IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL L. FILIPPI, Appellant.	No. 39973-3-II UNPUBLISHED OPINION

Worswick, J. — Michael Filippi appeals from his convictions for possession of a controlled substance and bail jumping. He argues that the trial court erred in denying his motion to suppress evidence of the possession charge and that the bail jumping "to convict" jury instruction denied him his right to a unanimous jury verdict. We affirm.

FACTS

In early April 2009, police officers, including Washington State Patrol Trooper Jason Hicks, were called to Filippi's home because he had locked himself inside with a firearm. This situation ended with police arresting Filippi for domestic violence.[1] On April 6, 2009, the district

court issued a no contact order against Filippi that directed him to stay away from his roommate. The order, however, provided that Filippi could return to the residence one time with a police escort in order to retrieve his personal property.

On April 11, Filippi contacted the Morton Police Department to request the police escort so that he could return to his home and retrieve his personal belongings. Officer Tara Hicks agreed to meet him later that day. Officer Hicks then contacted Trooper Hicks to request that he accompany her, to which he agreed. When Filippi met with Officer Hicks and Trooper Hicks, he presented them with a copy of the no contact order.

After reviewing the no contact order, Trooper Hicks explained to Filippi that the order prohibited him from possessing any firearms and that he or Officer Hicks would not allow him to remove any firearms from the residence. Trooper Hicks also told Filippi that anything large enough to conceal a firearm would have to be inspected by them and that if Filippi did not want the item to be searched, he had to leave it in the house. Filippi agreed to these terms.

Once inside the home, Filippi led Officer Hicks and Trooper Hicks to his room. The door to his room was locked with a padlock, so Filippi provided a key and opened it. Trooper Hicks entered and immediately secured several rifles and shotguns. Filippi then sought to take a locked

[1] Trooper Hicks entered the home and saw several firearms in Filippi's room. The police did not remove the firearms.

military ammunition canister, but Trooper Hicks insisted that it be searched. Filippi unlocked and opened the container, revealing a prescription pill bottle that clearly did not contain medication. Trooper Hicks suspected that the bottle contained methamphetamine. Trooper Hicks immediately detained Filippi by handcuffing him and reading him his *Miranda*[2] rights. Filippi admitted to Trooper Hicks that the bottle contained methamphetamine.

Trooper Hicks then asked Filippi for permission to search his room. After Trooper Hicks advised Filippi of his *Ferrier*[3] rights, Filippi consented to the additional search. The search produced a wide range of drug paraphernalia, including pipes, snort draws, and other items. Officers then placed Filippi under arrest and brought him to the Morton Police Station. Once at the police station, Filippi gave a recorded statement, admitting to owning the methamphetamine and drug paraphernalia and to willingly giving consent to the search of his room and possessions.[4]

On April 13, the State charged Filippi with one count of possession of a controlled substance. Two pretrial hearings were scheduled, including an omnibus hearing on April 28 and a conference on August 13. Filippi signed a form acknowledging the requirement that he appear on those dates. Despite this acknowledgement, Filippi failed to appear on August 13 and the court issued a bench warrant. As a result, the State filed an amended information and added a bail

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[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[3] *State v. Ferrier*, 136 Wn.2d 103, 116, 960 P.2d 927 (1998).

[4] Filippi later testified that he was concerned his roommate would steal his things and, as a result, he could not just leave his things there as the police suggested. He also testified that he believed the only way he could get clothes or anything was to do what Trooper Hicks said.

jumping charge for his failure to appear.

Filippi moved to suppress the evidence relating to the methamphetamine possession charge before trial. The trial court conducted a CrR 3.6 hearing and took testimony from Officer Hicks and Trooper Hicks, among others. After the hearing, the trial court entered findings of fact and conclusions of law, and denied Filippi's motion.

