

No. 40448-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN MATTHEW LUNDY
Appellant.

FILED
COURT OF APPEALS
DIVISION TWO
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STATE OF WASHINGTON
BY 
DEPUTY

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

The Honorable, Judge Wm. Thomas McPhee
Cause No. 09-1-00576-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the trial court improperly comment on the facts of the case?
2. Did Witness Ms. McIntosh's testimony improperly include an opinion of Mr. Lundy's guilty?
3. Did the trial court improperly admit propensity evidence against Mr. Lundy?
4. Was there sufficient evidence to convict Mr. Lundy beyond a reasonable doubt of bail jumping as charged in Count 4?
5. Did the Court did err in refusing to instruct the jury on the affirmative defense of "uncontrollable circumstances"?
6. Did trial counsel provide Mr. Lundy with effective assistance of counsel?
7. Were the trial court's jury instructions, reviewed as a whole, a proper statement of law that allowed both sides to argue their respective theory of the case? 7(a) If there was error, was it harmless?
8. Was the trial court's "reasonable doubt" instruction to the jury a correct statement of law? 8(a) If there was error, was it harmless?
9. Did the trial court correctly calculate Mr. Lundy's offender score?
10. Did the trial court correctly and properly impose an exceptional sentence based on the "free crimes" aggravating factor?

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of facts with the following corrections and additions.

On March 7, 2009, Mr. Lundy signed a contract to purchase a truck from Mr. Chris Gay. [RP 62-4]. The contract stated:

I Chris Gay will sell my 1989 Chevrolet 1500 Silverado Pick up Truck as is to John Lundy (Name of buyer) on 3-7-09 (Date) In return for a down payment of 240.00 and 9 payments of 250.00 and one final payment of 60.00. Upon the clearing of the funds I will sign the title of ownership over to the buyer. In the event of non payment of the full amount (\$2550) by 5-22-2009 or if the payment schedule is not met and the buyer is more than two weeks behind in payments the truck will also be returned to the original owner and no title transfer will take place. If any of the above payment terms are not met, no transfer of ownership will take place. If any of the above payment terms are not met, no transfer of ownership will take place and no funds will be returned to the buyer. It is the buyer's responsibility to have full insurance coverage of the vehicle and to maintain the vehicle during the time in which the title is held by the seller/original owner. In the event that any of the terms of payment are not met, the truck will be returned in the same condition as it was when sold.

[Exhibit 2, Supp. CP.]. Both Mr. Lundy and Mr. Gay signed this contract. [Id.] Before Mr. Lundy had signed the above contract, he had communicated with Mr. Gay numerous times via e-mail. [RP 58-60].

On March 7, 2009, Mr. Lundy gave Mr. Gay a check in the amount of \$240 for his first payment. [RP 65-6]. Mr. Gay deposited the check and received a letter from the Bank of America a few days later stating that the “check was rejected for non-sufficient funds”. [RP 66]. Mr. Gay immediately attempted to contact Mr. Lundy both by e-mail (from their earlier e-mail communications) and from the phone numbers that Mr. Lundy included on the contract. [RP 67-8]. None of his attempts to reach Mr. Lundy were successful and Mr. Lundy never contacted Mr. Gay after he took the truck. [RP 69-70].

After doing additional research to try to locate additional ways to contact Mr. Lundy, on March 16, 2009 Mr. Gay called the police department and reported his truck stolen. [RP 69-71]. On March 27, 2009, Mr. Gay learned that his truck had been recovered by the police; the truck had some damage to both the interior and the exterior of the vehicle. [RP 72-3].

Ms. Bonagofski, an employee of Rochester Lumber (Tru Value), testified that Mr. Lundy wrote two checks to Rochester Lumber on March 16 and March 19 for tools and a Skilsaw. [RP 108-114]. On March 16, the assorted tools purchased by Mr. Lundy were returned for cash, and on March 20, a Mr. Robbins

returned the Skilsaw Mr. Lundy purchased on March 19 for a refund. [RP 113-6 and 172].

Ms. Bonagofski testified that after the Lundy checks were deposited, she received both Lundy checks back returned from her bank as rejected for "non-sufficient funds". [RP 111]. Ms. Bonagofski testified that they tried to reach Mr. Lundy at the address printed on his check and learned that the address belonged to the Thurston County Jail. [RP 112]. Apparently, Mr. Lundy had been released from the jail at that point and there was no other contact information on his check. [RP112].

Mr. Gass, an employee of Rochester NAPA Auto Parts, testified regarding two more Lundy checks that were returned and rejected for non-sufficient funds. [RP 121]. On one of the occasions, Mr. Lundy purchased an alternator on March 13 with a check and a Mr. Robbins returned the alternator (that Mr. Lundy had purchased) for a cash refund on March 14. [RP 126 and 163-4]. Mr. Lundy never contacted the business after his two checks were rejected. [RP 170].

