# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>ANDREW CRAIG SKYBERG,<br><br>Appellant. | No. 37986-4-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

Bridgewater, J. — Andrew Craig Skyberg appeals his conviction for bail jumping, asserting insufficient evidence, deficient information, and instructional error. We affirm.

Facts

The State charged Skyberg with two counts of felony harassment and one count of bail jumping in Lewis County Superior Court. The bail jumping charge stemmed from Skyberg's failure to appear at his scheduled sentencing hearing in a previous case. On the day of trial in the present matter, the State dismissed the second harassment charge. A jury trial proceeded on the

remaining harassment charge (count I) and the bail jumping charge (count II).[1]

At trial, the State submitted several documents to support the bail jumping charge including two orders setting conditions of release that required Skyberg's appearance at specific court hearings. The first of these orders additionally required that "[t]he defendant shall return to court: AS DIRECTED." Ex. 1 The exhibits also included a notice of trial setting, which set Skyberg's sentencing hearing for May 12, 2008, at 9:00 AM. Skyberg signed each of these documents just below language that notified him that his appearance was required for court hearings as indicated in each document and that his failure to appear amounted to a crime.[2]

Skyberg and other defense witnesses testified that the alleged victims of Skyberg's purported harassment assaulted Skyberg outside a tavern four days before Skyberg's May 12 court date. Skyberg testified that on the morning his case was scheduled for court, he went to the hospital because of ongoing pain from injuries he received in the assault. He called his attorney from the hospital and the police arrested him at the hospital within two hours of his scheduled sentencing hearing. Skyberg testified that he knew he was required to be in court at 9:00 AM on May 12, but he chose instead to go to the hospital for treatment that morning, believing he would receive better care in a hospital than from the medical staff at the jail. He admitted that he was able to walk into the hospital without assistance and that he had not sought treatment for his

[1] The jury acquitted Skyberg of the harassment charge and it is not at issue on this appeal. Accordingly, we discuss only those facts relevant to the bail jumping charge.

[2] The evidence presented to the jury, including Skyberg's stipulation, his testimony, and the admitted exhibits, established that Skyberg signed each document requiring a future court appearance and that he appeared at each hearing from which each document issued.

injuries during the four-day period between the assault and his court date.

The trial court gave the jury three instructions defining bail jumping. There were no objections to the instruction.

The jury acquitted Skyberg of the harassment charge, and convicted him of bail jumping. Following his sentencing, he timely appealed.

## Discussion

### Sufficiency of Evidence

Skyberg contends that the evidence was insufficient to sustain his conviction for bail jumping. We disagree.

When a defendant's challenges the sufficiency of the evidence, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007) (citing *State v. Hosier*, 157 Wn.2d 1, 8, ¶ 9, 133 P.3d 936 (2006); and *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Brown*, 162 Wn.2d at 428. An insufficiency claim admits the truth of the State's evidence and all reasonable inferences. *Brown*, 162 Wn.2d at 428. Credibility determinations are for the trier of fact and are not subject to review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 875.

Skyberg was convicted of bail jumping in violation of RCW 9A.76.170(1), which provides in relevant part that "[a]ny 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 . . . and who fails to appear . . . as required is guilty of bail jumping." The statute also provides an affirmative defense where the accused proves that uncontrolled circumstances prevented him from appearing as required. RCW 9A.76.170(2). Skyberg argues that the statute's plain language requires that the accused know *at the time of his release* of the requirement of a specific subsequent personal court appearance, and that the State failed to prove such specific knowledge. This is a tortured reading of the statute that we decline to adopt. "The elements of bail jumping are satisfied if the defendant (1) was held for, charged with, or convicted of a particular crime; (2) had knowledge of the requirement of a subsequent personal appearance; and (3) failed to appear as required." *State v. Downing*, 122 Wn. App. 185, 192, 93 P.3d 900 (2004). Moreover, "the knowledge requirement is met when the State proves that the defendant has been given notice of the required court dates." *State v. Fredrick*, 123 Wn. App. 347, 353, 97 P.3d 47 (2004) (citing *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004)). Here, the evidence established that Skyberg received notice of (and knew of) the required court appearance on May 12 and that he failed to appear. We hold that the evidence was sufficient to sustain his conviction for bail jumping.[3]

[3] Even if we were to adopt Skyberg's reading of the statute, viewing the evidence and inferences in the light most favorable to the State, as we must, we would hold that the evidence is sufficient to sustain his conviction for bail jumping. Skyberg acknowledged at trial that he signed each of the noted documents and he indicated that he was present in court at each hearing with his attorney when each was signed. The evidence shows that Skyberg knew he was required to

Sufficiency of the Information

Skyberg contends that the information charging bail jumping was insufficient, thus requiring dismissal without prejudice. We disagree.

All essential elements of an alleged crime must be included in the charging document and the sufficiency of the charging document may be raised for the first time on appeal. *State v. Kjorsvik*, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). Where, as here, the defendant challenges the information after the verdict, we construe the document liberally and apply the following two-prong inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" *Kjorsvik*, 117 Wn.2d at 105-06. To analyze actual prejudice, we may look beyond the face of the charging document to determine if the accused actually received notice of the charges that he must have been prepared to defend against. *Kjorsvik*, 117 Wn.2d at 106.

