts that she drove him to the Lakewood park-and-ride so that he could take another bus to Olympia.

to exclude the testimony of both witnesses. RP (1/27/10) 7-8. The court sustained the objection and excluded the testimony. RP (1/27/10) 11, 70.

The prosecutor called Deputy Prosecuting Attorney Scott Jackson to testify regarding the Bail Jumping charge. RP (1/27/10) 71-92; Exhibits 4a, 5, 6, 7, Supp. CP. While this colleague of the prosecutor on the case did not have any specific recollection of court hearings involving Mr. Charles, he did testify in great detail about how cases are filed, how court appearances are handled, and how court actions and orders should be interpreted by the jury. RP (1/27/10) 88, 71-92.

Without objection from defense counsel, Prosecutor Jackson testified that Mr. Charles “would have” received copies of certain court documents, including the charging document and trial setting orders. RP (1/27/10) 76. The trial setting order, which was admitted at trial, included the following language:

The defendant is required to be present at all hearings scheduled in this matter, in the Criminal Presiding Department of the Superior Court, Thurston County Courthouse, Building No. 2, 2000 Lakeridge Dr. S.W., Olympia, Washington.
Exhibit 6, Supp. CP.

Without any objection from defense counsel, Prosecutor Jackson testified that Attempting to Elude is a class C felony. RP (1/27/10) 77. Again without objection, Prosecutor Jackson testified that while he could not read the signatures on the documents, the signatures were “consistent”

with the name Mario Charles and appeared to be the same on each document. RP (1/27/10) 79-80. Without objection, Prosecutor Jackson testified that a bench warrant is only issued after the court calls the courtroom for a person, and that issuance of a bench warrant means that the person was not present. RP (1/27/10) 84-87. Prosecutor Jackson testified that he would only sign a warrant order if the person was not present, and since he signed a warrant order in Mr. Charles's case, Mario Charles must not have been present in court. RP (1/27/10) 87-89. Without any defense objection, the prosecutor testified that Mr. Charles "would" know to be present because the court "would have" admonished him and given him a copy of the order. RP (1/27/10) 88.

Again without defense objection, the prosecutor testified that Mr. Charles had been charged with a crime, had been released subject to conditions, had been given notice of a hearing on November 25, 2009, and was not present when the case was called. RP (1/27/10) 89.

To prove the charge of Attempting to Elude, the state presented the testimony of Trooper Howson, who had pursued the pickup truck, and Sergeant Martin, who had helped searched the area after the truck was abandoned. Trooper Howson testified that he saw "reckless driving" from the very beginning of the chase. RP (1/27/10) 37. Sergeant Martin testified that the driver had successfully "eluded" Trooper Howson. RP

(1/27/10) 55. Martin also testified that the driver was clearly trying to get away from law enforcement. RP (1/27/10) 64.

Mr. Charles presented the testimony of Deborah Murphy, a defense attorney who covered the calendar on November 25, 2009. RP (1/27/10) 98-105. She told the jury that Mr. Charles was in the courthouse before his case was called, and that she had found him, asleep on the bench right outside the courtroom. RP (1/27/10) 101-102. She said that she told him to come into the courtroom, but that when his case was called, he was not in or around the courtroom. RP (1/27/10) 102, 104-105.

The court gave the following instructions regarding the Bail

Jumping charge:

A person commits the crime of bail jumping when he or she fails to appear after having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court.
Instruction No. 10, Court's Instructions to the Jury, Supp CP.

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

- (1) That on or about the[sic] November 25, 2009, the defendant failed to appear before a court;
- (2) That the defendant was charged with Attempting to Elude a Pursuing Police Vehicle;
- (3) That the defendant had been released by court order or admitted to bail with knowledge of a subsequent personal appearance before that court; and
- (4) That any of 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. 11, Court's Instructions to the Jury, Supp. CP.