Mr. Lemmon, a fraud investigator with Bank of America, testified regarding Mr. Lundy's checking account. [RP 175-189]. Mr. Lemmon testified that the five checks described above were

issued on Mr. Lundy's checking account and were all denied as there were insufficient funds within Mr. Lundy's account. [RP 176-189]. Mr. Lemmon testified that the only deposits into Mr. Lundy's account totaled \$421.31 consisting of 4 total deposits (the last deposit was in the amount of \$25.00 on March 16). [RP 177-9]. However, Mr. Lemmon listed 23 checks totaling \$1,976.08 that Mr. Lundy wrote between January 30 and March 5; all of these checks were rejected based on non-sufficient funds in Mr. Lundy's account. [RP 181-3].

Regarding the bail jumping charges, Ms. McIntosh, an employee of Thurston County Pretrial Services for seventeen years, testified regarding her knowledge of court procedure in Thurston County Superior Court. [RP194-8]. Exhibits 10-35 were entered by the stipulation and agreement of the parties. [RP 194]. Ms. McIntosh testified Mr. Lundy did not appear in court on July 1, 2009, September 23, 2009, and October 19, 2009 and the court issued bench warrants on those occasions. [RP 210, 219, and 223-4]. Ms. McIntosh also explained the procedures for how Mr. Lundy appeared back in court on those warrants. [RP 210-228]. On November 2, 2009, Ms. McIntosh discussed with Mr. Lundy his non-appearances on this case:

Q. Mr. Lundy has indicated in the stipulation that he was back in custody for a court hearing on November 2nd. Did you get a chance to meet with Mr. Lundy prior to his court appearance that – for that occasion?

A. I saw him on November 2nd.

Q. And did you talk with him about the non-appearances that he had in these cases?

A. Yes.

Q. And did he indicate to you that he was in custody at any time on any of the other – on that warrant or any of the previous warrants?

A. He stated that he had had other conflicting court dates.

Q. And just was apparently confused?

A. Yes.

Q. But did not offer any – did he offer any bona fide explanation for not being present, other than the confusion?

A. No. He just stated that he was out on bail in other matters, had confused the court dates, and wasn't sure. He was – he confused the court date with another one that he had in another jurisdiction.

[RP 226-7].

Ms. Lundy, the appellant's wife, was called as a defense witness. [RP 262]. Ms. Lundy testified that she started living with Mr. Lundy in June, 2009 and they married in September, 2009. [RP 264]. She testified that Mr. Lundy missed his court appearances "quite a few" times but that it was "not intentional". [RP 265]. She testified to numerous court hearings including the Chehalis tribal court that made it difficult for them to attend court in

Thurston County Superior Court. [RP 266]. However, Ms. Lundy was unclear on the exact dates. [RP 276]. She also testified that Mr. Lundy had Court hearing conflicts in Pierce County. [RP 279]. She was also unsure what he missed certain court dates and why he did not turn himself in on the first available date after he missed his court hearings in Thurston County Superior Court. [RP 279-81].

The appellant himself testified. [RP 285-317]. Mr. Lundy testified he was serving a sentence on the work release program at the Thurston County Jail which allowed him to work during the day and reside at the jail when he was not working. [RP 287-293]. He testified that his first checks from work he cashed. [RP 291-2]. He opened up a checking account with Bank of America set up direct deposit "towards the end of my job there". [RP 292]. Mr. Lundy stated, "[M]y employment at Ace Industrial ended as I was released from the work release program here; and so they never completed my direct deposit requests." [RP 293]. Mr. Lundy agreed that he had written a lot of checks and agreed that he probably wrote checks totaling over \$2,000. [RP 308].

Mr. Lundy stated, "I've missed quite a few court dates; I didn't know the specific dates that I missed – until I looked over the paperwork." [RP292]. Mr. Lundy stated that he had received notice

and signed to appear for the court hearings on July 1 (Count 4) and October 19 (Count 6) and that he subsequently failed to appear in court for both of those hearings. [RP 313-4]. Mr. Lundy did not acknowledge that he had received notice for the September 23 court hearing (Count 5).

When asked on direct examinations what he did when he discovered he missed a court date, he said he called the bail bondsman so “they weren’t going to come kick our door in”. [RP 292]. Then, Mr. Lundy said he would turn himself in “as soon as possible”. [RP 294]. Mr. Lundy further explained:

Well, I didn’t – sometimes I didn’t miss court and then the very next morning go, oh, I missed court yesterday. I mean, at the time I had ongoing cases in Pierce County, Chehalis tribal, Chehalis municipal, here in two different courts, and in Tumwater. So sometimes I didn’t realize the very next day that I missed court. There was one time that I – it was ten days later that I realized I missed court.

[RP 295].

As to the “bad” checks, Mr. Lundy stated that he wrote the checks to Mr. Gay, Rochester Lumber and Rochester NAPA Auto Parts but didn’t realize that he had insufficient funds to cover the checks. [RP 301-4]. When asked on direct examination to explain

how he was missing court hearings and “bouncing checks”, Mr. Lundy said it was “unintentional”. [RP 304].

When asked about receiving bank statements on cross-examination, Mr. Lundy stated:

When I got released from work release, I wasn't following through with my – with my drug and alcohol treatment, and a forwarding address was the last thing on my – on my mind.

