

62957-3

62957-3

No. 62957-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

---

STATE OF WASHINGTON,

Respondent,

v.

CYNTHIA NELSON,

Appellant.

---

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

The Honorable Michael Heavey

---

REPLY BRIEF OF APPELLANT

---

ELAINE L. WINTERS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

FILED  
CLERK OF SUPERIOR COURT  
STATE OF WASHINGTON  
2009 NOV -5 PM 4:49

**TABLE OF CONTENTS**

A. ARGUMENT IN REPLY .....1

    1. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MS. NELSON COMMITTED BAIL JUMPING BECAUSE IT FAILED TO PROVE SHE WAS THE PERSON WHO SIGNED THE COURT ORDERS SETTING THE COURT HEARINGS.....1

    2. THE INFORMATION DID NOT ADEQUATELY NOTIFY MS. NELSON OF THE ESSENTIAL ELEMENTS OF THE CRIME OF BAIL JUMPING IN VIOLATION OF HER CONSTITUTIONAL RIGHTS .....4

    3. MS. NELSON'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED BECAUSE THE JURY INSTRUCTIONS OMMITTED AN ESSENTIAL ELEMENT OF BAIL JUMPING .....8

B. CONCLUSION.....13

**TABLE OF AUTHORITIES**

**Washington Supreme Court Decisions**

State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003)..... 8, 11

State v. Emmanuel, 42 Wn.2d 799, 259 P.2d 845 (1953) ..... 8

State v. Harkness, 1 Wn.2d 530, 96 P.2d 460 (1939) ..... 3

State v. Holt, 104 Wn.2d 315, 704 P.2d 1189 (1985)..... 6

State v. Johnson, 119 Wn.2d 143, 829 P.2d 1078 (1992)..... 7

State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991)..... 4, 7

State v. Leach, 113 Wn.2d 679, 782 P.2d 552 (1989)..... 4, 6, 7

State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005) ..... 8, 9, 11

State v. O'Hara, \_\_\_ Wn.2d \_\_\_, 217 P.3d 756  
(No. 81062-1, 10/1/09)..... 9

State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002)..... 8, 10, 11

State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1998) ..... 10

State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997) ..... 8, 10

State v. Unosawa, 29 Wn.2d 578, 188 P.2d 104 (1948) ..... 6

State v. Williams, 162 Wn.2d 177, 170 P.3d 30 (2007)..... 4, 5, 7, 10

**Washington Court of Appeals Decisions**

State v. Boss, 144 Wn.App. 878, 184 P.3d 1264 (2008),  
rev. granted, 165 Wn.2d 1019 (2009) ..... 9

<u>State v. Brezillac</u> , 19 Wn.App. 11, 573 P.2d 1343 (1978).....	2, 3
<u>State v. Dixon</u> , 150 Wn.App. 46, 207 P.3d 459 (2009).....	4
<u>State v. Gonzalez-Lopez</u> , 132 Wn.App. 622, 132 P.3d 1128 (2006) .....	5
<u>State v. Huber</u> , 129 Wn.App. 499, 119 P.3d 388 (2005) .....	4
<u>State v. Pope</u> , 100 Wn.App. 624, 999 P.2d 51, <u>rev. denied</u> , 141 Wn.2d 1018 (2000) .....	9, 11, 12
<u>State v. Spiers</u> , 119 Wn.App. 85, 79 P.3d 30 (2003).....	5
<u>State v. Winings</u> , 126 Wn.App. 75, 107 P.3d 141 (2005) .....	7

**United States Supreme Court Decisions**

<u>Chapman v. California</u> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) .....	11
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) .....	8

**Federal Decision**

<u>United States v. Bishop</u> , 264 F.3d 919 (9 <sup>th</sup> Cir. 2001) .....	11
---	----

**Court Rule**

CrR 2.1(a)(1) .....	4
---------------------	---

A. ARGUMENT IN REPLY

1. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MS. NELSON COMMITTED BAIL JUMPING BECAUSE IT FAILED TO PROVE SHE WAS THE PERSON WHO SIGNED THE COURT ORDERS SETTING THE COURT HEARINGS

Cynthia Nelson was convicted of two counts of bail jumping and argues on appeal that the State did not prove beyond a reasonable doubt that she was the person who was given notice in court of future court hearings but failed to appear. Brief of Appellant at 6-11. The State concedes it had the burden of proving beyond a reasonable doubt that Ms. Nelson was the person who committed the offenses, but argues it proved identity. Brief of Respondent at 8-13. The State's argument should be rejected.