The jury convicted Mr. Charles of both Bail Jumping and Attempting to Elude. CP 17. At sentencing, the state filed a document captioned Prosecutor's Statement of Criminal History, and the court adopted its contents in the Judgment and Sentence without comment. RP (2/3/10) 4, 12-14; CP 8; Prosecutor's Statement of Criminal History, Supp. CP. Mr. Charles timely appealed. CP 4.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. CHARLES'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY EXCLUDING RELEVANT AND ADMISSIBLE EVIDENCE.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *In re Detention of Martin*, 163 Wn.2d 501, 506, 182 P.3d 951 (2008). Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Toth*, 152 Wn.App. 610, 615, 217 P.3d 377 (2009). 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. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). Reversal is required unless the state can prove that any reasonable fact-finder 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).

A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009); *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). This includes when the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Hudson*, at 652.

B. Due process guaranteed Mr. Charles a meaningful opportunity to present his defense.

Under the Fourteenth Amendment to the United States Constitution, a state may not “deprive any person of life, liberty, or property, without due process of law...” U.S. Const. Amend. XIV. The

due process clause guarantees an accused person a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

An accused person must be allowed to present her or his version of the facts to the jury so that it may decide “where the truth lies.” *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (quoting *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The U.S. Supreme Court has described this right as “a fundamental element of due process of law.” *Washington v. Texas*, at 19.

The right to present a defense includes the right to introduce evidence that is relevant and admissible. *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007). Denial of this right requires reversal unless it can be established beyond a reasonable doubt that the error did not affect the verdict. *State v. Elliott*, 121 Wn.App. 404, 410, 88 P.3d 435 (2004). An appellate court will not “tolerate prejudicial constitutional error and will reverse unless the error was harmless beyond a reasonable doubt.” *Fisher*, at 755.

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence.” ER 401.

All relevant evidence is admissible unless its admissibility is otherwise limited. ER 402. The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible. *Salas v. Hi-Tech*

Erectors, ___ Wn.2d ___, ___, ___ P.3d ___ (2010).

C. The trial court erroneously excluded admissible evidence relevant to Mr. Charles’s defense against the Bail Jumping charge.

To obtain a conviction for Bail Jumping, a prosecutor must prove that the accused person had been “released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state...” and that she or he “fail[ed] to appear... as required.” RCW 9A.76.170. Thus, at a trial for Bail Jumping, evidence that has “any tendency” to make the existence of any fact relating to these elements “more probable or less probable than it would be without the evidence” is relevant and admissible, unless otherwise excluded. ER 401; ER 402.

Here, Mr. Charles sought to introduce the testimony of his parents to show the efforts he made to make his court appearance. This evidence meets the minimal test for relevance required under ER 401, because it makes the existence of a fact of consequence to the action—that he failed to appear as required—less probable than it would be without the

evidence. ER 401; *Hi-Tech, supra*. Had the testimony been admitted, defense counsel would have been able to point out how hard Mr. Charles worked to get to court that morning. He would have been able to argue that the issuance of the warrant resulted not from a failure to appear, but from some other factor, such as the prosecutor's impatience in moving through the docket.

The evidence was admissible under ER 402, and no other authority limited its admissibility. Accordingly, the trial court violated Mr. Charles's due process right to present a defense by excluding it.² The error is presumed prejudicial. *Toth, supra*.

The state provided only circumstantial evidence that Mr. Charles failed to appear; the prosecutor who testified could not specifically recall what happened on that day, and relied on documentary evidence to suggest that Mr. Charles was absent. RP (1/27/10) 88, 91-92. It cannot be said that the error was trivial, formal, or merely academic, that it did not prejudice the accused, that it in no way affected the final outcome of the case, that any reasonable fact-finder would reach the same result absent the error, that the evidence of guilt was so overwhelming it necessarily

² The error is preserved for review because defense counsel made an offer of proof, and the court ruled the evidence inadmissible. RP (1/27/10) 7-11, 67-70. Furthermore, the error is a manifest error affecting a constitutional right, which may be raised for the first time on review. RAP 2.5(a)(3).

leads to a finding of guilt, or that the error was harmless beyond a reasonable doubt. *Toth, supra; Burke, supra; Lorang, supra.*

Mr. Charles's conviction for Bail Jumping must be reversed, and the case remanded for a new trial. *Toth, supra.* On retrial, he must be permitted to present all admissible evidence that is relevant to his defense.