Here, the information provided:

> And I, the Prosecuting Attorney aforesaid, further do accuse the defendant of the crime of BAIL JUMPING, which is a violation of RCW 9A.76.170(1)&(3)(c), the maximum penalty for which is 5 years in prison and a $10,000 fine, in that defendant on or about May 12, 2008, in Lewis County, Washington, then and there, having been charged with Possession of a Controlled Substance to wit: methamphetamine, a class C felony, and having been released by court order or having been admitted to bail in Lewis County Superior Court Cause Number 08-1-00127-4 with a requirement of a subsequent appearance before the Lewis County Superior Court, did knowingly fail to appear as required contrary to

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appear in court on the dates listed in each document, and also that he had such knowledge from the point in time that he signed each document at court hearings.

the peace and dignity of the State of Washington.

CP at 27.

Skyberg again contends that the plain language of the bail jumping statute requires the State to prove that he had knowledge of the future court appearance *at the time of his release*. He argues that the language of the charging document improperly reflects the text of the bail jumping statute prior to its 2001 amendment.[4] But, as noted, case law interpreting the current bail jumping statute, as amended in 2001, holds that the essential elements of that offense are that the defendant was charged with a particular crime, that he had knowledge of the requirement of a subsequent personal court appearance, and that he failed to appear as required. *Downing*, 122 Wn. App. at 192. Construing the information liberally as we must, we hold that the noted required elements are adequately set forth in the charging language.

Also, Skyberg cannot show that he was prejudiced by the language of the information in any event. The defense trial strategy demonstrated a clear understanding of what the State was required to prove and the defenses available to Skyberg. Skyberg admitted on the stand that he knew he was required to attend the May 12 sentencing hearing, but chose to seek medical aid instead, attempting to invoke the uncontrollable circumstances defense. *See* RCW 9A.76.170(2).[5]

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[4] *See* Laws of 2001, ch. 264, § 3.

[5] The trial court correctly instructed the jury on the uncontrollable circumstance defense as follows:

> It is an affirmative defense to the charge of bail jumping that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared

We hold that under these facts, Skyberg's assertion that the information was insufficient fails.

Instructional Error

Skyberg contends that the to-convict instruction omitted an essential element, the three instructions defining bail jumping misled the jury, and that the instruction defining knowledge improperly imposed a mandatory presumption. We disagree.

As a threshold matter, we must determine if Skyberg 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 Skyberg has characterized the instructional errors he alleges as reliving the State of its burden of proof, he may raise such issues for the first time on appeal.

To-Convict Instruction

Instruction 13 provided in relevant part:

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> or surrendered as soon as such circumstances ceased to exist.
>
> The burden is on the person offering this affirmative defense to prove by a preponderance of the evidence that the uncontrollable circumstance prevented the person from so appearing as required.

CP at 48 (Instruction 16).

> To convict the defendant of the crime of Bail Jumping as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt.
>
> (1) That on or about the 12th day of May 2008, the defendant knowingly failed to appear before a court;
>
> (2) That the defendant was charged with possession of a controlled substance to wit: methamphetamine, a class C felony; and
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> (3) That the defendant had been released by court order or admitted to bail in Lewis County Superior Court Cause Number 08-1-00127-4 with the requirement of a subsequent personal appearance before that court; and
>
> (4) That the acts occurred in the State of Washington.

CP at 45. 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 they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole 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. However, we generally may not rely on other instructions to supply an element missing from the "to convict" instruction. *Mills*, 154 Wn.2d at 7. Generally, 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. Elements may appear in other instructions, however, and while we may not import those elements to cure the omission of an element from a "to convict' instruction, 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). Where, as here, the essential elements appear in a definitional instruction,[6] the alleged failure of the "to convict" instruction to include an element is subject to harmless error analysis. *DeRyke*, 149 Wn.2d at 912 (citing *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002)).

Skyberg contends that the to-convict instruction omitted or at least misstated the knowledge element of bail jumping, permitting the jury to convict if it merely found that he knowingly failed to appear in court. He correctly contends that conviction for bail jumping requires proof that a person failed to appear *as required*, *and* had knowledge of the mandatory court date. *See* RCW 9A.76.170(1); *Downing*, 122 Wn. App. at 192.

Skyberg cites *Brown* for the proposition that an instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal. *Brown*, 147 Wn.2d at 339. But *Brown* recognized that not all instructional errors relieve the State of its burden and that instructional error is presumed to be prejudicial *unless* it affirmatively appears to be harmless. *Brown*, 147 Wn.2d at 340. 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. *Brown*, 147 Wn.2d at 341. Moreover, when applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence. *Brown*, 147 Wn.2d 341.

