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DIVISION II

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STATE OF WASHINGTON  
COURT OF APPEALS, DIVISION II *BY C*  
DEPUTY

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STATE OF WASHINGTON,

Respondent

vs.

RYAN W. ALLEN,

Appellant.

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BRIEF OF APPELLANT

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APPEAL FROM THE SUPERIOR COURT FOR  
THURSTON COUNTY

The Honorable Richard Strophy and Christine A. Pomeroy, Judges  
Cause No. 07-1-02163-2

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing Allen to be convicted of Count II on evidence that should have been suppressed where the evidence used at trial against Allen on this count was unconstitutionally obtained by the police in a warrantless search.
2. The trial court erred in entering Findings of Fact and Conclusions of Law findings Nos. 5-20; and conclusions Nos. 2-10.
3. The trial court erred in allowing Allen to be convicted of bail jumping (Count III) where the plain language of the bail jumping statute unambiguously does not apply to failing to appear for a violation of conditions of release hearing, or in the alternative, the statute is ambiguous as to whether it applies to failing to appear for a violation of conditions of release hearing and under the rule of lenity Allen should have prevailed.
4. The trial court erred, as a matter of law, in failing to take Count III (bail jumping) from the jury for lack of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in allowing Allen to be convicted of Count II on evidence that should have been suppressed where the evidence used at trial against Allen on this count was unconstitutionally obtained by the police in a warrantless search? [Assignments of Error Nos. 1 and 2].
2. Whether the trial court erred in allowing Allen to be convicted of bail jumping (Count III) where the plain language of the bail jumping statute unambiguously does not apply to failing to appear for a violation of conditions of release hearing, or in the alternative, the statute is ambiguous as to whether it applies to failing to appear for a violation of conditions of release hearing and under the rule

of lenity Allen should have prevailed? [Assignment of Error No. 3].

3. Whether, as a matter of law, there was sufficient evidence to find Allen guilty of bail jumping (Count III) beyond a reasonable doubt? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

1. Procedure

Ryan W. Allen (Allen) was charged by first amended information filed in Thurston County Superior Court with two counts of unlawful possession of a firearm in the first degree (Counts I and II), and one count of bail jumping (Count III). [CP 5-6].

Prior to trial the court heard a CrR 3.6 suppression motion regarding the firearm forming the basis for Count II, which the court denied. [CP 11-17, 18-29; 3-24-08 RP 4-36]. The court entered the following written Findings of Fact and Conclusions of Law:

II. FINDINGS OF FACT

1. On December 21, 2007, at about midnight, Deputy Cameron Simper was dispatched to 18525 Sergeant Road SW for a noise complaint.
2. Arriving at about 12:11 AM, Deputy Simper was able to hear the noise at some distance from the residence. As he arrived at the, Deputy Simper saw two cars at the mobile home residence.
3. As Deputy Simper walked up to the residence, the music was so loud it was shaking all of the mobile home's windows. Deputy Simper noticed that one of the windows

had a sign in it that read “No trespassing, violators will be shot and survivors will be prosecuted.”

4. As Deputy Simper knocked, the music was so loud he could not hear his mobile radio even though the volume was turned all the way up. When the deputy knocked, there was no response from within, so the deputy knocked again.
5. After the deputy knocked a second time, the deputy heard someone within the mobile home residence aggressively rush to the door and pull it open.
6. As the door opened, the deputy saw the defendant holding a 7.62 mm SKS assault rifle, at the low ready position with his right hand, while pulling open the door with his left hand.
7. The deputy had immediate officer safety concerns, because it was after midnight, he was alone, in an isolated area, with back-up 10-20 minutes away, and was faced with an armed suspect and a sign that indicated an intent to shoot visitors.
8. The deputy immediately told the defendant to put down the rifle, after which defendant was pulled out of the door, cuffed and detained for officer safety. The deputy rendered the assault rifle safe, finding it to be loaded with a 30 round banana clip with a round in the chamber, and left it standing within the residence near the door.
9. The deputy next asked the defendant if there were anymore firearms within the residence or anymore people. Defendant said there were no more people, but there was a loaded rifle in the bedroom. Defendant then led the deputy to the rifle. In so doing, the deputy was also able to see that there were no more people within the residence, but there was a loaded .22 caliber rifle on the bed in the bedroom.
10. The rifle was rendered safe, and there was also a round in the chamber of this second firearm. The second firearm was also left inside the residence, next to the assault rifle near the door.

