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No. 40448-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

John Lundy,

Appellant.

Thurston County Superior Court Cause No. 09-1-00576-5

The Honorable Judge Wm. Thomas McPhee

Appellant's Reply Brief

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ARGUMENT

I. MR. LUNDY’S TRIAL WAS INFECTED BY IMPROPER JUDICIAL COMMENTS ON THE EVIDENCE IN VIOLATION OF WASH. CONST. ARTICLE IV, SECTION 16.

Evidence admitted at Mr. Lundy’s trial¹ incorporated clear judicial comments on the evidence, including that the court had “found probable cause for initial arrest and detention” (relating to the stolen car and UIBC charges), and three separate findings that “after proper notice the Defendant has failed to appear as scheduled for [the] hearing.” Exhibits 9, 15, 27, 35. Such judicial comments are structural error, and are not subject to harmless error analysis. Wash. Const. Article IV, Section 16; *State v. Jackman*, 125 Wash. App. 552, 560, 104 P.3d 686 (2004). Respondent’s suggestion—that the “focus of the defense” and Mr. Lundy’s acknowledgments eliminated the prejudice—is directed at harmless error, and is therefore irrelevant. Brief of Respondent, p. 12; *Jackman*, at 560.

Mr. Lundy’s trial was infected by these judicial comments. His convictions must be reversed and the case remanded for a new trial. *Id.*

¹ Contrary to Respondent’s assertion, Mr. Lundy did not “stipulate[] to the bench warrant orders being admitted,” and he certainly did not waive his right to a trial free of judicial comment. Brief of Respondent, p. 11. Instead, counsel initially voiced a vague objection, and then withdrew the objection. RP (1/26/10) 194.

II. IMPROPER OPINION TESTIMONY VIOLATED MR. LUNDY’S RIGHT TO A JURY TRIAL.

Opinion testimony may violate an accused person’s constitutional right to a jury trial. *State v. Kirkman*, 159 Wash.2d 918, 155 P.3d 125 (2007); *State v. Black*, 109 Wash.2d 336, 745 P.2d 12 (1987). Here, the state elicited an opinion that Mr. Lundy did not “offer any bona fide explanation for not being present [in court].” RP (1/26/10) 227. The inclusion of the phrase “bona fide” transformed what might have been a simple factual statement—that Mr. Lundy did not offer any explanation other than his confusion—into an opinion that he was guilty. This invaded the province of the jury, and created a manifest error affecting Mr. Lundy’s state and federal right to a jury trial. RAP 2.5(a)(3); *Kirkman*, at 937.

The error is presumed prejudicial, and Respondent has made no attempt to argue otherwise. Brief of Respondent, pp. 14-15; *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). Because the error was not harmless beyond a reasonable doubt, Mr. Lundy’s convictions must be reversed and the case remanded for a new trial. *Id.*

III. THE INTRODUCTION OF PROPENSITY EVIDENCE VIOLATED MR. LUNDY'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A conviction based on propensity evidence may violate due process under the Fourteenth Amendment.² U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775-778 (9th Cir. 2001), *reversed on other grounds* at 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993). When evidence that might show criminal propensity is introduced, the court must give a proper limiting instruction. *State v. Russell*, 154 Wash.App. 775, 225 P.3d 478 (2010), *review granted* 169 Wash.2d 1006, 234 P.3d 1172 (2010) (addressing evidence admitted under ER 404(b)). Absent a proper instruction, jurors may imply guilt from evidence of propensity; this is especially true when jurors are required to consider “all of the evidence” relating to a proposition. Instruction No. 1, CP 24. *See also Russell*, at 483-484.