The State presented several pieces of evidence at trial to support the bail jumping charge, including (1) a copy of the original information, (2) a stipulation that Filippi was the same person who signed the order setting future hearing dates, (3) a copy of his appearance bond, and (4) a copy of clerk's minutes with handwritten notations stating that Filippi failed to appear and that a warrant would be issued. Filippi also testified in his own defense and stated that he did not know that he was required to be in court on August 13, 2009, that he lost his paperwork, and that he does not read, write, or comprehend very well. The jury found Filippi guilty as charged. He now appeals.

ANALYSIS

3.6 Hearing and Motion To Suppress

Filippi first contends that trial court erred in denying his motion to suppress evidence seized and statements he made that served as the basis for his methamphetamine possession

charge.[5] The State counters that the trial court properly denied Filippi's motion because he consented to the search and that all of the officers' actions were lawful.

We generally review a trial court's denial of a motion to suppress for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *Hill*, 123 Wn.2d at 644 (citing *State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993)). And we review the legal conclusions of the trial court de novo. *State v. Smith*, 165 Wn.2d 511, 516, 199 P.3d 386 (2009) (citing *State v. Carneh*, 153 Wn.2d 274, 281, 103 P.3d 743 (2004)).

Article I, section 7 of the Washington Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Under our constitution, the home enjoys special protection. "'[T]he closer officers come to intrusion into a dwelling, the greater the constitutional protection.'" *State v. Ferrier*, 136 Wn.2d 103, 112, 960 P.2d 927 (1998) (quoting *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994)).

The best source of "authority of law" is a warrant. *See State v. Day*, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007). "However, there are a few 'jealously and carefully drawn exceptions' to

[5] More specifically, Filippi assigns error to several of the trial court's findings of fact and conclusions of law, including: (1) that the district court's "no contact" order forbade appellant from possessing firearms or ammunition, (2) that Filippi voluntarily consented to the searches of his possessions and room and that such searches were legal, and (3) that Filippi voluntarily opened the ammunition box so that the officers could look inside.

the warrant requirement." *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004) (quoting *State v. Hendrickson*, 129 Wn.2d 61, 72, 917 P.2d 563 (1996)). Protection from searches without authority of law may be waived by meaningful, informed consent. When the State asserts that an exception authorizes its intrusion into private affairs, it bears the heavy burden of establishing that the exception applies. *State v. Johnston*, 107 Wn. App. 280, 284, 28 P.3d 775 (2001) (citing *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999)).

At the outset, the parties discuss a threshold issue: whether the no contact order itself, due to an ambiguity in the notation on the form, actually imposed firearm possession restrictions on Filippi. But below, all parties involved went forward on the assumption that the no contact order did impose the restrictions. By not raising the issue below, Filippi has failed to preserve it. *See State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995) (citing RAP 2.5(a)).[6] Thus, we do not reach the substance of Filippi's argument that the no contact order's terms precluded the officers' stated firearms restrictions.

[6] RAP 2.5(a) provides:

> **(a) Errors Raised for First Time on Review.** The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

Filippi also argues that his "consent" to the officers' initial search of his ammunition box was involuntary and coerced by the officers' misleading and incorrect statements regarding their legal authority. The State counters that Filippi's consent was voluntary and that the officers did not misrepresent their legal authority, nor is there any evidence that Filippi's consent was coerced.

The State has the burden of proving that the defendant voluntarily consented, that the defendant had the authority to consent, and that the search did not exceed the scope of the consent. *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). Whether consent is voluntary depends on the circumstances, and a court will consider "(1) whether *Miranda* warnings were given prior to obtaining consent, (2) the degree of education and intelligence of the consenting person, and (3) whether the consenting person was advised of his right not to consent." *Reichenbach*, 153 Wn.2d at 132 (citations omitted). The State must prove voluntary consent by clear and convincing evidence. *State v. Nelson*, 47 Wn. App. 157, 163, 734 P.2d 516 (1987).

In this case, Officer Hicks and Trooper Hicks represented to Filippi that, under the no contact order, Filippi would be required to turn over all weapons to them at that time, and that any container that could contain a firearm would have to be searched if Filippi wanted to take the container with him. Filippi explicitly agreed to these terms at the outset, which the State argues was sufficient consent to support the trial court's denial of Filippi's suppression motion. We agree with the State.