11. Having addressed his officer safety concerns and having rendered the two firearms safe, the deputy left the firearms within the residence and turned his attention to the defendant.
12. The deputy learned from dispatch that there was a confirmed warrant for defendant's arrest. Defendant was placed under arrest and was later transported to the jail by another deputy.
13. The Deputy Simper next asked dispatch to check defendant's criminal history, and learned that defendant had a prior conviction for residential burglary.
14. Based upon all of the events thus far, the deputy called the duty judge and requested a search warrant for defendant's residence to search for and seize firearms and ammunition, since defendant was a convicted felon.
15. The search warrant was granted and executed. The firearms and ammunition in the residence that were seized pursuant to the warrant, included the .22 caliber rifle and the 7.62 mm SKS assault rifle.
16. The deputy, even if he had not entered the residence and/or rendered the two firearms safe, would have seen the assault rifle. In the course of his contact with the defendant, the deputy would have learned of defendant's warrant and prior convictions. Based on that information, the deputy would have obtained a search warrant for firearms and ammunition, and would have seized both firearms.
17. Even if the deputy would not have acted on his officer safety concerns, the firearms would have been inevitably discovered in the normal course. There was sufficient basis for the search warrant, based upon the deputy's initial contact with the defendant, where he observed the assault rifle, and the information would have inevitably learned through his contact with the defendant and routine inquiries through dispatch.

18. The deputy did not begin his criminal investigation until the officer safety concerns had been addressed. The deputy did not attempt to use his officer safety actions as a pretext to conduct a criminal investigation. The deputy's observations during those initial officer safety actions were lawful open view observations.
19. The facts are uncontroverted.
20. The court finds the testimony of Deputy Simper to be credible.

From the above Findings of Fact, the Court hereby makes the following:

### III. CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and the subject matter.
2. The above Findings of Fact are incorporated herein as conclusions of law.
3. Detective Simper's testimony was credible.
4. The facts are uncontroverted.
5. The deputy's initial actions were properly motivated solely by officer safety concerns.
6. The deputy's intrusion into defendant's residence was limited to those steps necessary to retrieve the two firearms, render them safe, and leave them in the residence.
7. The deputy did not begin his criminal investigation until the officer safety concerns were addressed, and the deputy did not use his officer safety concerns as a pretext for further criminal investigation.

8. The information learned by the deputy's initial officer safety actions were lawfully obtained and a proper basis for issuance of a search warrant.
9. Even if the deputy had not taken the officer safety steps he had taken to retrieve and render safe the firearms, the deputy would have inevitably obtained a search warrant, and seized the two firearms, based upon information he had from his initial contact with the defendant and the information he would have routinely obtained through dispatch regarding defendant's warrants and criminal record.
10. The defendant's motions pursuant to CrR 3.6 is denied, no evidence or statements are suppressed.

[CP 30-33].

Allen was tried by a jury, the Honorable Christine A. Pomeroy presiding. Allen had no objections and took no exceptions to the court's instructions. [RP 59]. The jury found Allen guilty as charged on all three counts. [CP 56, 57, 58; RP 103-107].

The court sentenced Allen to a standard range sentences of 30-months on Count I, 30-months on Count II, and 12-months on Count III based on an undisputed offender score of 2 with all sentences running concurrently for a total sentence of 30-months. [CP 59-69, 73, 74, 75; RP 109-116].

A notice of appeal was timely filed on April 18, 2008. [CP 70].

This appeal follows.

2. Suppression Hearing Facts

On December 21, 2007, Thurston County Sheriff Deputy Cameron Simper (Simper) was dispatched in the early morning hours to 18525 Sergeant Road Southwest regarding a noise complaint. [3-24-08 RP 5-6]. Upon arriving at the address, Simper noticed the music coming from the residence was so loud that windows were rattling and that two cars were parked in the driveway. [3-24-08 RP 6, 15]. He walked up to the residence and knocked on the door noticing a sign on the door saying, "Warning no trespassing. Violators will be shot. Survivors will be prosecuted." [3-24-08 RP 6, 9]. No one responded so Simper knocked again then heard footsteps coming towards the door. [3-24-08 RP 6]. The door was jerked open and a man later identified as Allen stood in the doorway holding a 7.62 millimeter rifle with a banana clip. [3-24-08 RP 7-8]. Simper testified that fearing for his safety he grabbed Allen, pulled him outside of the house, and handcuffed him. [3-24-08 RP 8-9]. He then asked Allen if anyone else was in the house to which Allen told him "no," and whether there were any other firearms in the house to which Allen said "yes." [3-24-08 RP 8]. After securing the first firearm and without obtaining a warrant, Simper entered the residence found a second firearm and secured that firearm too. [3-24-08 RP 10-11]. Simper left the residence with Allen and took him to his patrol car leaving both firearms

in the residence as a back-up unit arrived. [3-24-08 RP 11]. At this point, Simper learned that Allen had an outstanding warrant as well as a felony conviction for burglary. [3-24-08 RP 12]. Allen was arrested and transported to jail and Simper obtained a telephonic search warrant to remove the firearms from the residence, which was granted. [3-24-08 RP 12-13, 15]. Simper admitted that Allen never pointed a firearm at him, and that no one other than Allen was in the residence. [3-24-08 RP 14-15].

Allen did not testify at the suppression hearing.