[RP 308].

Mr. Lundy agreed that he had written quite a few checks totaling over thousands of dollars in checks when he got out of the work release program. [RP 308 and 316].

Mr. Lundy was convicted of possession of stolen motor vehicle, one count of felony unlawful issuance of bank checks, one count of gross misdemeanor unlawful issuance of bank checks and two counts of bail jumping; he was acquitted of one count of bail jumping (Count 5). [RP 414-5].

At the sentencing hearing, the State provided to the trial court the defendant's criminal history and as part of that packet provided a certified judgment and sentence for Snohomish County Superior Court Cause No. 97-1-00944-2 entered on September 5, 1997 which imposed a prison term of 84 months for the crime of

assault in the second degree with a deadly weapon enhancement.
[Plaintiff's Supp. Designation of Clerk's Papers, Plaintiff's
Statement of Criminal History, pages 6-17].

At sentencing, Mr. Lundy stated:

Looking at my criminal history, I'm a horrible person. I've spent most of my life in prison. And when I was released in 2003 I vowed that I would never see the inside of a prison again. And in 2004 I made over \$100,000 and 2005 I tried meth.

[2-4-10, RP 14].

Mr. Lundy later told the court:

I apologize for wasting your time. I apologize to the people that I stole from, but I've got one violent crime and after I almost killed that guy, I stopped. That's it. I walked out of Walla Walla and vowed to never be back.

[2-4-10, RP 16].

The court then engaged in the following discussion with the defendant:

THE COURT: When you were released from prison in 2003, was that at the end of your sentence for the assault second and possession of stolen property?

THE DEFENDANT: It was.

THE COURT: So from '97 to 2003 you were in the institutions?

THE DEFENDANT: I was incarcerated.

[2-4-10, RP 16].

Based on the defendant's extensive criminal history (Mr. Lundy had an offender score of 23.5 on Count 1 and offender scores of 14.5 on Count 2, 4, and 6), the court imposed an exceptional sentence of 70 months on Count 1 pursuant to RCW 9.94A.535(2)(b),(c). [2-4-10, RP 18-22 and CP 6]. The standard range for this count was 43-57 months. The Court ran the other counts concurrently. [2-4-10, RP 18-22 and CP 6].

Mr. Lundy's appeal was timely filed.

C. ARGUMENT.

1. The trial court did not improperly comment on the facts of the case.

The appellant alleges that the trial judge improperly commented on the facts by admitting evidence, specifically, the bench warrant orders issued by the trial court for the court dates that were the basis of the bail jumping charges. As the defense stipulated to the bench warrant orders being admitted, this allegation is misplaced. [RP 194]. The entire focus of the defense in this case regarding the bail jumping charges was that either the defendant did not know about the court date because of a notice issue (Count 5 on which the jury ultimately acquitted) or the defendant did not intentionally miss court and he was simply

confused because of his many court obligations (Counts 4, 5 and 6 – the jury did ultimately convict Mr. Lundy of Count 4 and Count 6).

The defense acknowledged that the defendant missed the three court hearings which were the basis of the three bail jumping charges; in fact, the defense embraced that fact when they demonstrated that the defendant would always turn himself in on the outstanding bench warrants soon after they were issued. The focus of the defense was that this was a defendant who did not intentionally miss court and when he found out that he missed court he always turned himself in.

The documents that the appellant complains of in his brief were entered by the stipulation and agreement of the parties. The trial court did not improperly comment on the evidence in the case.

2. Witness Ms. McIntosh's testimony did not improperly include an opinion of Mr. Lundy's guilty.

The appellant incorrectly states that Ms. McIntosh “testified that Mr. Lundy did ‘offer any bona fide explanation for not being present’.” [Appellant’s Opening Brief, page 16]. This mischaracterizes the testimony of Ms. McIntosh.

The general rule is that a witness may not offer his or her opinion as to the defendant’s guilt, whether directly or by inference.

Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993). Such an opinion may be reversible error because it violates the defendant's constitutional right to a jury trial, which includes an independent determination of the facts by the jury. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Whether the testimony constitutes an impermissible opinion depends on the circumstances of the case, which include "the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and other evidence before the trier of fact." *Heatley* at 579. The courts do not take an expansive view of claims that testimony constitutes an opinion as to guilt. *Id.*

Regarding the bail jumping charges, Ms. McIntosh, an employee of Thurston County Pretrial Services for seventeen years, testified regarding her knowledge of court procedure in Thurston County Superior Court. [RP194-8]. Exhibits 10-35 were entered by the agreement of the parties. [RP 194]. Ms. McIntosh testified Mr. Lundy did not appear in court on July 1, 2009, September 23, 2009, and October 19, 2009 and the court issued bench warrants on those occasions. [RP 210, 219, and 223-4]. Ms. McIntosh also explained the procedures for how Mr. Lundy appeared back in court on those warrants. [RP 210-228]. On

November 2, 2009, Ms. McIntosh discussed with Mr. Lundy his non-appearances on this case:

Q. Mr. Lundy has indicated in the stipulation that he was back in custody for a court hearing on November 2nd. Did you get a chance to meet with Mr. Lundy prior to his court appearance that – for that occasion?

