IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DELPHINE S. JACKSON,

Appellant.

No. 46303-2-II

UNPUBLISHED OPINION

MELNICK, J. — Delphine Jackson appeals her conviction for bail jumping. The State concedes that it did not provide sufficient evidence to convict. After reviewing the record, we reject the concession. However, we conclude that Jackson's counsel was ineffective for failing to move for dismissal of the bail jumping charge at the close of the State's case in chief. Accordingly, we reverse the bail jumping conviction.[1]

FACTS

The State charged Jackson with two felony offenses. They were dismissed. Before their dismissal, Jackson missed a court date. The State charged Jackson with bail jumping. RCW 9A.76.170(1).

At Jackson's bench trial, the State's sole witness was a court clerk who had no personal knowledge of Jackson's circumstances. The trial court admitted three exhibits, the clerk's minutes from a May 2 hearing that Jackson missed, which showed that the court issued a bench warrant; the clerk's minutes from a later hearing; and the information charging Jackson with the underlying felony charges. After the State rested, Jackson testified that she attempted to get to the May 2

[1] A commissioner of this court initially considered Jackson's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel.

hearing but missed the hearing because her truck broke down. During cross-examination, the following exchange occurred:

> [Prosecutor:] Ms. Jackson, you knew that you were supposed to be, or that you had been ordered to return to court on May 2nd of 2013, correct?
> [Jackson:] Yes.

Report of Proceedings (RP) at 31. The court found Jackson guilty of bail jumping.

ANALYSIS

Jackson argues insufficient evidence exists to support her conviction because the State failed to prove that before the May 2 hearing, Jackson was "released by court order or admitted to bail." RCW 9A.76.170(1).

When a defendant challenges the sufficiency of the evidence after a bench trial, our review is limited to determining whether substantial evidence supports the trial court's findings of fact and whether those findings support its conclusions of law. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). Unchallenged findings of fact are verities on appeal. *Homan*, 181 Wn.2d at 106. We review the trial court's conclusions of law de novo. *Homan*, 181 Wn.2d at 106. When arguing insufficient evidence on appeal, the defendant admits the truth of the State's evidence and all reasonable inferences that may be drawn from it. *Homan*, 181 Wn.2d at 106 (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

> [T]he elements of bailing jumping are met if the defendant: (1) was held for, charged with, or convicted of a particular crime; (2) was released by court order or admitted to bail with the requirement of a subsequent personal appearance; and, (3) knowingly failed to appear as required.

State v. Pope, 100 Wn. App. 624, 627, 999 P.2d 51 (2000).

The State concedes that insufficient evidence supported the bail jumping conviction "because the State did not provide evidence to prove [Jackson] had been notified of the next court date or that she had signed the notice." Br. of Resp't at 4. However, we cannot accept this

concession because after the State rested, Jackson admitted that she knew a court had ordered her to attend the missed May 2 hearing. *See generally State v. Rodriguez*, 183 Wn. App. 947, 950, 335 P.3d 448 (2014) (rejecting the State's concession).

Jackson also argues that her attorney was ineffective for failing to move for dismissal of the bail jumping charge after the State rested. Here, the State concedes that it presented insufficient evidence in its case in chief to support the conviction. We agree. None of the State's exhibits proved that Jackson was required to appear on May 2 and the State's sole witness had no personal knowledge of the events leading up to May 2.

To establish ineffective assistance of counsel, the defendant must prove both that the attorney's performance was deficient and that the deficiency prejudiced the defendant. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *Strickland v. Washington*, 466 U.S 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn .2d 61, 77–78, 917 P.2d 563 (1996)). An attorney's performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient performance prejudices a defendant, if there is a "reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. There is a strong presumption that counsel's performance was reasonable. *Kyllo*, 166 Wn.2d at 862. Counsel's performance is not deficient if it can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863.

State v. Lopez, 107 Wn. App. 270, 275, 27 P.3d 237 (2001), *aff'd*, 147 Wn.2d 515, 55 P.3d 609 (2002), supports Jackson's argument. In *Lopez*, defense counsel was ineffective because he failed to move for dismissal at the end of the State's case in chief after the State failed to prove an

element of the offense. 107 Wn. App. at 270. The same reasoning applies here. The State presented no evidence showing that Jackson "had been notified of the next court date or that she had signed the notice." Br. of Resp't at 4. Thus, defense counsel should have moved for dismissal of the bail jumping charge at the close of the State's case in chief. And, "[b]ecause the State had neglected to prove an essential element . . . the trial court would have necessarily granted the motion." *Lopez*, 107 Wn. App. at 277. In addition, as in *Lopez*, "no sound strategic or tactical reason is evident" for failing to move to dismiss and "no possible advantage could flow" to Jackson from counsel's failure to so move. 107 Wn. App. at 277. In sum, because Jackson proved that her attorney's performance was deficient and that the deficiency prejudiced her, we reverse Jackson's conviction.[2]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Johanson, C.J.

Bjorgen, J.

[2] Because we are reversing Jackson's conviction, we need no reach the issue whether her information was deficient.