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DIVISION II
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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 Reply Brief

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ARGUMENT

I. THE TRIAL COURT VIOLATED MR. CHARLES'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

Although evidentiary rulings are reviewed for an abuse of discretion, alleged constitutional errors are reviewed *de novo*. *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009). A lower court necessarily abuses its discretion by denying an accused person's constitutional rights. *Id* (citing *State v. Perez*, 137 Wn.App. 97, 105, 151 P.3d 249 (2007)). In this case, Mr. Charles alleges that the lower court excluded relevant evidence in violation of his Fourteenth Amendment right to present a complete defense. Appellant's Opening Brief, pp. 9-14; U.S. Const. Amend. XIV; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). Accordingly, review is *de novo*. *Iniguez, supra*.

Evidence is relevant if it has "any tendency" to prove a fact of consequence to the case. ER 401 (emphasis added). The threshold for admission is so low that even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, ___, 230 P.3d 583, 585 (2010).

Here, the trial court denied Mr. Charles a meaningful opportunity to present his defense. *Holmes, supra*. He sought to introduce the testimony of his parents, in order to raise a reasonable doubt that he

“fail[ed] to appear... as required,” which is an element of Bail Jumping. RCW 9A.76.170. His parents’ testimony met the low threshold for admissibility because it is at least minimally relevant. *Salas, supra*. Their evidence established that Mr. Charles traveled a considerable distance to come to court. RP (1/27/10) 7-11, 67-71. Given the difficulty he went through to get to the courthouse, it is unlikely that he chose not to “appear” for his case. This conclusion is bolstered by the fact that he quashed the warrant on the next judicial day. RP (1/27/10) 95.

Because the evidence was at least minimally relevant (and not otherwise inadmissible), the trial court’s decision excluding it violated Mr. Charles’s Fourteenth Amendment right to present a defense. *Id; Holmes, supra*. Respondent argues that the evidence was not “reasonably” relevant. Brief of Respondent, p. 3. But “reasonableness” is not the correct standard: evidence is admissible if it is *minimally* relevant. ER 401; *Salas, supra*.

Furthermore, contrary to Respondent’s assertion, the evidence *was* “related to the statutory elements of the charge.” Brief of Respondent, p. 4. The effort expended by Mr. Charles in traveling to court provided circumstantial evidence undermining the state’s position that he “failed to appear” as required. RCW 9A.76.170; Instruction No. 11, Court’s Instructions to the Jury, CP 35. Having obtained a ride (from his father) to

the Seattle bus station, traveled by bus to Tacoma, obtained a ride (from his mother) to the Lakewood park-and-ride,¹ traveled again by bus, and then arrived at the courthouse, it is highly unlikely that Mr. Charles would have left the courthouse or otherwise “failed to appear” when his case was called.

Although the evidence did consist of “only the transportation Mr. Charles took,”² it gave rise to an inference that he appeared in court, and thus was at least *minimally* relevant. *Salas, supra*. That inference—founded on the great effort he expended to make it to the courthouse—was *not* duplicated by the testimony of Deborah Murphy. She testified that she saw him at the courthouse; she did not describe the steps he had taken to get there. RP (1/27/10) 98-105.

Respondent’s argument—that the evidence was not “reasonably relevant”—presumes that Mr. Charles is guilty. Brief of Respondent, pp. 3-5. Evidence that Mr. Charles made great effort to appear in court and was present in the courthouse building right before his case was called could raise a reasonable doubt that he failed to appear as required. The

¹ At one point, defense counsel indicated that Maria Charles drove her son directly to the courthouse; at another point, he said she drove him to the park-and-ride. Compare RP (1/27/10) 7 with RP (1/27/10) 67-69.

² Brief of Respondent, p. 4.

excluded evidence (regarding his efforts) is arguably irrelevant only if it is taken as fact that he failed to appear (by absenting himself when his case was called). But the jury was entitled to disregard the evidence introduced through Mr. Jackson and the unfavorable testimony provided by Ms. Murphy.

The trial judge implicitly weighed this evidence against the inference raised by the proffered testimony, and concluded that the inference was too weak to justify admission. But the weakness of the inference goes to its weight, not its relevance and admissibility. *See, e.g., State v. Bander*, 150 Wn.App. 690, 719, 208 P.3d 1242 (2009) (“Results indicating that a relatively large proportion of the population could have contributed to the DNA samples go to the weight to be accorded to those test results, not to their relevance.”)

Nor was the evidence properly excluded under ER 403, as Respondent baldly contends without argument. Brief of Respondent, p. 5. The evidence was at least somewhat probative on the issue of whether or not Mr. Charles failed to appear as required. It did not interfere with the prosecution’s theory of the case. Nor was there any danger that it would confuse or mislead the jury. Furthermore, the proffered testimony was relatively simple, and would not have wasted time or delayed the proceedings. Finally, the evidence was not cumulative, as no other

evidence established the efforts Mr. Charles made to reach the courthouse on time. Accordingly, it should not have been excluded under ER 403.

Testimony that Mr. Charles made significant efforts to reach court was at least minimally relevant to whether or not he failed to appear. ER 401; *Salas*. Exclusion of this relevant and admissible evidence violated his constitutional right to present a defense, and was therefore an abuse of discretion. *Holmes, supra*. The error is presumed prejudicial, and the state's evidence was not so strong that the presumption is overcome beyond a reasonable doubt.³ *State v. Toth*, 152 Wn.App. 610, 615, 217 P.3d 377 (2009). Accordingly, the Bail Jumping conviction must be reversed and the case remanded for a new trial. If the case is retried, Mr. Charles must be permitted to present all admissible evidence that is relevant to his defense. *Holmes, supra*.

