

No. 40340-4-II

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

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STATE OF WASHINGTON,

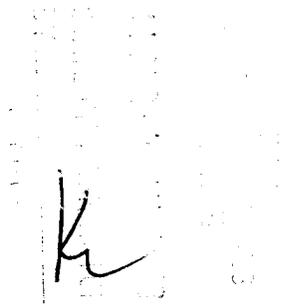
Respondent,

v.

JAY KASBAUM,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

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The Honorable Bryan E. Chushcoff (motion) and the Honorable Frank E.  
Cuthbertson (trial and sentencing), Judges

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant Jay Kasbaum was deprived of his Article 1, § 22 and Sixth and Fourteenth Amendment rights to present a defense.
2. The prosecutor committed flagrant, prejudicial misconduct.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The state and federal due process clauses guarantee a defendant in a criminal case the right to present a defense. That right includes the right to present evidence which is relevant and material to the defense.

Kasbaum was accused of bail jumping, for which there is an affirmative defense of “uncontrollable circumstances.” That defense applies, *inter alia*, when a person has a medical condition that requires immediate hospitalization or treatment.

Were Kasbaum’s rights to present a defense violated by the trial court’s exclusion of documents from a hospital Kasbaum said he had been at when he had injured himself and sought treatment on a day he missed court?

2. Did the prosecutor commit flagrant, prejudicial misconduct by first successfully moving to exclude evidence and then faulting Kasbaum to the jury for failing to present it?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Jay Kasbaum was charged by amended information with two counts of bail jumping. CP 31-32; RCW 9A.76.170. After a motion hearing before the Honorable Judge Bryan E. Chushcoff on December 2, 2009, trial was held before the Honorable Frank E. Cuthbertson on December 2 and 3, 2009, and a jury found Kasbaum guilty as charged. CP

51-52; 1RP 1, 2RP 1.<sup>1</sup> At sentencing on January 14, 2010, Judge Cuthbertson imposed a Drug Offender Sentencing Alternative sentence. CP 66-79; 3RP 1-22.

Kasbaum appealed, the prosecution cross-appealed, and this pleading follows. See CP 80-82.

2. Testimony at trial

Deputy prosecuting attorney Jessica Giner worked as “barrel” deputy in part of 2009. 2RP 12. She described her duties, which included calling “roll” for people who were supposed to appear for court proceedings. 2RP 12. Giner said that, when she was barrel deputy, she would call roll usually at least twice, once right after 9 a.m. and then after a mid-morning break. 2RP 12. Sometimes she also did a third “roll call” a little later in the proceedings. 2RP 12. If someone was supposed to appear and did not answer to Giner’s “call,” a bench warrant was usually issued. 2RP 12. Giner said that she would usually “poll the gallery” for a person before requesting a warrant and would also try to have “some personal contact with the defense attorney to verify that their client had not shown up.” 2RP 13, 22.

Giner identified a charging document which charged Jay Kasbaum with several felonies, as well as a document dated March 3, 2009, notifying Kasbaum of the conditions with which he was required to

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<sup>1</sup>The verbatim report of proceedings consists of 3 volumes, which will be referred to as follows:

the volume containing the proceedings of December 2, 2009, as “1RP;”  
December 2 and 3, 2009, as “2RP;”  
January 14, 2010, as “3RP.”

comply when he was released pretrial. 2RP 14-19. Giner explained that the document with that information had multiple carbonless copies and one copy was given to the defendant at the time of arraignment. 2RP 18. One of the conditions imposed in the document with Kasbaum's name on it was that he agreed to appear for any court date set by the court or his attorney and understood that failure to appear would cause a bench warrant to be issued for a separate crime for that failure to appear. 2RP 20.

Giner also identified a scheduling order which had hearings set for June 24, 2009, at 8:45 a.m. in courtroom 250, and a jury trial for July 28, 2009, at 8:30 a.m. in courtroom 260. 2RP 21. Giner said that, on June 24, 2009, Kasbaum did not respond when she polled the gallery for him at 9:20 a.m., 9:50 a.m., 10:25 a.m. and 11:15 a.m., so she made a note that he had failed to appear and a bench warrant had issued for his arrest. 2RP 24.