Here, the to-convict instruction is inartful, but does not require reversal in this

[6] Instruction 11 (discussed below) defined bail jumping by tracking the language of RCW 9A.76.170, and Skyberg admits that it correctly defined the offense.

circumstance. The instruction omits the "as required" language appearing in the bail jumping statute and the information and, thus, arguably fails to require knowledge of a specific court date. RCW 9A.76.170(1). However, that element is supported by uncontroverted evidence. As noted, Skyberg admitted in testimony that he knew he was required to be in court on the morning of May 12, but he sought medical aid instead. Skyberg admitted the crime, but asserted an affirmative defense, which the jury rejected. Under these circumstances, there is no possibility that the asserted error in the to-convict instruction affected the verdict. Accordingly, the error, if any, was harmless beyond a reasonable doubt.

Inconsistent Instructions

Skyberg contends that reversal of his conviction is required because the three instructions defining bail jumping, instructions 10, 11, and 13, were inconsistent and misled the jury. We disagree.

Skyberg relies on *State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997), but that case does not require reversal of Skyberg's conviction under the circumstances of his case. *Walden* reiterated the rule that when instructions are inconsistent, it is the duty of the reviewing court to determine whether the jury was misled as to its function and responsibilities under the law by that inconsistency. *Walden*, 131 Wn.2d at 478. Where such an inconsistency is the result of a clear misstatement of the law, the misstatement must be presumed to have misled the jury in a manner prejudicial to the defendant. *Walden*, 131 Wn.2d at 478. Walden held that where an instruction misstates the law, the defendant is entitled to a new trial "unless the error can be declared harmless beyond a reasonable doubt". *Walden*, 131 Wn.2d at 478. An instructional error is

harmless if it in no way affected the final outcome of the case. *Walden*, 131 Wn.2d at 478.

Instruction 13 (the to-convict instruction) is quoted above. Instruction 11 provided:

> 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.
>
> Bail jumping is a class C felony if the person was held for, charged with, or convicted of a class C felony.

CP at 43 Instruction 10 provided:

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

CP at 42.

As for instruction 11, Skyberg admits that it is a correct statement of the law, noting that it tracks the language of RCW 9A.76.170. Regarding instruction 13, he repeats his assertion that the knowledge element is omitted or misstated. But as discussed above, any alleged error in instruction 13 is harmless beyond a reasonable doubt given Skyberg's admissions at trial. As for instruction 10, he contends the instruction misstates the law because it fails to provide that the defendant knew of the required subsequent court appearance *at the time of his release*. As previously discussed, Skyberg misconstrues the bail jumping statute's required elements. *See Downing*, 122 Wn. App. at 192. Unlike the circumstance in *Walden*, there is no similar clear misstatement of the law in the noted instructions. And, as discussed above, to the extent there is any error in instruction 13 it is harmless beyond a reasonable doubt. Reversal is not required.

Mandatory Presumption

Skyberg argues that instruction 19 required jurors to impute knowledge to him, and thus improperly created a mandatory presumption requiring reversal. We disagree.

Instruction 19 provided:

> A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.
>
> If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.
>
> Acting knowingly or with knowledge also is established if a person acts intentionally.

CP at 51.

Skyberg argues that the substitution allowed in the final sentence of instruction 19 requires reversal under *State v. Goble*, 131 Wn. App. 194, 126 P.3d 821 (2005), but that is not so. *Goble* analyzed the same "knowledge" instruction at issue here. *Goble*, 131 Wn. App. at 202. *Goble* held that the last sentence in the instruction was confusing under the circumstances of that case because it potentially allowed the jury to find the defendant guilty of third degree assault against a law enforcement officer if the jury found that the defendant *intentionally* assaulted the victim, but without having to find that the defendant *knew* the victim was a law enforcement officer performing his official duties. *Goble*, 131 Wn. App. at 202-03. In *Goble*, the instruction improperly conflated the separate intent and knowledge elements required under the to-convict

instruction into a single element and relieved the State of its burden of proving that the defendant knew the victim's status if the jury found that the assault was intentional. *Goble*, 131 Wn. App. at 203. Here, however, there is no second required mental element to conflate. *Goble's* holding has been expressly limited to cases that require the State to prove two mental states. *State v. Gerdts*, 136 Wn. App. 720, 728, 150 P.3d 627 (2007); *State v. Boyd*, 137 Wn. App. 910, 924, 155 P.3d 188 (2007). *Goble* has no application here.

In any event, the instruction does not create a mandatory presumption. It provides that the jury "is permitted but not required to find" that the person acted with knowledge. CP at 51. And as discussed above, even if there were any instructional error, the uncontroverted evidence supported Skyberg's conviction for bail jumping beyond a reasonable doubt. Skyberg's testimony established that he knew he was required to appear in court on the morning of May 12 at the sentencing hearing and chose to seek medical treatment instead. *See State v. Deal*, 128 Wn.2d 693, 703, 911 P.2d 996 (1996) (instructional error was harmless beyond a reasonable doubt where defendant's testimony admitted all elements of the charged offense).

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.

Bridgewater, J.

We concur:

Houghton, P.J.

Hunt, J.