Id.

II. MR. CHARLES'S BAIL JUMPING CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT.

A. Standard of Review

Statutory construction is a question of law reviewed *de novo*. *Martin*, at 506. 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).

B. The Fourteenth Amendment's due process clause requires the state to prove the crime charged 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). The criminal law may not be diluted by a

standard of proof that leaves the public to wonder whether innocent persons are being condemned. *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). The reasonable doubt standard is indispensable, because it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue. *Id.*

A conviction based on insufficient evidence raises a manifest error affecting a constitutional right, which may be argued for the first time on review. *Colquitt*, at 795-796; RAP 2.5(a)(3).

Although a claim of insufficiency admits the truth of the state's evidence and all inferences that can reasonably be drawn from it, *Id.*, this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. On review, the appellate court must find the proof to be more than mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wn. App. 589, 592, 123 P.3d 891 (2005). The evidence must also be more than clear, cogent and convincing evidence, which is described as evidence "substantial enough to allow the [reviewing] court to conclude that the allegations are 'highly probable.'" *In re A.V.D.*, 62 Wn.App. 562, 568, 815 P.2d 277 (1991), *citation omitted*.

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*.

In interpreting a statute, a court must assume that the legislature means exactly what it says. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001), *cert. den. sub nom Keller v. Washington*, 534 U.S. 1130, 122 S.Ct. 1070, 151 L.Ed.2d 972 (2002). If the statute is clear on its face, its meaning is derived from the statutory language alone; an unambiguous statute is not subject to judicial interpretation. *State v. Cramm*, 114 Wn.App. 170, 173, 56 P.3d 999 (2002); *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997). The court may not add language to a clearly worded statute, even if it believes the legislature intended more. *Id.*

A statute is ambiguous if it is “amenable to more than one reasonable interpretation.” *State v. Mendoza*, 165 Wn.2d 913, 921, 205 P.3d 113 (2009). In such cases, to determine legislative intent, courts turn to rules of statutory construction. *Delyria v. State*, 165 Wn.2d 559, 563, 199 P.3d 980 (2009).

C. The state did not prove beyond a reasonable doubt that Mr. Charles failed to “appear” within the meaning of the statute.

To obtain a conviction for Bail Jumping, the prosecution must prove that the accused person failed to “appear” as required. RCW

9A.76.170(1). The statute does not define the term “appear.” Where a statute fails to define a term, rules of statutory construction require that the term be given its plain and ordinary meaning, derived from a standard dictionary if possible. *McClarty v. Totem Elec.*, 157 Wn.2d 214, 225, 137 P.3d 844 (2006).

The plain and ordinary meaning of “appear” is (in relevant part) “to come into sight; become visible,” or “to attend or be present.” *Dictionary.com Unabridged, based on the Random House Dictionary*, Random House, Inc. 2010. A more specialized, legal meaning is given as “to come formally, esp. as a party or counsel, to a proceeding before a tribunal, authority, etc.” *Id.* Because the word “appear” can reasonably be interpreted in more than one way, the statute is ambiguous. When a statute is ambiguous, courts turn to rules of statutory construction to determine legislative intent. *Delyria* at 563.