In addition to the State's point, additional facts support the State's argument that Filippi

voluntarily consented. After Trooper Hicks's initial search that found methamphetamine, Filippi was handcuffed, and read his rights. After Trooper Hicks made those rights clear to Filippi, he still consented to an additional search of his room. *See Reichenbach*, 153 Wn.2d at 132. In light of this, the search was proper and Filippi's argument fails.

Bail Jumping Jury Instructions

Filippi also contends that the trial court's "to convict" instruction on the bail jumping charge unconstitutionally relieved the State of its burden to prove every element of bail jumping beyond a reasonable doubt. He specifically points to the fact that the instruction decoupled the "knowledge" portion of the instruction from the hearing date associated with the bail jumping charge.

As a threshold matter, we must determine if Filippi waived his right to appeal the alleged instructional errors by failing to object at trial. A party is required to object to an erroneous instruction in order to afford the trial court the opportunity to correct the error. CrR 6.15(c); *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). Failing to object to an instruction may bar review. *Scott*, 110 Wn.2d at 686. But a party may raise a manifest error of constitutional magnitude for the first time on appeal. RAP 2.5(a)(3). An instruction that shifts the burden of proof from the State or omits an element of the crime charged is such a constitutional error. *Scott*, 110 Wn.2d at 688 n.5. Because Filippi argues that the supposed instructional errors relieved the State of its burden of proof, he may raise such issues for the first time on appeal.

The ultimate issue here is whether the instruction language itself was sufficient. We review the adequacy of a challenged "to convict" jury instruction de novo. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). As a general matter, jury instructions are sufficient if substantial evidence supports them, they allow the parties to argue their theories of the case, and when read as a whole they properly inform the jury of the applicable law. *Mills*, 154 Wn.2d at 7. We review jury instructions in the context of the instructions as a whole. *Mills*, 154 Wn.2d at 7. The "to convict" instruction must contain all elements essential to the conviction. *Mills*, 154 Wn.2d at 7. This is because the 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. *Mills*, 154 Wn.2d at 8. But automatic reversal is required only where the trial court failed to instruct the jury on all elements of the charged crime. *State v. DeRyke*, 149 Wn.2d 906, 911-12, 73 P.3d 1000 (2003).

Bail jumping is defined as follows:

> (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

RCW 9A.76.170(1). And a person acts "knowingly" when:

> (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
> (ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

RCW 9A.08.010(1)(b). In this case, the trial court issued the following "to convict" instruction:

> To convict the defendant of the crime of bail jumping, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 13th day of August, 2009, the defendant failed to appear before a court;
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> (2) That the defendant was charged with a class C felony, to wit Possession of a Controlled Substance;
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> (3) That the defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court; and
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> (4) That 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 your 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 one of these elements, then it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) at 41 (Jury Instruction 12). And the trial court defined "knowledge" as follows:

> A person knows or acts knowingly or with knowledge with respect to a fact, when he or she is aware of that fact. It is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP at 39 (Jury Instruction 10). Automatic reversal here would not be proper because all elements of the crime, although inartfully written, are present in the instructions.

Filippi also argues that the "to convict" instruction was facially confusing because it permitted the jury to find Filippi guilty even if it was not convinced that he ever had notice of the date of the court hearing he missed, August 13. Filippi further argues that the use of "a

subsequent personal appearance" instead of explicitly linking this language with the August 13 hearing caused a unanimity problem because the trial setting notice at issue directed him to appear on both April 28 and August 13. As a result, Filippi suggests that the jury could have concluded that he had notice to appear April 28, which was just ten days after the trial setting notice was issued, and not specifically as to August 13 in order to fulfill the knowledge element.