Kasbaum appeared at a hearing to "quash" that warrant on July 7, 2009. 2RP 27, 29, 36.

Giner admitted that a "quash" hearing takes time to schedule after the defendant asks for it. 2RP 27. Such a hearing only occurs when a defendant approaches the court to take care of the warrant on his own, rather than being arrested and brought before the court by police. 2RP 36. This meant that Kasbaum could have been trying to quash the warrant anytime from June 24<sup>th</sup> to about July 6<sup>th</sup> of 2009. 2RP 37.

John Cummings, another deputy prosecutor, testified about being a barrel deputy on September 21, 2009. 2RP 59. Cummings said he would usually take first "roll" at 8:30 and might try to take roll again if he had "time during the day. . . just to make sure we hit people that may have

trickled in late.” 2RP 61.

Cummings identified a scheduling order issued in a case with Kasbaum listed as the defendant, with dates of August 19, 2009, at 8:45 a.m. for omnibus and September 21, 2009, at 8:30 a.m. for trial, dates when Kasbaum was supposed to appear. 2RP 65, 72. Another order indicated a change of date for the omnibus hearing to September 16, 2009, with the same trial date. 2RP 66. Another scheduling order changed the omnibus to September 9, 2009, with the same trial date. 2RP 68.

Cummings said a bench warrant issued for Kasbaum after he failed to appear on September 21, 2009, and a “quash” hearing was held on September 29, 2009. 2RP 75. Cummings also said that writing on one of the earlier court orders had indicated that, if Kasbaum failed to show, his bail should be increased. 2RP 78. The prosecutor also thought that such a written order was probably accompanied by a verbal warning by the court to the defendant about appearing. 2RP 78.

Cummings also said that he had occasionally heard from defense counsel or a deputy prosecutor on a case that the defendant had a medical emergency. 2RP 87. In such circumstances, he said, he would “oftentimes” hold off on issuing the warrant for a time. 2RP 87. Cummings admitted, however, that there could be a circumstance where a defense attorney did not know about the medical emergency until after a warrant issued and at that point the “quash” procedure would have to be used. 2RP 89. The prosecutor said it was possible that a “quash” hearing could be set within a day in those circumstances but then amended that declaration, saying “it would be whenever the defense attorney could get

that quash date set.” 2RP 89.

Jay Kasbaum testified that he had failed to appear on June 24 because the place he was renting had a circuit breaker which “popped.” 2RP 98. He had specifically set his clock to make sure he would wake up and go to court. 2RP 98. He explained that he did not usually get up for work until around 10 or 11 but wanted to be on time to court, which was earlier. 2RP 98-99. Because the alarm did not go off and he missed his court time, he called his boss and asked for another day off work to go try to deal with the issue. 2RP 99. His boss refused, so Kasbaum worked two more days until the weekend. 2RP 99. Kasbaum thought he also called his attorney’s office as well. 2RP 110.

Kasbaum explained that the following Monday was the earliest he could get to the courthouse when it was open to quash the warrant. 2RP 99. He explained that he did not set his work schedule and his boss had already done him a favor by giving him the one day off for which the court hearing was originally scheduled. 2RP 100. That was why he had gone to get the warrant quashed on the 26th. 2RP 101.

Kasbaum was aware that he was supposed to be in court on September 21, 2009, but missed that date, too. 2RP 101. He had been working on a vehicle since 5 that morning, intending to drive it to court, when he broke his knuckle, an injury from which he was still suffering at the time of trial. 2RP 102, 104. Kasbaum said it “hurt bad” so he had his partner drive him to a hospital in Lakewood which Kasbaum thought was named St. Francis. 2RP 103-104. It was probably 8 in the morning when they got to the hospital. 2RP 104.