The State claims it proved identity because Black Diamond Police Officer Tim MacDonald identified Ms. Nelson in court. Brief of Respondent at 11. Officer MacDonald, however, merely identified Ms. Nelson as the passenger in a car he stopped for expired license plates. He communicated with Ms. Nelson only to determine her identify and ascertain she could not drive the car after the driver was arrested. 9/16/08RP 58-62, 80. Officer MacDonald did not arrest Ms. Nelson for possession of

methamphetamine, nor did he attend her arraignment or any of the hearings where Ms. Nelson was allegedly provided notice of future court appearances.

The State also argues it proved identity because it introduced certified copies of court documents with signatures in the spaces for the defendant's signature. Brief of Respondent at 11-12. The State assumes that Ms. Nelson's signature is on those documents, but the State made no effort to prove this. In the absence of, for example, handwriting analysis or a witness who observed Ms. Nelson sign the court orders, the State cannot use those orders to prove identity. Nor do the clerk's minute entries assist the State in proving identity in the absence of evidence Ms. Nelson was the person in court on those dates.

The State cites State v. Brezillac, 19 Wn.App. 11, 573 P.2d 1343 (1978), for the proposition that "a solid connection to one count, which is tied to other counts, can constitute independent evidence that all counts relate to the same person." Brief of Respondent at 12. The State stretches the Brezillac opinion far beyond its holding, as the case addresses the admissibility of prior judgments, not the sufficiency of the evidence of identity.

In Brezillac, this Court addressed the admissibility of evidence used to prove the defendant's prior convictions in an habitual criminal prosecution. Brezillac, 19 Wn.App. at 12-15. More than identity of names is required to submit a prior judgment to the jury. Id. at 13 (citing State v. Harkness, 1 Wn.2d 530, 96 P.2d 460 (1939)). In Brezillac the State submitted not only certified copies of the defendant's prior judgments, but also prison records showing the defendant was incarcerated as a result of the convictions; the prison records included photographs of the defendant for three of the convictions. Id. at 13-14. Since the prison official asserted that all of the judgments were the defendant's and the judgments showed the named defendant had corresponding prior convictions, this Court held there was a sufficient connection to permit the admission of all of the judgments. Id. at 14-15.

Here, however, the State is asserting because Ms. Nelson was charged in Count I, there was necessarily proof she was the person charged with bail jumping. The State produced no proof that Ms. Nelson was the person who appeared in court and received notice of further court hearings. No bootstrapping can now produce this proof on appeal. Ms. Nelson's bail jumping

convictions must be reversed and dismissed. State v. Dixon, 150 Wn.App. 46, 50, 53, 207 P.3d 459 (2009) (bail jumping conviction reversed in absence of proof of notice); State v. Huber, 129 Wn.App. 499, 504, 119 P.3d 388 (2005) (bail jumping conviction reversed in absence of proof of identity).

2. THE INFORMATION DID NOT ADEQUATELY NOTIFY MS. NELSON OF THE ESSENTIAL ELEMENTS OF THE CRIME OF BAIL JUMPING IN VIOLATION OF HER CONSTITUTIONAL RIGHTS

Ms. Nelson argues her constitutional right to be informed of the charges against her was violated because the amended information charging two counts of bail jumping did not inform her of the underlying crime. Brief of Appellant at 11-16. Washington's "essential elements rule" requires the charging document to clearly set forth every material element of the crime along with essential supporting facts. State v. Williams, 162 Wn.2d 177, 183, 170 P.3d 30 (2007); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989); CrR 2.1(a)(1). The rule applies to both statutory and court imposed elements. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991).

Here, the information informed Ms. Nelson she was charged with bail jumping, but did not mention the underlying offense for

which she failed to appear other than to say it was a Class C felony. CP 4-5. Thus, the information failed to inform Ms. Nelson of every essential element of the crime.

The State concedes the identification of the particular underlying crime is an essential non-statutory element of bail jumping that must be included in the information. Brief of Respondent at 17-18 (citing State v. Williams, 162 Wn.2d at 183-84, 191-21; State v. Gonzalez-Lopez, 132 Wn.App. 622, 633, 132 P.3d 1128 (2006)). The State, however, asserts the underlying crime may be identified either by the name of the charge or the class of the crime. Id. at 18. The State argues this case is controlled by an opinion where Division Two of this Court found an information was sufficient where it informed the defendant he was charged with bail jumping after being charged with a class B or C felony, State v. Spiers, 119 Wn.App. 85, 90-91, 79 P.3d 30 (2003). Brief of Respondent at 18. This Court's decision, however, is not controlled by Spiers but only by the Supreme Court's decision Williams.