In this case, rules of statutory construction favor the broadest possible definition of “appear,” and the word must be interpreted to mean “to come into sight; become visible.” Under the rule of lenity, a criminal statute must be construed in the manner most favorable to the accused person. *State v. Gonzales Flores*, 164 Wn.2d 1, 17, 186 P.3d 1038 (2008); *State v. Jackson*, 61 Wn.App. 86, 93, 809 P.2d 221 (1991). The policy underlying the rule of lenity is “to place the burden squarely on the

Legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are.” *Id.*, at 93. Applying the rule of lenity, a broad interpretation of the word “appear” would ensure that the statute is applied in the most egregious of cases—where the defendant does not even come into sight on the appointed date.³

Because Mr. Charles came into sight on the appointed day, as Ms. Murphy testified, he did not fail to appear, and the evidence was insufficient to convict him of Bail Jumping. *Winship, supra*. Accordingly, the Bail Jumping conviction must be reversed and the charge dismissed with prejudice. *Smalis, supra*. The companion charge must be remanded to the trial court for a new sentencing hearing.

D. The state did not prove beyond a reasonable doubt that Mr. Charles failed to appear “as required” within the meaning of the statute.

To convict Mr. Charles of Bail Jumping, the prosecution was required to prove that Mr. Charles failed to appear “as required.” RCW 9A.76.170(1). In this case, Mr. Charles received notice that described his required appearance as follows:

³ If the legislature wishes to narrow the definition of “appear,” so that the statute reaches those—like Mr. Charles—who come into sight but do not formally come before the tribunal or attend the hearing, it may do so by amending the statute to include a more restrictive definition of “appear.”

The defendant is required to be present at all hearings scheduled in this matter, in the Criminal Presiding Department of the Superior Court, Thurston County Courthouse, Building No. 2, 2000 Lakeridge Dr. S.W., Olympia, Washington.
Exhibit 6, Supp. CP.

At trial, the prosecutor proved that a hearing was held on November 25, 2009; however, the prosecutor did not prove that the hearing took place in the Criminal Presiding Department of the Superior Court, and that it was held in Building No. 2 at 2000 Lakeridge Dr. S.W. Under these circumstances, the evidence was insufficient to prove that Mr. Charles failed to appear “as required,” even when taken in a light most favorable to the state.

Accordingly, Mr. Charles’s Bail Jumping conviction must be dismissed with prejudice. *Smalis, supra*. The companion charge must be remanded to the trial court for a new sentencing hearing.

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

A. Standard of Review

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). To meet this standard, the appellant “must identify a constitutional error and show how, in the context of the trial, the

alleged error actually affected the [appellant's] rights; it is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995); *see also State v. Contreras*, 92 Wn. App. 307, 313-314, 966 P.2d 915 (1998). 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).⁴

Jury instructions are reviewed *de novo*. *State v. Hayward*, 152 Wn.App. 632, 641, 217 P.3d 354 (2009). Instructions must be manifestly clear because juries lack tools of statutory construction. *See, e.g., State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. Berg*, 147 Wn.App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004).

B. The court's instructions relieved the prosecution of its obligation to prove that Mr. Charles failed to appear "as required."

A trial court's failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). A "to convict"

⁴ 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).

instruction must contain all the elements of the crime, because it serves as a “yardstick” by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004).

The jury has the right to regard the “to convict” instruction as a complete statement of the law. Any conviction based on an incomplete “to convict” instruction must be reversed. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

As noted above, a Bail Jumping conviction requires proof that the accused person failed to appear “as required.” RCW 9A.76.170(1). But the court’s “to convict” instruction omitted this element. Instead, the instruction allowed conviction upon proof that Mr. Charles failed to “appear.” Instruction No. 11, Court’s Instructions to the Jury, Supp. CP. The word “appear” was not defined for the jury, and none of the court’s other instructions informed the jury of the prosecution’s burden to prove that Mr. Charles failed to appear “as required.” Court’s Instructions to the Jury, Supp. CP.

Because the “to convict” instruction omitted the state’s burden to that Mr. Charles failed to appear “as required,” and because the deficiency was not corrected elsewhere in the instructions, the prosecution was relieved of its burden to prove the essential elements. *Smith, supra*. This created a manifest error affecting Mr. Charles’s Fourteenth Amendment

right to due process, and thus can be argued for the first time on appeal, pursuant to RAP 2.5(a)(3). *Kirwin, supra*.