Kasbaum ended up getting no treatment for his hand because he left after waiting for awhile to run to the courthouse. 2RP 105-107. By the time he got there, the bench warrant had already issued, so he started the “quash” procedure that same day, September 21. 2RP 106-14. Kasbaum said he had called his attorney’s office and gotten an answering machine so he had hung up and was told to go down to get the situation handled so he did, securing a date later in September for the “quash” hearing. 2RP 107-13.

D. ARGUMENT

KASBAUM’S ARTICLE 1, §22 AND SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO PRESENT A DEFENSE AND TO FUNDAMENTAL FAIRNESS WERE VIOLATED AND THE PROSECUTOR COMMITTED MISCONDUCT IN EXPLOITING THE VIOLATIONS

Both the state and federal due process clauses guarantee the defendant in a criminal case the right to present a defense. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 51 (1983), limited in part and on other grounds by State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002); Sixth Amend.; 14<sup>th</sup> Amend.; Art. 1, § 22. This right guarantees a defendant the opportunity to “present the defendant’s version of the facts,” rather than having jurors only hear the version of the state. State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004), abrogated in part and on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004). In addition, due process mandates that criminal prosecutions comport with prevailing notions of fundamental fairness, which requires giving the defendant a meaningful opportunity to present a

complete defense. See State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994).

In this case, this Court should reverse, because Kasbaum's rights to present a defense and to a fundamentally fair trial were violated when the court excluded evidence which was relevant, material and necessary to Kasbaum's defense. Further, the prosecutor committed flagrant, prejudicial misconduct in arguing Kasbaum's guilt based upon his failure to present the very evidence the prosecutor had successfully moved to exclude.

a. Relevant facts

On the second day of trial, the prosecutor told the court that defense counsel had provided "discovery" the day before and the prosecution had objections "if they're going to seek to admit these or talk about them." 2RP 47. The items were records from the Franciscan Health System for one of the dates Kasbaum had allegedly committed bail jumping, September 21, 2009. 2RP 47. The prosecutor said that, because there was no defense witness list, he had assumed that the only person who was testifying was the defendant. 2RP 47. He then said that Kasbaum would not be able to establish the foundation for the documents to be admitted as "business records" under ER 803(a)(6). 2RP 47-48. He also pointed out the copies were not certified. 2RP 48. Finally, he argued that the documents were not necessarily relevant, because they did not show what time Kasbaum was in the hospital on September 21, 2009, or for what he sought treatment. 2RP 49. The prosecutor moved to exclude not only the documents but also mention of the documents by any witness,

saying, “[i]f the defendant wants to testify that he was getting treatment, he can testify.” 2RP 49.

Counsel noted that the documents were for one of the specific dates the prosecutor was claiming that Kasbaum had committed “bail jump” and argued that Kasbaum was qualified to testify about receiving the records from the hospital. 2RP 50.

At that point, the court asked how long counsel had been representing Kasbaum in the case. 2RP 50. Counsel admitted it was “[s]ince roughly the beginning” and that he was aware that the state would be charging a “bail jump” for September 21 just after September 21. 2RP 51.

The court then said it was looking at an omnibus order dated September 16, 2009, which indicated that discovery had been completed and that meant this discovery “hasn’t been timely provided to the State.” 2RP 51. The court also said that the documents were hearsay and “there isn’t sufficient indicia of authenticity to admit these documents.” 2RP 51. The court then said the “patient information section” one a document was not filled in and there was nothing on the papers about a diagnosis or treatment received. 2RP 51. The court then ruled that, while Kasbaum could testify that he was at the hospital and say what happened with treatment or diagnosis, the documents were not admissible. 2RP 51.

Counsel then said that he received the records only the day before himself, asking for a brief recess “to explore the possibility of finding someone who can authenticate those records and see if there’s a reasonable time frame in which to call that person into court.” 2RP 52. The court

said it would reserve ruling and the defense could renew the motion after the prosecution had rested. 2RP 52.