A. I saw him on November 2nd.

Q. And did you talk with him about the non-appearances that he had in these cases?

A. Yes.

Q. And did he indicate to you that he was in custody at any time on any of the other – on that warrant or any of the previous warrants?

A. He stated that he had had other conflicting court dates.

Q. And just was apparently confused?

A. Yes.

Q. But did not offer any – did he offer any bona fide explanation for not being present, other than the confusion?

A. No. He just stated that he was out on bail in other matters, had confused the court dates, and wasn't sure. He was – he confused the court date with another one that he had in another jurisdiction.

[RP 226-7].

As detailed above, Ms. McIntosh was asked whether Mr. Lundy offered a “bona fide explanation for not being present, other than the confusion”; her answer to this question was “no” and then she provided that Mr. Lundy had told her that he was “confused”.

[RP 226-7]. There was no objection to either the question or the

answer. In no way does this answer intrude on the province of the juror to determine the ultimate fact of guilt or innocence on the charge of bail jumping. Ms. McIntosh was simply asked what Mr. Lundy told her about missing court. There was nothing improper about the question or the answer as detailed above.

3. Propensity evidence was not improperly admitted by the Court against Mr. Lundy.

Pursuant to RCW 9A.56.060, to convict a defendant of unlawful issuance of a check, the State must prove that the defendant made, delivered or drew a check, that the defendant knew there were insufficient funds in the bank to meet the check, and that the defendant acted with the intent to defraud. [RCW 9A.56.060(1); Jury Instruction No. 16 and 18; and RP 339-42]. Evidence that the defendant had seriously underfunded his checking account and written a large number of checks that greatly exceeded the amount of money he deposited in his checking account clearly was evidence of both his intent to defraud and his knowledge that there were insufficient funds in his account to “meet” the checks. As this evidence went to the elements of the crime, it was clearly proper evidence.

In addition to the above argument, Evidence Rule (ER) 401 defines relevant evidence as that which 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 403 provides that all relevant evidence is admissible unless it is limited by statutory, constitutional, or other considerations. ER 404(b) prohibits admitting evidence of a person’s character in order to prove that he acted in conformity with that character trait. However, ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The entire defense theory of this case was that the defendant made a mistake and was a poor bookkeeper. Therefore, evidence of the defendant writing 23 checks over approximately 5 weeks (without balancing deposits) clearly went to proof of motive, intent to defraud, knowledge and absence of mistake or accident.

A trial court has “wide discretion” in balancing the probative and prejudicial values of evidence. *State v. Coe*. 101 Wn.2d 772,

782, 684 P.2d 668 (1984). Unfair prejudice is that which suggests a decision on an improper basis, often, though not necessarily, an emotional one. *State v. Rupe*, 101 Wn.2d 664, 686, 683 P.2d 571 (1984)

The list contained in ER 404(b) is not exclusive. Washington courts also recognize an exception for “res gestae,” or “same transaction,” where “evidence of other crimes is admissible ‘to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.’” *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980) (internal cite omitted). “Under the res gestae or ‘same transaction’ exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime.” *State v. Lillard*, 122 Wn. App. 422, 432, 93 P.3d 969 (2004).

Again, evidence that Mr. Lundy was writing large numbers of checks that were not being honored by the bank in a short period of time was highly relevant to demonstrate his intent to defraud and to show Mr. Lundy’s knowledge that he had insufficient funds to cover the checks he was writing; this evidence also was covering a small

period of time that was the same as Counts 2 and 3 and demonstrated absence of mistake or accident.

4. There was clearly sufficient evidence to convict Mr. Lundy beyond a reasonable doubt of bail jumping as charged in Count 4.

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

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

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

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn

therefrom.” *Salinas, supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Mr. Lundy’s sole contention regarding the State’s evidence on the single count of bail jumping charged in count 4 is that there was insufficient evidence to prove that the defendant failed to appear at his trial status hearing at 9 a.m. on July 1, 2009. Mr. Lundy’s argument fails as he himself testified that he failed to appear for his status hearing on July 1, 2009:

Q. We went over some of the court information. The – at your arraignment back on April 14th, you were assigned a trial date of – or a pre-trial date of May 13th, a pre-trial – or a status hearing on July 1st, and a trial on July 6th. Is that your signature on it?

A. That is.

Q. And you get copies of this. This is a multiple copy form; right?

A. Yes.

Q. Okay. And you obviously did not appear on July 1st for your status hearing; correct?

A. I did not.

[RP 313].

The appellant's reliance on *State v. Coleman*, 155 Wn.App. 951, 231 P. 3d 212 (2010) is misplaced. In *Coleman*, the evidence of bail jumping rested solely on documentary evidence and the Court found that the evidence at trial only supported that the defendant failed to appear at 8:30 a.m. and not at 9 a.m. as contained on the defendant's notice of court hearing. *Id.*, at 963-4. Here, Mr. Lundy himself testified that he did not attend his status hearing as contained on his notice of court hearing. Therefore, there was clearly sufficient evidence to support the jury's finding of guilt on the charge of bail jumping contained in count 4.