C. The error was prejudicial and requires reversal.

Failure to instruct on an essential element requires reversal. *Smith, supra*. Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *Toth*, at 615. To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang*, at 32. Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *Burke*, 222.

The error here is presumed prejudicial, and Respondent cannot meet its burden of establishing harmless error under the stringent test for constitutional error. *Toth*, at 615. The evidence that Mr. Charles failed to appear “as required” was not overwhelming. First, uncontroverted evidence established that Mr. Charles was in the building on the date and time scheduled for his hearing. Second, the prosecutor did not establish that the hearing occurred in the Criminal Presiding Department of the

Superior Court, or that it was held in Building No. 2 at 2000 Lakeridge Dr. S.W.

Under these facts, a reasonable jury could have decided that the prosecution did not meet its burden of proving that Mr. Charles failed to appear “as required.” With proper instructions, they would have voted to acquit. Thus, under the circumstances, the error was not trivial, formal, or merely academic; it prejudiced Mr. Charles and likely affected the final outcome of the case. *Lorang*, at 32. Because the error was not harmless beyond a reasonable doubt, the conviction must be reversed and the case remanded for a new trial. *Id.*

IV. MR. CHARLES’S CONVICTIONS WERE OBTAINED IN VIOLATION OF HIS RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 21 OF THE WASHINGTON CONSTITUTION.

A. Standard of Review

Whether or not opinion testimony impermissibly infringes an accused person’s right to a jury trial is an issue of constitutional dimension; such issues are reviewed de novo. *Martin*, at 506.

B. Impermissible opinion testimony on an accused person’s guilt violates the constitutional right to a jury trial.

A criminal defendant has a constitutional right to a jury trial.

Under Article I, Section 21 of the Washington Constitution, “The right of

trial by jury shall remain inviolate...” Wash. Const. Article I, Section 21. Article I, Section 22 provides that “the accused shall have the right . . . to have a speedy public trial by an impartial jury.” Wash. Const. Article I, Section 22. Similarly, the Sixth Amendment to the U.S. Constitution, applicable to the states through the Fourteenth Amendment, guarantees a federal constitutional right to a jury trial. U.S. Const. Amend VI; U.S. Const. Amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

Impermissible opinion testimony on the accused person’s guilt violates the constitutional right to a jury trial. *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007); *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987). Opinion testimony on an ultimate issue is forbidden if it is a “nearly explicit” or “almost explicit” statement by the witness that the witness believes the accused is guilty. *Kirkman*, at 937. The admission of such testimony creates a manifest error affecting a constitutional right, and may be raised for the first time on review. *Id.*, at 936; RAP 2.5(a)(3).

- C. Prosecutor Scott Jackson’s testimony included a “nearly explicit” or “almost explicit” opinion that Prosecutor Jackson believed Mr. Charles was guilty of Bail Jumping.

To convict Mr. Charles of Bail Jumping, the prosecutor was required to prove that he had been charged with a crime, that he had been “released by court order or admitted to bail with knowledge of the

requirement of a subsequent personal appearance before any court of this state...” and that he “fail[ed] to appear... as required.” RCW 9A.76.170.

Prosecutor Scott Jackson testified that Mr. Charles was charged with a crime, that he had been released on conditions of release, that he had been given notice of a hearing on November 25, and that he was not present when the case was called in open court in a courtroom at the Thurston County courthouse. RP (1/27/10) 89. This was a “nearly explicit” or “almost explicit” opinion that Prosecutor Jackson believed Mr. Charles was guilty of Bail Jumping. *Kirkman*, at 937. Jackson’s testimony violated Mr. Charles’s constitutional right to a jury trial under the Sixth and Fourteenth Amendments and Article I, Section 21 of the Washington Constitution. *Id.* The admission of his testimony is a manifest error affecting Mr. Charles’s constitutional right to a jury trial, and thus can be raised for the first time on review. RAP 2.5(a)(3).