After several more witnesses, the prosecution rested its case and, with the jury out, counsel renewed the motion “for a brief recess so that [the] defense may explore” whether it was reasonably possible to obtain follow-up records and get a witness on board. 2RP 90-92. The prosecutor objected that the documents were “late discovery,” speculating that the fault lay not with counsel but with Kasbaum. 2RP 91. The prosecutor declared his belief that Kasbaum had given the documents to counsel too late, then faulted Kasbaum for this speculative failure, saying, “[i]f the defendant wanted his attorney to present this information or to research this information, then he should have provided this in a timely manner.” 2RP 91. Again speculating, the prosecutor declared that Kasbaum “chose not to apprise his attorney or give his attorney discovery and now wants to delay the trial so he can go research this.” 2RP 92. The prosecutor then said Kasbaum “knows how the system works. His criminal history makes that clear,” at which point Kasbaum asked, “[w]hat the hell does that mean?” 2RP 92.

At that point, counsel said that he would “stand by” his motion but would abide by the court’s ruling if it said “late discovery.” 2RP 92. Counsel then asked for “at least the lunch hour” to try to “see if anything can be done about this.” 2RP 92.

In denying the motion, the court said first that the discovery was “late” and the court did not know why. 2RP 92-93. The judge then said he could not “comment on the veracity of the evidence” but that he

thought a witness had testified that usually if there is a quash that needs to be set up because of medical emergency, “that the health care information is provided to you or provided to the prosecuting attorney as a basis for the quash.” 2RP 93. The judge then declared, “it doesn’t sound like there’s any way that given the delay in providing this information that it could be asserted that that happened in this case.” 2RP 93. Counsel then pointed out that the omnibus order which said that the discovery was completed was before the offense date in question. 2RP 94.

At that point, the court said it was now looking at a November 9 omnibus order which “indicates that the defense is investigating defendant’s hospital records,” almost a month before. 2RP 94. The court said, “[t]oday is December 3<sup>rd</sup>, so I believe that the defense has had adequate time to research the defendant’s hospital records.” 2RP 94.

Later, during direct examination of Kasbaum, counsel elicited testimony that Kasbaum had gone to St. Francis Hospital for treatment. 2RP 104. Counsel then asked for a “quick side bar.” 2RP 104. After Kasbaum’s testimony was through, the parties put that sidebar on the record, noting that counsel had asked to be allowed to refresh Kasbaum’s recollection of which hospital he had gone to with the records and the court had denied that request. 2RP 117. The court said that Kasbaum had not indicated a lack of memory and that the documents indicated no treatment had been received at “St. Joseph’s, St. Francis, Enumclaw Regional hospital and St. Anthony’s.” 2RP 119. Another document had the name of “St. Clare’s Hospital in Lakewood.” 2RP 119.

Later, in cross-examining Kasbaum, the prosecutor questioned

Kasbaum's failure to provide evidence that would prove that Kasbaum had, in fact, gone to get medical treatment on September 21:

Q: Okay. Did you see a nurse or a doctor?

A: I walked in and - -

Q: A nurse or a doctor.

A: It was - - I believe it was a nurse at the front desk.

Q: All right. Is that person here today?

A: No, because you objected [to] it.

Q: Is that person, yes or no, here today?

A: No.

2RP 111.

In initial closing argument, the prosecutor addressed the "medical condition" affirmative defense, saying the defense had to give some evidence "that shows the defendant needed to be hospitalized or that he needed to receive treatment," then said, "[w]here's the evidence?" 2RP 131-32. A moment later, the prosecutor questioned Kasbaum's claim that he was seen by a nurse, saying, "[o]kay. Where's that person? Not here." 2RP 132. The prosecutor also said, "[w]e saw no x-rays. We saw no medical records." 2RP 132. He then argued that the defense of "uncontrollable circumstances" did not apply. 2RP 133.

In rebuttal closing argument, the prosecutor returned to this theme, telling the jury that Kasbaum had not provided "any medical information whatsoever" and seemed able to use his hand on the stand. 2RP 139. The prosecutor concluded, "[t]here's no signs there [of injury], and he provided you with no documentation or proof to show that he had any, so I'm

asking you to find him guilty of both counts.” 2RP 139.