5. The Court did not abuse its discretion in refusing to instruct the jury on the affirmative defense of uncontrollable circumstances.

It is an affirmative defense that uncontrollable circumstances prevented the person from appearing if the person did not contribute to those circumstances and "appeared or surrendered as soon as such circumstances ceased to exist." RCW 9A.76.170(2).

“Uncontrollable circumstances” are defined as:

[A]n act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of man such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

RCW 9A.76.010(4).

Mr. Lundy did not offer sufficient evidence to argue the affirmative defense. [RP 353-358]. The trial court did not abuse its discretion in refusing to instruct the jury on an affirmative defense that had no factual support. The trial court ruled:

Counsel, Mr. Lundy, I'm going to deny this motion to instruct the jury on the affirmative defense contained in RCW 9A.76.170(2). There are three possible reasons why I could deny the motion: First, that it's not timely, that it's too late; second, that there was no notice given to the prosecutor on the pretrial notice of that affirmative defense; and third, that the evidence does not support it. I am not ruling that this request is untimely. I'm going to reinstruct the jury at this time in any event, and so I am treating this as a request for an instruction as if the request had been made prior to the time I instructed the jury.

I understand the change that occurred and the reason why it did not – the request was not made before the jury was initially instructed. But I could cure that if I felt that the evidence warranted giving such an instruction.

There was the third reason I mentioned, failure to give notice to permit the prosecutor to respond to the affirmative defense with evidence preceded by

investigation of all of the events or barriers to his appearance here in Thurston County Superior Court that the defendant, Mr. Lundy, alluded to in his testimony, but the second reason that I mentioned, simply inadequate evidence, is really the factor that compels this decision.

I have not been called upon to rule on this affirmative defense in this context in other cases, but I have on many occasions determined whether the evidence is sufficient to submit an instruction to a jury on other affirmative defenses. And so I'm well aware of the law that requires that there be some significant evidence supporting the affirmative defense, not simply the contention in order to instruct the jury.

There is testimony about confusion, testimony about beliefs that the defendant was held in court on one occasion longer than he had anticipated, and so he could not leave that other court, and which court it was was not certain, when it was not certain. But in any event, he could not come to this court. But then as the evidence clearly developed, there was ample opportunity subsequent to that to immediately clear up the issue of his absence, and it is undisputed that the defendant failed to do so. I'm satisfied that here there is simply not sufficient evidence to submit the matter to the jury, and so I deny the motion.

[RP 356-8].

The record of Mr. Lundy's testimony clearly did not establish "uncontrollable circumstances". Mr. Lundy stated that he had received notice and signed to appear for the court hearings on July 1 (Count 4) and October 19 (Count 6) and that he subsequently failed to appear in court for both of those hearings. [RP 313-4]. Mr.

Lundy did not acknowledge that he had received notice for the September 23 court hearing (Count V).

When asked on direct examinations what he did when he discovered he missed a court date, he said he called the bail bondsman so “they weren’t going to come kick our door in”. [RP 292]. Then, Mr. Lundy said he would turn himself in “as soon as possible”. [RP 294]. Mr. Lundy further explained:

Well, I didn’t – sometimes I didn’t miss court and then the very next morning go, oh, I missed court yesterday. I mean, at the time I had ongoing cases in Pierce County, Chehalis tribal, Chehalis municipal, here in two different courts, and in Tumwater. So sometimes I didn’t realize the very next day that I missed court. There was one time that I – it was ten days later that I realized I missed court.

[RP 295].

The above record in no way shows that “uncontrollable circumstances” prevented Mr. Lundy from attending court in Thurston County Superior Court and the trial court was correct in not instructing the jury on the affirmative defense.

6. Trial counsel provided Mr. Lundy with effective assistance of counsel.

Mr. Lundy alleges that he received ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel’s performance was

deficient; and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when "but for the deficient performance, the outcome would have been different." *In the Matter of the Personal Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. *See Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

Mr. Lundy first alleges that trial counsel was ineffective for failing to object to the evidence that Mr. Lundy had written a large number of checks when there were insufficient funds in his checking account to meet and cover the checks that he wrote. [Brief of Appellant, pages 32-3]. As discussed above in section C-

3, this evidence was used directly by the State to prove elements of the crime of unlawful issuance of bank checks which requires proof beyond a reasonable doubt that the defendant had the intent to defraud and that he had knowledge that there were insufficient funds in his checking account to meet and cover the checks he continued to write. This evidence was also properly admitted to address Mr. Lundy's claimed defense that he was confused and a "bad bookkeeper". As the above evidence was highly relevant to the elements of the crime and properly admitted by the court, trial counsel clearly was not ineffective for failing to object.