Here, evidence showed that Mr. Lundy had written numerous bad checks (in addition to the checks that were the subject of Counts I-III). RP (1/26/10) 175-186; Exhibit 40. The court did not instruct the jury that the evidence was to be considered only to establish Mr. Lundy's intent,

² The U.S. Supreme Court has expressly reserved ruling on a very similar issue. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

knowledge, or absence of mistake. CP 22-40. As in *Russell*, the error was compounded by Instruction No. 1. CP 24. The prejudice was magnified by the fact that these other “bad acts” were “identical to [those] with which the defendant [was] charged.” *State v. Newton*, 109 Wash.2d 69, 76-77, 743 P.2d 254 (1987).

Respondent does not address the trial judge’s failure to provide a limiting instruction. Brief of Respondent, pp. 15-18. This failure to argue the issue may be treated as a concession. *See, e.g., In re Pullman*, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009). Assuming the evidence was properly admitted for a limited purpose, the court’s failure to provide a limiting instruction requires reversal. *Russell, supra*.

The failure to provide a proper limiting instruction resulted in a conviction improperly based on propensity evidence. *Garceau, supra; Russell, supra*. This violated Mr. Lundy’s Fourteenth Amendment right to due process, and requires reversal of the UIBC convictions. *Id.*

IV. THE EVIDENCE WAS INSUFFICIENT TO PROVE BAIL JUMPING AS CHARGED IN COUNT IV.

Bail Jumping requires proof “that the defendant has been given notice of the required court dates.” *State v. Fredrick*, 123 Wash.App. 347, 353, 97 P.3d 47 (2004). This includes notice of the time for the hearing. *State v. Coleman*, 155 Wash.App. 951, 231 P.3d 212 (2010).

Here, as in *Coleman*, the defendant signed an order directing him to appear in court at 9:00 a.m. According to the evidence, the hearing was held at 8:30 a.m. Exhibits 13 and 14. His admission that he “did not appear on July 1st for [his] status hearing” establishes only that he was not present at the 8:30 hearing. RP (1/26/10) 313. As in *Coleman*, this evidence was insufficient to prove beyond a reasonable doubt that he failed to appear as required. *Id.*, at 963-964.

Mr. Lundy’s conviction for Bail Jumping in Count IV must be reversed and the charge dismissed with prejudice. *Id.*

V. THE TRIAL COURT VIOLATED MR. LUNDY’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY REFUSING TO INSTRUCT THE JURY ON THE “UNCONTROLLABLE CIRCUMSTANCES” AFFIRMATIVE DEFENSE TO BAIL JUMPING.

Mr. Lundy stands on the argument set forth in his Opening Brief.

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

Mr. Lundy stands on the argument set forth in his Opening Brief.

VII. THE “TO CONVICT” INSTRUCTIONS FOR BAIL JUMPING OMITTED AN ESSENTIAL ELEMENT.

Jury instructions must be manifestly clear. *State v. Kylo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009). A “to convict” instruction must contain all the elements of the charged crime. *State v. Lorenz*, 152

Wash.2d 22, 31, 93 P.3d 133 (2004). Any conviction based on an incomplete “to convict” instruction must be reversed. *State v. Smith*, 131 Wash.2d 258, 263, 930 P.2d 917 (1997).

In this case, Instruction No. 20 omitted an essential element: it failed to require proof that Mr. Lundy was released “with knowledge of the requirement of a subsequent personal appearance...” Instruction No. 20, CP 37.³ None of the three “to convict” instructions for Bail Jumping obligated the prosecution to prove that Mr. Lundy failed to appear “as required.” Instruction Nos. 20-22, CP 37-39.

These omissions relieved the prosecution of its burden to prove the essential elements of Counts IV and VI, and created a manifest error affecting Mr. Lundy’s Fourteenth Amendment right to due process. RAP 2.5(a)(3). *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009); *Smith, supra*. Without explanation, Respondent asserts that the instructions “did make the relevant legal standard manifestly apparent.” Brief of Respondent, p. 30. Respondent’s assertion is apparently based on Instruction No. 19, which differs from Instruction Nos. 20-22 in that it *does* include the required language. Brief of Respondent, p. 30. The argument is without merit for two reasons.