- b. Kasbaum’s rights were violated by exclusion of medical evidence which was relevant, necessary and material to his defense

The right to present a defense ensures the defendant has the opportunity to “put before a jury evidence that might influence the determination of guilt.” Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). Further, a defendant is entitled to a “fair opportunity to defend against the State’s accusations.” Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, cert. denied, 508 U.S. 953 (1993). While this right does not guarantee the defendant the opportunity to admit irrelevant, immaterial evidence, it does ensure that he is allowed to present evidence which is relevant and material to establish his defense. See, e.g., State v. Bell, 60 Wn. App. 561, 565, 805 P.2d 815, review denied, 116 Wn.2d 1030 (1991).

In this case, Kasbaum was charged with bail jumping under RCW 9A.76.170. See CP 31-32. The elements of that crime are 1) the defendant was held for, charged with or convicted of a particular crime, 2) the defendant had been ordered to make a subsequent personal appearance before, *inter alia*, a court, 3) the defendant had knowledge of that requirement to appear and 4) that he failed to appear. See State v. Downing, 122 Wn. App. 185, 192, 93 P.3d 900 (2004); RCW 9A.76.170(1).

Under RCW 9A.76.170(2), the crime of “bail jumping” is subject

to an affirmative defense of “uncontrollable circumstances,” which requires the defendant to prove that such circumstances prevented them from appearing at the relevant time, that they did not contribute to the creation of the circumstances “in reckless disregard of the requirement to appear,” and that they appeared as soon as the circumstances “ceased to exist.” RCW 9A.76.170(2); see State v. Frederick, 123 Wn. App. 347, 97 P.3d 47 (2004). “Uncontrollable circumstances” are defined in RCW 9A.76.010(4) to include “a medical condition that requires immediate hospitalization or treatment[.]”

Here, Kasbaum was raising this defense to the September 21 charges, and the trial court abused its discretion and violated Kasbaum’s rights to present a defense by excluding the medical evidence Kasbaum sought to introduce. First, the excluded evidence was obviously relevant to Kasbaum’s defense, because it would have supported Kasbaum’s testimony that he had gone to get treatment because of the seriousness of his injury. Second, the excluded evidence was “material.” That evidence went directly to Kasbaum’s only defense and would have provided crucial support for Kasbaum’s testimony.

In arguing to exclude the evidence, the prosecutor focused in large part on his belief that the evidence was not admissible under the rules of evidence. See 2RP 50-52. But those rules are not the ultimate arbiter of what evidence is admissible when the defendant’s right to present a defense is involved. See State v. Jones, 168 Wn.2d 713, 723-24, 230 P.3d 576 (2010); State v. Hieb, 107 Wn.2d 97, 105-16, 727 P.2d 239 (1986). Instead, in such situations, “the rules of evidence do not circumscribe the

limits of constitutional rights.” State v. Anderson, 107 Wn.2d 745, 749-50, 733 P.2d 517 (1987).

As a result, evidence which is relevant and material to a defendant’s defense cannot be excluded under an evidentiary rule or statute unless the governmental interests the rule or statute furthers outweigh the defendant’s interests in his rights. State v. Baird, 83 Wn. App. 477, 482-83, 922 P.2d 157 (1996), review denied, 131 Wn.2d 1012 (1997); see also Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed.2d 504 (2006) (rules excluding evidence may violate the right to present a defense if the rules are disproportionate to the purposes they are designed to serve). And where evidence has high probative value to the defense, “no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. Art. 1, § 22” rights to present a defense. Hudlow, 99 Wn.2d at 16; Jones, 168 Wn.2d at 723-24.

Thus, in Jones, the Supreme Court recently held that, even if evidence would have been inadmissible under the “rape shield” law, the exclusion of that evidence violated the state and federal rights to present a defense because the evidence had “high probative value” to the defendant’s defense. Jones, 168 Wn.2d at 720-21. Specifically, the Court declared, the evidence “could not be restricted regardless how compelling the State’s interest” in doing so and despite the provisions of the rape shield law. 168 Wn.2d at 720-21; see also Baird, 83 Wn. App. 483 (evidence which would be excluded under the Washington Privacy Act may be admissible to vindicate the defendant’s right to present a defense).