Mr. Lundy next alleges that his trial counsel was ineffective for failing to object to documents related to his failures to appear in Thurston County Superior Court as required on July 1, 2009 (Count 4), September 23, 2009 (Count 5), and October 19, 2009 (Count 6). [Brief of Appellant, pages 33-5]. As discussed above in section C- 1, the entire focus of the defense in this case regarding the bail jumping charges was that either the defendant did not know about the court date because of a notice issue (Count 5) or the defendant did not intentionally miss court and he was simply confused because of his many court obligations (Counts 4, 5 and 6).

The defense acknowledged that the defendant missed the three court hearings; in fact, the defense embraced that fact when they demonstrated that the defendant would always turn himself in on the outstanding bench warrants “soon” after they were issued. It is also important to note that the defense had planned to not have Mr. Lundy testify but Mr. Lundy decided, as is his right, to testify; his testimony was very incriminating. [RP 285-317].

The focus of the defense was that this was a defendant who did not intentionally miss court and when he found out that he missed court he always turned himself in “soon” after. This was an effective strategic decision by defense counsel and the strategy worked as to Count 5 when the jury acquitted Mr. Lundy of that charge. Again, defense counsel was not ineffective in his representation of Mr. Lundy.

Mr. Lundy next alleges that his trial counsel was ineffective for failing to object to the testimony of Ms. McIntosh. [Brief of Appellant, pages 35-6]. As discussed above in section C-2, Ms. McIntosh was asked whether Mr. Lundy offered a “bona fide explanation for not being present, other than the confusion”; her answer to this question was “no” with further explanation as to what Mr. Lundy told her. [RP 226-7]. In no way does this answer intrude

on the province of the jury to determine the ultimate fact of guilt or innocence. Ms. McIntosh was simply asked what Mr. Lundy told her about missing court. There was nothing improper about the question or the answer as detailed above. Therefore, trial counsel was not ineffective for failing to object to a proper question and answer that did not invade the province of the jury.

Finally, Mr. Lundy takes issue with the fact that his trial counsel proposed the affirmative defense of “uncontrollable circumstances” late in the trial. [Brief of Appellant, pages 36-9]. However, the reason for this late request is clearly explained by trial counsel Mr. King in the record as follows:

MR. KING: Thank you. As I informed the court in chambers, until the last minute, our strategy was not to put the defendant on the stand and testify on his own behalf because of his numerous – or because of his bad record. My client changed his mind, and I understand why, and he did take the stand. And at that time I wondered, well – or actually, last night I wondered, well, did he bring in enough evidence to warrant another instruction on the bail jumping.

And so as we know, bail jumping has an affirmative defense which states that if there are uncontrollable circumstances that prevented the person from appearing or surrendering, that person and – and that person did not contribute to the creation of those circumstances in reckless disregard of the requirement to appear, and the person appeared or surrendered as soon as such circumstances were – ceased to exist, that’s actually statutory language under 9A.76.170(2).

So the question is, did my client, in his own testimony, bring forth enough testimony to warrant the giving of that instruction. And I'm the first to say that I think it's a close call, because my client wasn't exactly sure, on at least one occasion – on what date he had missed court. Particularly when he testified that he had been in Pierce County court, but he couldn't for sure say that was the reason that he missed court on the 1st of July. But, I do believe, though, that there's enough here to warrant at least the giving of the instruction.

[RP 254-5].

Mr. Lundy mistakenly states that his counsel did not make a timely request for the instruction when the trial court explicitly found that the “request is timely under the circumstances”. [RP 354]. As detailed in above in section C-5, the record regarding this issue was preserved for review and the trial court properly ruled that there was clearly insufficient evidence to support instructing the jury on the affirmative defense. [RP 356-8]. Again, defense counsel was effective in his representation of Mr. Lundy.

7. The trial court's instructions, reviewed as a whole, were a proper statement of law that allowed both sides to argue their respective theory of the case; any error was harmless.

An appellate court reviews challenged jury instructions de novo, considering the instructions as a whole when examining the effect of any particular phrase. The challenged portion of an instruction is read in the context of all the instructions given. *State*

v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). Jury instructions are sufficient when both sides can argue their theories of the case, they are not misleading, and when read as a whole properly state the law to be applied. *State v. Douglas*, 128 Wn. App. 555, 562, 16 P.3d 1012 (2005) (citing to *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). "Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror." *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

Mr. Lundy challenges Jury Instruction No. 20 which reads:

To convict the defendant of the crime of bail jumping as charged in Count 4, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about July 1, 2009, the defendant knowingly failed to appear before a court;
- (2) That the defendant was charged with one count of possessing a stolen motor vehicle;
- (3) That the defendant had been released by court order or admitted to bail with the requirement 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 a 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 of these elements, then it will be your duty to return a verdict of not guilty.

[Supp. CP, Jury Instruction No. 20].

Jury Instruction No. 19 instructed the jury as follows:

A person commits the crime of bail jumping when he or she fails to appear as required after having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court.

[Supp. CP, Jury Instruction No. 19].