³ The “to convict” instructions for the other Bail Jumping charges correctly set forth the knowledge requirement. Instruction Nos. 21 and 22, CP 38-39.

First, the discrepancies between the four instructions cannot possibly have made the relevant standard manifestly apparent. The instructions contradicted one another, and the jury received no guidance for resolving the conflict. Where inconsistency in a court's instructions results from a clear misstatement of the law, the inconsistency is presumed to have misled jurors in a manner prejudicial to the defendant. *State v. Walden*, 131 Wash.2d 469, 478, 932 P.2d 1237 (1997), *citing State v. Wanrow*, 88 Wash.2d 221, 239, 559 P.2d 548 (1977); *see also State v. Carter*, 127 Wash. App. 713, 718, 112 P.3d 561 (2005).

Second, the jury is entitled to regard the "to convict" instruction as a complete statement of the law; it serves as a yardstick by which the jury measures the evidence. *State v. Lorenz*, at 31. The "to convict" instructions were deficient; the deficiencies cannot be corrected by language in another instruction. *Id.*

The errors are presumed prejudicial, and Respondent has failed to establish harmless error under the stringent test for constitutional error. *Toth*, at 615. Furthermore, because the jury may have assumed that Instructions 20 and 22 were identical, the convictions for Counts IV and VI are infected by the omission of the knowledge requirement in Instruction No. 20. Accordingly, Mr. Lundy's Bail Jumping convictions must be reversed and the case remanded for a new trial. *Id.*

VIII. THE TRIAL COURT VIOLATED THE SUPREME COURT’S ORDER APPROVING WPIC 4.01 AS THE EXCLUSIVE MEANS TO INSTRUCT THE JURY ON THE BURDEN OF PROOF AND THE REASONABLE DOUBT STANDARD.

Because the Supreme Court has adopted WPIC 4.01 as the exclusive means of instructing the jury regarding the burden of proof, failure to use WPIC 4.01 requires reversal, unless the instruction used in its place is an improvement upon WPIC 4.01. *State v. Castillo*, 150 Wash.App. 466, 472-473, 208 P.3d 1201 (2009) (citing *State v. Bennett*, 161 Wash.2d 303, 318, 165 P.3d 1241 (2007)).

Here, the trial judge did not use WPIC 4.01. Instruction No. 9 omitted the following language:

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged.

WPIC 4.01. Instruction No. 9 also added language not contained in WPIC 4.01: “Each crime charged by the State includes one or more elements which are explained in a subsequent instruction.” CP 29.

The trial court’s nonstandard instruction is not the “simple, accepted, and uniform instruction” adopted by the Supreme Court. *Bennett*, at 318. Nor is it an improvement on that instruction, as required under *Castillo*, *supra*. By omitting the language quoted above (and by inserting an additional sentence), Instruction No. 9 accomplishes the “ever so slight[.]” shift warned of in *Bennett*, redirecting the jury’s focus away

from the defendant's plea of not guilty and from the fact the fact that *every* element is at issue. *Bennett, at 317; WPIC 4.01.*

Because Instruction No. 19 is not an improvement over WPIC 4.01, Mr. Lundy's conviction must be vacated and the case remanded for a new trial. *Castillo, supra; Bennett, supra.*

IX. THE TRIAL JUDGE FAILED TO PROPERLY DETERMINE MR. LUNDY'S OFFENDER SCORE.

Mr. Lundy's Judgment and Sentence includes written findings of fact. CP 4-7. These findings include a recitation of his criminal history. CP 5-6. The court did not make a written finding establishing that Mr. Lundy was confined from 1997-2007. CP 5-6. Under the court's written findings, any prior Class C offenses washed out during that period. RCW 9.94A.525.