Here, the evidence excluded by the court was of “high probative value” to Kasbaum’s defense. Indeed, it was crucial, because it was the only evidence other than Kasbaum’s testimony which would have supported the defense.

The trial court’s error in excluding the medical evidence was only exacerbated by the prosecutor’s misconduct regarding the evidence. It is improper and misconduct for a prosecutor to denigrate the defendant for failing to present evidence when that “failure” was actually based upon the prosecutor’s successfully moving to exclude it. State v. Kassahun, 78 Wn. App. 938, 952, 900 P.2d 1109 (1995). Thus, in Kassahun, such misconduct occurred when the prosecutor first moved to exclude evidence that the victim and witnesses were gang members and involved in gang activity outside the defendant’s store and then belittled the defendant during closing argument because the defendant had said he had felt threatened by gang activity because there had been no evidence of such activity presented at trial. 78 Wn. App. at 952. Using the absence of the very evidence the state had moved to exclude in arguing that the defendant’s claims of fear and self-defense were not credible was serious misconduct, the Court held, because it was the prosecution’s own efforts which kept the evidence out. 78 Wn. App. at 952.

Here, just as in Kassahun, the prosecutor committed serious, prejudicial misconduct. After first successfully preventing Kasbaum from presenting the medical records - and, indeed, preventing counsel from getting a continuance to get more support for those records - the prosecutor then repeatedly faulted Kasbaum for failing to present evidence

to support his claim that he was at the hospital and missed his court date on September 21. First in cross-examination, the prosecutor intimated that Kasbaum was lying about that claim because he had not presented the doctor or nurse he saw that day, i.e., evidence to support the claim. 2RP 110-11. Then, in initial closing argument, the prosecutor argued Kasbaum had failed to present evidence to prove the claim that he had been to the hospital and seen by a nurse because that nurse was “[n]ot here” and Kasbaum had not presented x-rays or “**medical records.**” 2RP 132-33 (emphasis added). And then, in rebuttal closing argument, the prosecutor again faulted Kasbaum for failing to provide “any medical information whatsoever” and “no documentation or proof” to show any injury, asking the jury to therefore find Kasbaum guilty. 2RP 139.

Thus, just as in Kassahun, after first successfully moving to exclude the medical records Kasbaum wanted to use, the prosecutor then faulted Kasbaum for failing to present those same records to the jury. And just as in Kassahun, this argument of the prosecutor was flagrant, prejudicial misconduct. This Court should so hold

- c. Reversal is required because the prosecution cannot meet the heavy burden of proving this serious violation of Kasbaum’s fundamental constitutional rights constitutionally harmless

Reversal is required. Exclusion of evidence relevant and necessary to the defense is constitutional error because it “deprives the defendant of the basic right to have the prosecutor’s case encounter and survive the crucible of meaningful adversarial testing.” See Crane v. Kentucky, 476 U.S. 683, 690-91, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). Thus, if the

trial court excludes evidence which is relevant and material to the defense, reversal is required unless the prosecution can prove the constitutional error harmless. See State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied sub nom Washington v. Guloy, 475 U.S. 1020 (1986).

The prosecution cannot meet that heavy burden in this case. The constitutional harmless error test is only met if the state can prove, beyond a reasonable doubt, that the jury would have reached the same result if the evidence had been admitted. See Maupin, 128 Wn.2d at 929. It is important to note that this is a far different standard than the one employed when the issue on review is the sufficiency of the evidence. Where the question is sufficiency, this Court uses a relatively deferential standard, looking to see if the evidence, taken in the light most favorable to the state, would be enough for *any* rational fact-finder to convict. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). In addition, the burden is on the defendant to prove that the evidence was so deficient that no reasonable fact-finder could have made the required findings below. See, e.g., State v. Eckenrode, 159 Wn.2d 488, 496, 150 P.3d 1116 (2007).