Read as a whole, the jury instructions given by the trial court did make the relevant legal standard manifestly apparent to the average juror. Neither defense counsel nor the State had any exceptions to the jury instructions proposed by the trial court. [RP 322-3]. Both sides were not prejudiced by the jury instructions as they were both able to effectively argue their theory of the case.

a. Any error in the jury instructions was harmless under the facts of this case.

It is a fundamental precept of criminal law that the prosecution must prove every element of the crime charged beyond a reasonable doubt. . . . An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal However, not every omission or misstatement in a jury instruction relieves the State of its burden. . . . [E]ven in cases where there are multiple crimes charged and multiple defendants as to some charges, the use of an erroneous instruction may be harmless. . . . [The test for] determining

whether a constitutional error is harmless: “Whether it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” In order to hold the error harmless, we must “conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. . . .

State v. Brown, 147 Wn.2d 330, 339-41, 58 P.3d 889 (2002), (cites omitted).

Applying this test to Mr. Lundy’s case, it is clear that any error harmless under the facts of this case. The evidence was overwhelming that Mr. Lundy had signed court documents informing him of all the court dates that he missed; the only defense issue on Count 4 was that the defendant did not intentionally miss court and his failure to appear as required was based on his confusion regarding his large number of court cases in different jurisdictions. There was no issue that the defendant lacked knowledge of the requirement of the subsequent court appearances in Thurston County Superior Court.

Under these facts and the record in Mr. Lundy’s case, this error was clearly harmless. “We will not reverse a conviction based on instructional error even on direct review if we are convinced beyond a reasonable doubt that the error was harmless.” *State v. Brown*, *supra*, at 340 (quoting *Neder v. United States*, 527

U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Based on the facts and record of this case, Mr. Lundy was not prejudiced by Jury Instruction No. 20 when reviewed as a whole as given by the trial court.

8. The trial court's "reasonable doubt" instruction to the jury was a correct statement of law; any error was harmless.

Without objection from the State or the defense, the trial court gave the jury the following "reasonable doubt" instruction:

A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that it has been overcome by evidence beyond a reasonable doubt.

Each crime charged by the State includes one or more elements which are explained in a subsequent instruction. The State has the burden of proving each element of a charged crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

[Supp. CP, Jury Instruction No. 9].

Mr. Lundy claims that this instruction is a deviation from WPIC 4.01 that prejudiced him because it redirected "the jury's

focus away from the defendant's plea of not guilty and away from the fact that every element is at issue." [Brief of Appellant, page 44]. This argument ignores that the trial court's instruction No. 9 starts with "[A] defendant is presumed innocent" and the second paragraph of the instruction which states, "[T]he State has the burden of proving each elements of a charged crime beyond a reasonable doubt". [Supp. CP., Jury Instruction No. 9].

Mr. Lundy argues that *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007) requires reversal; *Bennett* does not stand for this proposition and Mr. Lundy's argument is inapposite.

The Court in *Bennett* specifically dealt with whether the *Castle* instruction defining reasonable doubt was constitutional; while the Court found that while the *Castle* instruction satisfied the constitutional requirements of the due process clause of the U.S. Constitution, the Court did not endorse its use. *Id.*, at 315. The Court went on to "exercise our supervisory power to instruct Washington trial courts not to use the *Castle* instruction" and "trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of the government's burden to prove every element of the crime charged beyond a reasonable doubt." *Id.*, at 318.

However, the court also stated:

Although no specific wording is required, jury instructions must define reasonable doubt and clearly communicate that the State carries the burden of proof.

Id., at 307 (citing *State v. Coe*, 101 Wn.2d 772, 787-88, 684 P.2d 668 (1984)).

The trial court's instruction basically reverses the order of the first two paragraphs of WPIC 4.01 to begin with the presumption of innocence language normally found in second paragraph of WPIC 4.01.¹ The instruction given by the court in this case uses the WPIC 4.01 definition of reasonable doubt found in the third paragraph verbatim.

The trial court's instruction on reasonable doubt was a correct statement of law; the defendant's reliance on *Bennett* is misplaced as the trial court gave the approved definition of

¹ WPIC 4.01 Burden of Proof – Presumption of Innocence – Reasonable Doubt [The] [Each] defendant has entered a plea of not guilty. That plea puts in issue every element of [the] [each] crime charged. The [State] [City] [County] is the plaintiff and has the burden of proving each element of [the] [each] crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists [as to these elements].

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fairly, fully, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.]

“reasonable doubt” as defined in WPIC 4.01. Clearly, the trial made some minor changes to the first two paragraphs of WPIC 4.01 in an effort to make it clearer but these changes were still a correct statement of law. If this court disagrees and finds the instruction was error, it was clearly harmless and the defendant suffered no prejudice.

9. The trial court correctly calculated Mr. Lundy's offender score.

The State does not disagree with the appellant's legal authority but takes issue with the appellant's factual recitation. The appellant alleges that the trial court “did not find that Mr. Lundy was confined during the period from 1997-2007;” the appellant is mistaken.