A jury may convict a criminal defendant only if it unanimously concludes that the defendant committed the criminal act charged in the information. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). Even if the trial court erred by decoupling the knowledge requirement from August 13, the error is harmless if it did not contribute to the verdict. *See State v. Brown*, 147 Wn.2d 330, 339-40, 58 P.3d 889 (2002). In order to find that the defendant had knowledge, all the jury must find is that an ordinary person would have had knowledge under the circumstances. *State v. Shipp*, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980); *See State v. Bryant*, 89 Wn. App. 857, 870, 950 P.2d 1004 (1998). Further, "[s]pecific criminal intent may be inferred from circumstantial evidence or from a defendant's conduct, where the requisite intent is plainly indicated as a matter of logical probability." *Bryant*, 89 Wn. App. at 870-71.

Thus, the State must prove beyond a reasonable doubt that the defendant knew or was aware that he was required to appear at the scheduled hearing. RCW 9A.76.170(1); *State v. Ball*, 97 Wn. App. 534, 536, 987 P.2d 632 (1999) (quoting *Bryant*, 89 Wn. App. at 870). The State presented, among other evidence, a certified notice of trial setting, signed by Filippi and his attorney, which imposed an obligation on Filippi to appear at two court hearings: one on April 28,

2009 and another on August 13, 2009. This information would lead a reasonable person in the same situation to be aware of an obligation to appear in court on August 13 beyond a reasonable doubt. Thus, Filippi's argument fails.[7]

Ineffective Assistance of Counsel

Filippi lastly contends that his defense counsel was ineffective for failing to properly interpret the district court's no contact order, for failing to object to instruction 12, and for not moving to dismiss the bail jumping charge at the close of the State's case. We disagree.

The federal and state constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. An appellant claiming ineffective assistance of counsel must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). 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). Prejudice occurs when, but for counsel's deficient performance, the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). We start with a strong presumption of counsel's effectiveness. *State v. McFarland*,

[7] Filippi also contends that his defense counsel was ineffective for failing to object to the instructional language. To establish ineffective assistance of counsel, Filippi must show that (1) his counsel's performance was deficient and (2) the deficient performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); McFarland, 127 Wn.2d at 334-35. To show prejudice, Filippi must establish that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *McFarland*, 127 Wn.2d at 335. Due to the fact that the instructional error here was harmless, however, he cannot demonstrate deficient performance or resulting prejudice.

127 Wn.2d at 335. Additionally, legitimate trial tactics fall outside the bounds of an ineffective assistance of counsel claim. *State v. Grier*, *171* Wn. App. 17, 33, 246 P.3d 1260 (2011).

Failure To Properly Interpret No Contact Order

Filippi argues that his counsel was ineffective for failing to properly interpret the district court no contact order that provided the "entire underpinning for the officers' search of Filippi's possessions." Br. of Appellant at 28. This argument is based on ambiguities on the no contact order form itself. Next to "**FIREARMS PROHIBITED**" is a checkbox for the trial court to check if the restrictions are to apply. CP, Ex. 1 (emphasis in original). In this case, the box is completely filled in with initials next to the box, much like someone would do to authorize a change on a document. The remaining blanks and checkboxes associated with this section of the form are blank. Filippi argues that these firearm restrictions were never intended to be imposed and the mark with the initials supports this. The State counters that they were proper and that Trooper Hicks was under the impression that they were in effect.

Filippi asks us to speculate as to the district court's intent in drafting its order, which is, at best, ambiguous. Based on the record before us, Filippi cannot show that more likely than not the outcome would have changed had he raised the issue.

Jury Instruction 12 and Failure To Move to Dismiss

Filippi also contends that his counsel was ineffective for failing to object to the trial court's language in jury instruction 12 and for failing to move to dismiss the bail jumping charge for lack of evidence. Because the instructional error was harmless and sufficient evidence exists

to support the conviction, it is impossible for Filippi to show that the outcome likely would have differed had counsel objected to the instruction or moved to dismiss below. Thus, on this point, Filippi's argument also fails.

Affirmed.

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 pursuant to RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Hunt, J.

Penoyar, C.J.