Williams holds an information charging bail jumping must state the "particular" underlying crime. Williams, 162 Wn.2d at 185. This test was satisfied in Williams because the information clearly

told the defendant the underlying charge was possession of a controlled substance even though it did not state the class of that offense. Here, the information did not tell Ms. Nelson of the “particular” underlying crime – possession of a controlled substance – but instead informed her the underlying crime was a Class C felony. CP 4-5. This Court may not look to other counts to inform the defendant of the essential elements and underlying facts. State v. Unosawa, 29 Wn.2d 578, 588, 188 P.2d 104 (1948). Even under a liberal construction of Counts 2 and 3 of the information, this Court cannot conclude Ms. Nelson was informed of the “particular” underlying crime for which she failed to appear.

The State also argues Ms. Nelson “waived” her constitutional challenge to the information because she did not request a bill of particulars. Brief of Respondent at 20-21. The Leach Court explained an information that omits essential elements of the charged offense must be dismissed for failure to state a crime, whereas one that includes the essential elements but is vague as to the factual basis for the charge may be cured with a bill of particulars. Leach, 113 Wn.2d at 686-87 (citing State v. Holt, 104 Wn.2d 315, 320-21, 704 P.2d 1189 (1985)). Thus, this Court found an information charging the defendant with assault in the second

degree with a deadly weapon was sufficient where the information included these elements but did not identify the victim, weapon, or how the weapon was used to make it a deadly weapon. State v. Winings, 126 Wn.App. 75, 85-86, 107 P.3d 141 (2005). Here, however, the “particular” underlying crime is an essential element of bail jumping even if it is not a statutory element. Williams, 162 Wn.2d at 184-85; State v. Johnson, 119 Wn.2d 143, 146-47, 829 P.2d 1078 (1992); Kjorsvik, 117 Wn.2d at 101. Thus, an essential element of bail jumping was omitted from the information and not a supporting fact. Williams, 162 Wn.2d at 181.

As part of its waiver argument, the State cites Williams for the proposition that there are “no additional implied elements” to bail jumping beyond those included in Ms. Nelson’s information. Brief of Respondent at 20. What the Williams decision actually says, however, is that “a simple identification of the underlying charge” is sufficient. Williams, 162 Wn.2d at 187 (addressing the “to convict” instruction). The information here did not identify the underlying charge and thus omitted an essential, nonstatutory element. This Court should reject the State’s argument that the information was merely “vague” and reverse and dismiss Ms. Nelson’s bail jumping convictions. Leach, 113 Wn.2d at 691.

3. MS. NELSON'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED BECAUSE THE JURY INSTRUCTIONS OMITTED AN ESSENTIAL ELEMENT OF BAIL JUMPING

Ms. Nelson also argues her bail jumping convictions must be reversed because the “to convict” instructions did not instruct the jury it was required to find she was charged with a particular underlying crime beyond a reasonable doubt in order to find guilt. Brief of Appellant at 16-21. Due process mandates that the State must prove every element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The Washington Supreme Court has repeatedly held that the court’s “to convict” instruction must include every element of the charged crime. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005); State v. DeRyke, 149 Wn.2d 906, 911, 73 P.3d 1000 (2003); State v. Oster, 147 Wn.2d 141, 147, 52 P.3d 26 (2002); State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953).

The State first attempts to deflect this clear constitutional principle by arguing Ms. Nelson cannot raise this issue for the first time on appeal. Brief of Respondent at 24-27. The State’s argument rests heavily upon State v. Boss, 144 Wn.App. 878, 184

P.3d 1264 (2008), rev. granted, 165 Wn.2d 1019 (2009), but the State fails to inform this Court that review was granted in that case by the Washington Supreme Court in February 2009.<sup>1</sup> The State does not address Pope, where this Court held a similar defect in the “to convict” instruction for bail jumping was a constitutional issue that could be raised under RAP 2.5(a). State v. Pope, 100 Wn.App. 624, 629, 999 P.2d 51, rev. denied, 141 Wn.2d 1018 (2000).

More importantly, the State fails to cite any Washington Supreme Court cases holding that the omission of an element of the crime from the “to convict” instruction is not a manifest constitutional error that may be raised for the first time on appeal. In fact, the court has held that the issue is a manifest constitutional error. Mills, 154 Wn.2d at 6.

The omission of an element from that [to convict] instruction is of sufficient constitutional magnitude to warrant review when raised for the first time on appeal.