D. Trooper Howson and of Sergeant Martin both expressed inadmissible opinions that Mr. Charles was guilty of Attempting to Elude.

In a trial for Attempting to Elude, an officer’s testimony that “the person driving that vehicle was attempting to get away from me and knew I was back there and refusing to stop” violates the accused person’s right to a jury trial. *State v. Farr-Lenzini*, 93 Wn.App. 453, 459, 970 P.2d 313 (1999). In this case, Trooper Howson and Sergeant Martin made similar

statements. As in *Farr-Lenzini*, Howson's testimony (that he saw "reckless driving" from the very beginning of the chase) as well as Martin's testimony (that the driver had successfully "eluded" Howson and that the driver was clearly trying to get away from law enforcement) invaded the jury's factfinding role and violated Mr. Charles's constitutional right to a jury trial. RP (1/27/10) 55, 64.

E. The violation of Mr. Charles's constitutional right to a jury trial was not harmless beyond a reasonable doubt.

The errors here are presumed prejudicial, and Respondent cannot meet its burden of establishing harmless error under the stringent test for constitutional error. *Toth*, at 615. The errors were not trivial, formal, or merely academic; they prejudiced Mr. Charles and likely affected the final outcome of the case. *Lorang*, at 32. A reasonable juror could have entertained a reasonable doubt about whether or not the prosecution had established the elements of Attempting to Elude and of Bail Jumping. Because the error was not harmless beyond a reasonable doubt, Mr. Charles's convictions must be reversed and the case remanded for a new trial. *Id.*

V. MR. CHARLES WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

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).

B. Mr. Charles was entitled 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 “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

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 v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); see also *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

- C. Defense counsel was ineffective for failing to object to improper opinion testimony.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

In this case, defense counsel failed to object each time a prosecution witness offered an inadmissible opinion on Mr. Charles's guilt. RP (1/27/10) 37, 55, 64, 71-92. No legitimate strategy explains defense counsel's failure to object; the opinion testimony bolstered the state's case, and provided strong and unequivocal testimony that Mr. Charles was guilty. An objection to the evidence would likely have been sustained (as outlined above). Accordingly, the failure to object constituted deficient performance. Furthermore, the result of the trial would have been different had the testimony been excluded.

As to the Attempting to Elude charge, a reasonable jury could have decided that the driver of the pickup had driven unsafely but not recklessly, or that his driving did not relate to an effort to evade law enforcement.

Similarly, on the Bail Jumping charge, a reasonable jury could have decided that Mr. Charles “appeared” because he was present in the courthouse building at the appointed date and time.

If the improper admission of the opinion testimony cannot be reviewed as a manifest error affecting Mr. Charles’s constitutional right to a jury trial, his convictions must be reversed for ineffective assistance.

Reichenbach, supra. The case must be remanded to the superior court for a new trial, with instructions to exclude inadmissible opinion testimony.

Id.

VI. THE SRA, AS AMENDED IN 2008, VIOLATES THE FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND PRIVILEGE AGAINST SELF-INCRIMINATION BY SHIFTING THE BURDEN OF PROOF AT SENTENCING.

A criminal defendant has a constitutional privilege against self-incrimination. U.S. Const. Amend. V; U.S. Const. Amend. XIV. This includes a constitutional right to remain silent pending sentencing. *In re Detention of Post*, 145 Wn.App. 728, 758, 187 P.3d 803 (2008) (citing *Mitchell v. United States*, 526 U.S. 314, 325, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) and *Estelle v. Smith*, 451 U.S. 454, 462-63, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)). A sentencing court may not draw adverse inferences from an offender’s silence pending sentencing. *Mitchell*, at 328-329.

Thus, for example, it is improper to imply lack of remorse from an accused person's presentencing silence. *Post*, at 758.