Respondent implies that the court *did* make an oral finding that Mr. Lundy was incarcerated from 1997-2003 (based on Mr. Lundy's answers to questions from the bench). Brief of Respondent, pp. 35-36. But a court's oral findings are provisional, and are superseded by written findings. *See, e.g., State v. Pruitt*, 145 Wash.App. 784, 797, 187 P.3d 326 (2008). Furthermore, Mr. Lundy retained a right to remain silent pending sentencing; he should not have been subject to judicial questioning on a matter that had the potential to increase his offender score and standard

range. *Mitchell v. United States*, 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999).

The trial court's written findings support an offender score of seven for each charge. CP 5-6; RCW 9.94A.525. Based on the trial judge's written findings, the calculation of Mr. Lundy's offender score and standard range was erroneous. See *In re Cadwallader*, 155 Wash.2d 867, 874, 123 P.3d 456 (2005); *In re Goodwin*, 146 Wash.2d 861, 873-874, 50 P.3d 618 (2002). Accordingly, Mr. Lundy's sentence must be vacated, and the case remanded for resentencing with an offender score of seven.

X. THE TRIAL COURT ERRED BY IMPOSING AN EXCEPTIONAL SENTENCE.

It is "well established" that a 'free crimes' determination cannot be made by a judge, because (under Supreme Court precedent) such a determination requires factual findings beyond mere recidivism. *State v. Flores*, 164 Wash.2d 1, 20, 186 P.3d 1038 (2008); *State v. Hughes*, 154 Wash.2d 118, 110 P.3d 192 (2005), *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). Respondent argues to the contrary, citing both irrelevant authority and authority that has been overruled. Brief of Respondent, p. 37, *citing Bennett, supra; State v. Van Buren*, 123 Wash.App. 634, 98 P.3d 1235 (2004), *review granted in part, cause remanded at* 154 Wash.2d 1032, 119

P.3d 852 (2005); and *State v. Alkire*, 124 Wash.App. 169, 100 P.3d 837 (2004), review granted in part, cause remanded at 154 Wash.2d 1032, 119 P.3d 852 (2005). *Bennett* does not refer to the ‘free crimes’ aggravating factor. *Van Buren* and *Alkire* were both overruled *sub silentio* by *Hughes*, *supra*.

The error is not subject to harmless error analysis. *State v. Recuenco*, 163 Wash.2d 428, 440, 180 P.3d 1276 (2008) (citing Wash. Const. Article I, Section 21).⁴ Because there was neither a stipulation nor a jury determination on the ‘free crimes’ aggravating factor, the exceptional sentence violates Mr. Lundy’s right to a jury trial under the state and federal constitutions. *Flores*, *supra*.

In addition to the constitutional error, the trial judge failed to find sufficient facts to support the exceptional sentence. CP 5-6. Accordingly, the court’s findings do not support an exceptional sentence under RCW 9.94A.535(2)(b) and (c). Mr. Lundy’s sentence must be vacated and the case remanded for sentencing within the standard range. *Hughes*, *supra*.

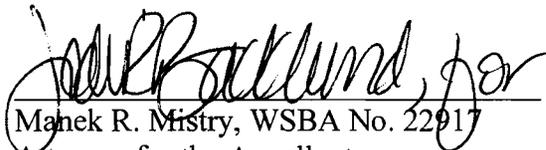
⁴ By contrast, harmless error analysis *does* apply under federal law. *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

CONCLUSION

Mr. Lundy's convictions must be reversed. Count IV must be dismissed with prejudice; the remaining counts must be remanded for a new trial. In the alternative, the sentence must be vacated, and the case must be remanded for resentencing with an offender score of seven.

Respectfully submitted on December 6, 2010.

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CERTIFICATE OF MAILING

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

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and to:

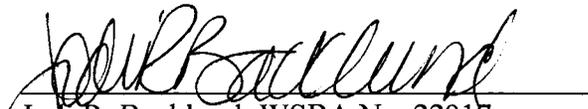
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 6, 2010.



Jodi R. Backlund, WSBA No. 22917
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BY _____
DATE _____
TITLE _____
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