Id. See State v. O’Hara, \_\_\_ Wn.2d \_\_\_, 217 P.3d 756 (No. 81062-1, 10/1/09), Slip Op. at 8 (list of errors in jury instructions that are manifest constitutional errors under RAP 2.5 includes omitting an

---

<sup>1</sup> State v. Boss, Supreme Court No. 81897-5, was argued on October 13, 2009. The King County Prosecutor’s Office is the respondent in the case.

element of the crime charged); State v. Scott, 110 Wn.2d 682, 687 n.5, 757 P.2d 492 (1998) (accord).

The State suggests the error is not of constitutional magnitude because the jury could have found all of the essential elements of bail jumping by looking at other jury instructions. Brief of Respondent at 26-27. This argument ignores the principal supporting the rule that all elements must be included in the “to convict” instruction: “[t]he jury has a right to regard the ‘to convict’ instruction as a complete statement of the law and should not be required to search other instructions in order to add elements necessary for conviction.” Oster, 147 Wn.2d at 147. In addition, this Court cannot be assured Ms. Nelson had a fair trial if the jury could have assumed this element need not be proven. Smith, 131 Wn.2d at 263.

The State also submits the “to-convict” instruction was sufficient because it required the jury to find Ms. Nelson was charged with a Class C felony. Brief of Respondent at 28-32. As argued above, the jury must find the defendant was charged with a “particular” offense. Williams, 162 Wn.2d at 188. “Class C felony” or “regarding a felony matter” is not a particular offense. Id; Pope, 100 Wn.App. at 629.

Finally, the State claims any error in the “to convict” instruction was harmless. Brief of Respondent at 33-35. The constitutional harmless error standard places the burden on the government to prove beyond a reasonable doubt a constitutional error was not harmless. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The constitutional harmless error test requires an evaluation of the incriminating evidence in the record and also reflection upon the effect of the error on a reasonable trier of fact. United States v. Bishop, 264 F.3d 919, 927 (9<sup>th</sup> Cir. 2001). In the context of jury instructions, this Court must determine if the jury was properly instructed as to the requirement of finding all of the elements of the crime beyond a reasonable doubt. Mills, 154 Wn.2d at 15; DeRyke, 149 Wn.2d at 910.

The State argues the jury was fully informed of the elements by looking at both the “to convict” instruction and a separate instruction stating possession of methamphetamine is a Class C felony. Brief of Respondent at 33-34. The State’s argument assumes the jury is required to search the instructions for the elements, whereas Washington requires all elements be found in the “to convict” instruction. Oster, 147 Wn.2d at 147. The State’s argument also assumes the jury had no idea there are any other

Class C felonies in the criminal code. The jury was never instructed it was required to find Ms. Nelson's underlying crime was possession of a controlled substance, an essential element of bail jumping. Pope, 100 Wn.App. at 629-30. The State cannot demonstrate beyond a reasonable doubt this error was harmless. Accordingly, Ms. Nelson's bail jumping convictions must be reversed and her case remanded for a new trial. Id. at 631.

B. CONCLUSION

Cynthia Nelson's two convictions for bail jumping must be reversed and dismissed because the State did not prove Ms. Nelson's identity beyond a reasonable doubt. In the alternative, the convictions must be reversed and dismissed without prejudice because the charging document does not include the essential elements of bail jumping or reversed and remanded for a new trial because the "to convict" instructions omitted the same essential element – the name of the underlying charge.

Dated this 5<sup>th</sup> day of November 2009.

Respectfully submitted,



---

Elaine L. Winters – WSBA # 7780  
Washington Appellate Project  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 62957-3-I
	)	
CYNTHIA NELSON,	)	
	)	
Appellant.	)	

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 NOV -5  
PH 4:40

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5<sup>TH</sup> DAY OF NOVEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |                                       |     |               |
|---------------------------------------|-----|---------------|
| [X] JENNIFER ATCHISON, DPA            | (X) | U.S. MAIL     |
| KING COUNTY PROSECUTOR'S OFFICE       | ( ) | HAND DELIVERY |
| APPELLATE UNIT                        | ( ) | _____         |
| 516 THIRD AVENUE, W-554               |     |               |
| SEATTLE, WA 98104                     |     |               |
| <br>                                  |     |               |
| [X] CYNTHIA NELSON                    | (X) | U.S. MAIL     |
| 12725 SE 312 <sup>TH</sup> ST, #I-104 | ( ) | HAND DELIVERY |
| AUBURN, WA 98092                      | ( ) | _____         |

**SIGNED** IN SEATTLE, WASHINGTON THIS 5<sup>TH</sup> DAY OF NOVEMBER, 2009.

X \_\_\_\_\_  


**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710