The state does not meet its burden to establish an offender's criminal history through "bare assertions, unsupported by evidence." *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999). An offender's "failure to object to such assertions [does not] relieve the State of its evidentiary obligations." *Id.*, at 482. This rule is constitutionally based, and thus cannot be altered by statute; as the Supreme Court pointed out, requiring the offender to object when the state presents no evidence "would result in an unconstitutional shifting of the burden of proof to the defendant." *Id.*, at 482.

In 2008, the legislature amended RCW 9.94A.500 and RCW 9.94A.530. *See* Laws of 2008, Chapter 231, Section 2. Under RCW 9.94A.500(1), "[a] criminal history summary relating to the defendant from the prosecuting authority... shall be prima facie evidence of the existence and validity of the convictions listed therein." RCW 9.94A.500(1). Furthermore, the sentencing court may rely on information that is "acknowledged in a trial or at the time of sentencing," and

“[a]cknowledgment includes... not objecting to criminal history presented at the time of sentencing.” RCW 9.94A.530(2).⁵

These provisions result in the “unconstitutional shifting of the burden of proof to the defendant.” *Ford*, at 482. By requiring an offender to object to a prosecutor’s allegations, RCW 9.94A.500(1) and RCW 9.94A.530(2) violate the Fifth and Fourteenth Amendments to the U.S. Constitution. *Ford, supra*.

Here, the prosecutor failed to present any evidence that Mr. Charles had criminal history.⁶ Instead, the prosecutor submitted a document captioned “Statement of Prosecuting Attorney,” which merely alleged six prior adult felonies and one prior juvenile offense.⁷ Prosecutor’s Statement of Criminal History, Supp. CP. Under these circumstances, Mr. Charles should have been sentenced with an offender score of zero.

⁵ Under the prior version of the statute, a Statement of Prosecuting Attorney was insufficient to establish an offender’s criminal history. *State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 113 (2009).

⁶ Nor did the prosecutor present evidence to establish that Mr. Charles was on community custody at the time of the offense.

⁷ The statement did not allege that Mr. Charles was on community custody, or that he had a prior conviction for a serious traffic offense. Prosecutor’s Statement of Criminal History, Supp. CP. A worksheet attached to the prosecutor’s statement added a point for a prior serious traffic offense, and another point for commission of the offense while on community custody. Attachment to Prosecutor’s Statement of Criminal History, Supp. CP.

Instead, however, the trial judge (apparently) adopted the prosecutor's assertions and sentenced Mr. Charles with an offender score of ten on the Attempting to Elude charge and seven on the Bail Jumping.⁸ CP 8. By accepting the prosecutor's statement (and the attached worksheet), the court relied on "bare assertions" of criminal history in violation of *Ford, supra*.

The prosecutor failed to prove Mr. Charles's criminal history, and the trial court failed to properly determine his offender score. The sentence must be vacated and the case remanded for sentencing with an offender score of zero. *Id.*

CONCLUSION

Mr. Charles's conviction for Attempting to Elude must be reversed, and the case remanded for a new trial. The Bail Jumping conviction must be reversed and the charge dismissed with prejudice. In the alternative, the Bail Jumping charge must be remanded for a new trial.

⁸ The prosecutor alleged two prior convictions for vehicular assault, each of which scored double against the Attempting to Elude charge. Prosecutor's Statement of Criminal History, Supp. CP. The court added a point for commission of the offense while on community custody, and apparently counted a serious traffic offense in the offender score (although it did not make a finding regarding this offense in its Findings of Fact.) CP 8.

If the convictions are not reversed, the sentence must be vacated
and the case remanded for a new sentencing hearing.

Respectfully submitted on May 17, 2010.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF MAILING

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

Mario Charles, DOC #878278
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

and to:

Thurston County Prosecutor's Office
2000 Lakeridge Dr SW Bldg 2
Olympia WA 98502-6045

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

All postage prepaid, on May 17, 2010.

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 17, 2010.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

FILED
COURT OF APPEALS
10 MAY 19 PM 12:27
STATE OF WASHINGTON
BY _____ DEPUTY