In stark contrast, to prove a constitutional error “harmless,” the prosecution bears the burden of showing that *every* reasonable fact-finder would have convicted even if the error had not occurred. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Indeed, constitutional error is presumed prejudicial. Id. Rather than being deferential, the standard for

constitutional harmless error, the “overwhelming evidence test, requires the Court to reverse unless it is convinced - beyond a reasonable doubt - that the constitutional error could not have had *any* effect on the fact-finder’s decision to convict. Easter, 130 Wn.2d at 242.

Thus, even when there is enough evidence to uphold a conviction against a “sufficiency of the evidence” challenge, that is not enough to meet the “overwhelming evidence” test. See, e.g., State v. Romero, 113 Wn. App. 779, 783-85, 54 P.3d 1255 (2002). Romero is instructive. In Romero, the defendant was accused of having shot a gun in a mobile home park. 113 Wn. App. at 783. In addition to the evidence that Mr. Romero ran from the officers and was seen in the area of the crime just after the shooting, officers also found a shotgun inside the mobile home where Mr. Romero was hiding, and shell casings on the ground next to the mobile home’s front porch. Romero, 113 Wn. App. at 783. Descriptions of the shooter seemed to point to Mr. Romero, and an eyewitness testified to seeing him shooting the weapon. 113 Wn. App. at 784. Although the witness was “one hundred percent” positive the shooter was Romero, the witness remembered seeing that man wearing a blue-checked shirt, rather than a grey-checked shirt Romero had. 113 Wn. App. at 784. And although another man, wearing a blue-checked shirt, was also with Romero that night, when shown the shirt Romero was wearing the eyewitness identified it as the one the shooter had worn. 113 Wn. App. at 784.

In reversing, the court of appeals rejected Romero’s argument that the evidence was insufficient, taking the evidence in the light most

favorable to the state. 113 Wn. App. at 794. But the same evidence the Court found adequate to support the conviction against a sufficiency challenge was *not* enough when the constitutional harmless error standard applied. 113 Wn. App. at 793. Even though there was significant evidence that Romero was guilty, that was not sufficient to amount to “overwhelming” evidence of guilt, sufficient to find the constitutional error harmless. 113 Wn. App. at 795-96. Indeed, the Court held, because the evidence was disputed, the jury was “[p]resented with a credibility contest,” and “could have been swayed” by the constitutional error (in that case an officer’s comment that Romero had not spoken to police, “which insinuated that Romero was hiding his guilt”). 113 Wn. App. at 795-96.

The Romero decision serves to highlight the differences between the amount of proof of guilt required to be sufficient to support a conviction in cases where the challenge is to sufficiency of the evidence versus when the issue is whether the evidence is so overwhelming that it overcomes the presumption of reversal for a constitutional error. Here, just as in Romero, there may be evidence from which a reasonable jury could find Kasbaum guilty of bail jump. But just as in Romero, the jury was presented with a credibility evaluation i.e., whether to believe Kasbaum and therefore find that he had proven the affirmative defense. The excluded evidence was directly relevant to that credibility evaluation, because it would have provided support Kasbaum’s defense. The prosecution cannot meet its burden of proving that no reasonable juror would have failed to convict Kasbaum even if the excluded evidence had been admitted, and the prosecution thus cannot prove the constitutional error harmless.

The trial court erred and violated Kasbaum's rights to present a defense by excluding evidence which was relevant and material to Kasbaum's defense, and the prosecution committed flagrant, prejudicial misconduct by exploiting that exclusion. The constitutional error cannot be found harmless, and reversal and remand for a new trial is required.

E. CONCLUSION

For the reasons stated herein, reversal of the conviction for the September 21, 2009, alleged bail jump is required.

DATED this 15<sup>th</sup> day of April, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL STATE OF WASHINGTON  
BY KRS

Under penalty of perjury under the laws of the State of Washington,  
I hereby declare that I sent a true and correct copy of the attached  
Appellant's Opening Brief to opposing counsel and to appellant by  
depositing the same in the United States Mail, first class postage pre-paid,  
as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,  
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. Jay Kasbaum, DOC 768386, Airway Heights CC, P.O. Box  
1899, Airway Heights, WA. 99001-1899

DATED this 18<sup>th</sup> day of April, 2011.



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