³ Respondent apparently misunderstands Mr. Charles's argument regarding harmless error. Brief of Respondent, pp. 5-6. The Bail Jumping statute does not require direct evidence; however, in light of Mr. Jackson's inability to remember the events of November 25, the prosecution's case was not overwhelming. A reasonable juror could decide that the circumstantial evidence provided through the exhibits, Mr. Jackson's testimony, and the limited evidence introduced via Ms. Murphy did not prove guilt beyond a reasonable doubt, in light of the improperly excluded evidence.

II. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. CHARLES OF BAIL JUMPING.

A. Mr. Charles “appeared” within the meaning of the statute.

The term “appear” is not defined in the bail jumping statute. RCW 9A.76.170. “Appear” can mean to “come into sight; become visible,” “to attend or be present,” or “to come formally, esp. as a party or counsel, to a proceeding before a tribunal, authority, etc.” *Dictionary.com Unabridged, based on the Random House Dictionary*, Random House, Inc. 2010.

Because the word can reasonably be interpreted in more than one way, RCW 9A.76.170(1) is ambiguous, and rules of statutory construction apply. *Delyria v. State*, 165 Wn.2d 559, 563, 199 P.3d 980 (2009).

The rule of lenity requires that RCW 9A.76.170(1) be construed in the manner most favorable to Mr. Charles. *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). Under a broad reading of the statute, Mr. Charles was not guilty of bail jumping: he came into sight and became visible on the appointed date. Consistent with the rule of lenity, this reading of the statute ensures that the most egregious cases of bail jumping are punished while excusing those who show themselves at the courthouse, even if they are temporarily absent when their case is called.

Without explanation, Respondent argues that the statute is unambiguous. Brief of Respondent, pp. 8-9. Citing no authority, Respondent urges the court to adopt the “specialized legal meaning” of the word “appear.” Brief of Respondent, p. 8. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007). Furthermore, Respondent’s argument contravenes the Supreme Court’s directive that undefined words are to be given their common, ordinary meaning. *See McClarty v. Totem Elec.*, 157 Wn.2d 214, 225, 137 P.3d 844 (2006).

Because Mr. Charles came into sight and became visible at the courthouse on the appointed day, as Ms. Murphy testified (RP (1/27/10) 101-102), he did not fail to “appear” within the meaning of the statute, and the evidence was insufficient to convict him of Bail Jumping. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Accordingly, the Bail Jumping conviction must be reversed and the charge dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986). The companion charge must be remanded to the trial court for a new sentencing hearing.

B. The state did not prove that Mr. Charles failed to appear “as required” within the meaning of the statute.

A Bail Jumping conviction requires proof that the accused person failed to appear “as required.” RCW 9A.76.170(1). Here, Mr. Charles was “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, CP. Accordingly, the state was required to prove that Mr. Charles was absent from the Criminal Presiding Department, Building 2, at 2000 Lakeridge Drive S.W. in Olympia, at the appointed date and time.

Although the prosecutor produced evidence showing that Mr. Charles missed a hearing at the appointed date and time, nothing in the record showed where that hearing took place. Thus, 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. 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. THE COURT’S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE AN ESSENTIAL ELEMENT OF BAIL JUMPING.

The court’s “to convict” instruction did not require the prosecutor to prove that Mr. Charles failed to appear “as required.” Appellant’s Opening Brief, pp. 19-23. Respondent apparently claims that this was not error because it “did not reasonably affect the jury’s understanding of the required elements... Neither the court nor the jury considered the question as to whether Mr. Charles was in fact required to attend the hearing to be a disputed element.” Brief of Respondent, pp. 12, 13.⁴ But a “to convict” instruction must include *all* essential elements, not merely those that are actively disputed at trial. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004); *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

Furthermore, contrary to Respondent’s assertion, the absence of the “as required” element did not suggest to the jury that Mr. Charles was “not required to attend the hearing in the first place.” Brief of Respondent, p. 13. Instead, it allowed the jury to convict even if Mr. Charles’s hearing was held at a different time or place than that required in the notice he was provided.

⁴ In making this argument, Respondent erroneously asserts that Mr. Charles posted bail. Brief of Respondent, p. 13. He did not post bail; he was released on his own recognizance. Exhibit 5, CP.

By the same token, the error was not harmless beyond a reasonable doubt. The prosecution did not prove the location of the proceeding that took place on November 25. If the judge, prosecutor, and Ms. Murphy were in a courtroom other than the “Criminal Presiding Department of the Superior Court, Thurston County Courthouse, Building No. 2, 2000 Lakeridge Dr. S.W.” in Olympia, a reasonable jury could have found that the state didn’t prove that Mr. Charles failed to appear “as required.” Exhibit 6, CP. Accordingly, the error was not harmless beyond a reasonable doubt, and reversal is required. *Toth, supra*. Accordingly, Mr. Charles’s Bail Jumping 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.

Mr. Charles rests on the argument set forth in his Opening Brief.

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

Mr. Charles rests on the argument set forth in his Opening Brief.

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.

Mr. Charles rests on the argument set forth in his Opening Brief.

CONCLUSION

Mr. Charles's Attempting to Elude conviction 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. If the convictions are not reversed, the sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on July 6, 2010.

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CERTIFICATE OF MAILING

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

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Reply

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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 July 6, 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 July 6, 2010.

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