As part of the Prosecutor's Statement of Criminal History submitted at the time of sentencing, the State submitted the defendant's judgment and sentence for Snohomish County Superior Court Cause No. 97-1-00944-2 which consisted of a conviction for assault in the second degree with a deadly weapon enhancement; Mr. Lundy was sentenced to a prison sentence of 84 months when he was sentenced on that cause on September 5, 1997. [Plaintiff's Supplemental Designation of Clerk's Papers,

Prosecutor's Statement of Criminal History, pages 6-17]. Further, at the time of sentence in this case, the trial court specifically confirmed with the defendant that he was confined in prison on the Snohomish County felony conviction from 1997-2003. [2-4-10, RP 16]. As the defendant then committed the crime of attempted possession of methamphetamine on May 26, 2007 in Thurston County Superior Court Cause No. 07-1-00964-1 (he was subsequently convicted on January 30, 2008), none of the defendant's criminal history "washes" as he did not spend the requisite 5 years in the community without committing any crime that subsequently resulted in a conviction. RCW 9.94A.525(2)(c).

Based on the Prosecutor's Statement of Criminal History, which the defense agreed and stipulated to, the trial court correctly sentenced the defendant with an offender score 23.5 on the possession of a stolen vehicle (Count 1), an offender score of 14.5 on the felony unlawful issuance of bank checks (Count 2), an offender score of 14.5 on the bail jumping charge (Count 4), and an offender score of 14.5 on the bail jumping charge (Count 6). Based on the record at the sentencing hearing, the trial court correctly calculated the defendant's offender score.

10. The trial court correctly and properly imposed an exceptional sentence based on the “free crimes” aggravating factor.

A trial court’s imposition of an exceptional sentence under the “free crimes” doctrine does not violate the Sixth Amendment:

“Free crime” analysis is a function of determining the defendant’s offender score from the record of his prior and current criminal convictions. It does not require weighing evidence, determining credibility, or making a finding of disputed facts. Thus, it is not affected by the *Blakely* requirement that factual issues used to impose an exceptional sentence must be pleaded and proved to a jury beyond a reasonable doubt.

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007) (citing *State v. Van Buren*, 123 Wn. App. 634, 98 P.3d 1235 (2004); see also *State v. Alkire*, 124 Wn. App. 169, 176, 100 P.3d 837 (2004) (Division One opinion holding that when defendant had offender scores of 20 and 21, his “exceptional sentence fell squarely within the narrow exception for prior convictions recognized by *Apprendi* and *Blakely*”).

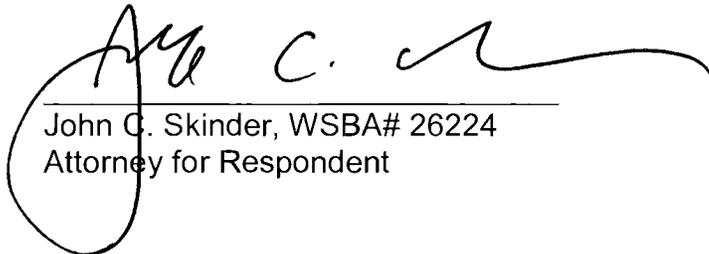
The defense agreed with the Prosecutor’s Statement of Criminal history and agreed that the defendant’s offender score was accurately calculated as 23.5 on the possession of stolen vehicle conviction and a 14.5 on the unlawful issuance of bank checks and the bail jumping convictions. [2-4-10, pages 3-4].

Based upon the defendant's very lengthy criminal history, the "free crimes" doctrine, and community safety concerns, the trial court properly ordered an exceptional sentence of 70 months (the standard range was 43-57 months) on the possession of the stolen vehicle conviction; the trial court ran the other counts concurrent with the 70 month sentence. The Court included its findings in the judgment and sentence.

D. CONCLUSION.

Based on the facts of this case and the above arguments, the State respectfully requests that this Court affirm the convictions as found by the jury and the exceptional sentence imposed by the trial court.

Respectfully submitted this 6th day of OCTOBER, 2010.



John C. Skinder, WSBA# 26224
Attorney for Respondent

CERTIFICATE OF SERVICE

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

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by to Supreme Court

TO: DAVID C. PONZOHA, CLERK
COURT OF APPEALS, DIVISION II
950 BROADWAY, SUITE 300
MS-TB-06
TACOMA, WA 98402-4454

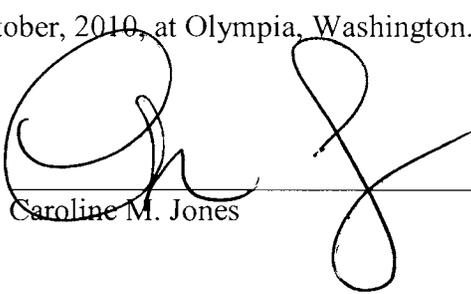
--AND--

JODI R. BUCKLAND
BACKLUND & MISTRY
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FILED
COURT OF APPEALS
DIVISION II
10 OCT -7 AM 10:50
STATE OF WASHINGTON
BY _____
DEPUTY

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

Dated this 6 day of October, 2010, at Olympia, Washington.



Caroline M. Jones