3. Trial Facts

On December 21, 2007, Thurston County Sheriff Deputy Cameron Simper (Simper) was dispatched in the early morning hours to a18525 Sergeant Road Southwest regarding a noise complaint. [RP 7]. Upon arriving at the address, Simper noticed the music coming from the residence was very loud and that two cars were parked in the driveway. [RP 7-9]. He walked up to the residence and knocked on the door. [RP 8-9]. No one responded so Simper knocked again then heard footsteps coming towards the door. [RP 9]. The door was jerked open and a man later identified as Allen stood in the doorway holding a 7.62 millimeter rifle with a banana clip. [RP 9-10]. Simper ordered Allen to put the firearm down and grabbed Allen, pulled him outside of the house, and

detained him. [RP 11]. He then asked Allen whether there were any other firearms in the house to which Allen said “yes.” [RP 11-12]. After securing the first firearm, Simper entered the residence found a second firearm and secured that firearm too. [RP 11-12]. Simper left the residence with Allen and learned that Allen had an outstanding warrant as well as a felony conviction for burglary. [Supp. CP Exhibit No. 5; RP 13-15]. Simper obtained a telephonic search warrant to remove the firearms from the residence, which was granted and the firearms were taken into evidence and admitted at trial. [RP 15-17, 22]. Simper admitted that Allen never pointed a firearm at him. [RP 10].

Joseph Wheeler, a Thurston County Deputy Prosecuting Attorney, testified that Allen was released on bail, that he failed to follow his conditions of release by failing to provide a UA sample, that a notice of revocation was mailed to him on February 11, 2008 ordering his appearance on February 14, 2008, and that Allen did not appear on that date for the hearing. [Supp. CP Exhibits Nos. 6, 7, 8, 9, 10; RP 37-46].

Allen did not testify in his defense.

D. ARGUMENT

- (1) THE TRIAL COURT ERRED IN ALLOWING ALLEN TO BE CONVICTED IN COUNT II BASED ON EVIDENCE THAT SHOULD HAVE BEEN SUPPRESSED WHERE THE EVIDENCE WAS UNCONSTITUTIONALLY OBTAINED BY THE POLICE IN A WARRANTLESS SEARCH OF ALLEN'S HOME AND THE STATE FAILED TO SATISFY ITS BURDEN OF PROVING AN EXCEPTION TO THE WARRANT REQUIREMENT,

- a. Overview of What Occurred.

On December 21, 2007, Thurston County Sheriff Deputy Cameron Simper (Simper) was dispatched in the early morning hours to 18525 Sergeant Road Southwest regarding a noise complaint. [3-24-08 RP 5-6]. Upon arriving at the address, Simper noticed the music coming from the residence was so loud that windows were rattling and that two cars were parked in the driveway. [3-24-08 RP 6, 15]. He walked up to the residence and knocked on the door noticing a sign on the door saying, "Warning no trespassing. Violators will be shot. Survivors will be prosecuted." [3-24-08 RP 6, 9]. No one responded so Simper knocked again then heard footsteps coming towards the door. [3-24-08 RP 6]. The door was jerked open and a man later identified as Allen stood in the doorway holding a 7.62 millimeter rifle with a banana clip. [3-24-08 RP 7-8]. Simper testified that fearing for his safety he grabbed Allen, pulled him outside of the house, and handcuffed him. [3-24-08 RP 8-9]. He then

asked Allen if anyone else was in the house to which Allen told him “no,” and whether there were any other firearms in the house to which Allen said “yes.” [3-24-08 RP 8]. After securing the first firearm and without obtaining a warrant, Simper entered the residence found a second firearm and secured that firearm too. [3-24-08 RP 10-11]. Simper left the residence with Allen and took him to his patrol car leaving both firearms in the residence as a back-up unit arrived. [3-24-08 RP 11]. At this point, Simper learned that Allen had an outstanding warrant as well as a felony conviction for burglary. [3-24-08 RP 12]. Allen was arrested and transported to jail and Simper obtained a telephonic search warrant to remove the firearms from the residence, which was granted. [3-24-08 RP 12-13, 15]. Simper admitted that Allen never pointed a firearm at him, and that no one other than Allen was in the residence. [3-24-08 RP 14-15].

b. Applicable Law.

Under Art. 1, sec. 7 of the Washington Constitution warrantless searches are per se illegal unless they come within one of the few, narrow exceptions to the warrant requirement. State v. Khounvichai, 149 Wn.2d 557, 562, 69 P.3d 862 (2003); State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999); State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Exceptions to the warrant requirement are narrowly drawn and

jealously guarded. State v. Parker, 139 Wn.2d at 496; State v. Hendrickson, 129 Wn.2d at 71. In each case, the State bears the onerous burden of demonstrating that a warrantless search falls within an exception. State v. Khounvichai, 149 Wn.2d at 562; State v. Parker, 139 Wn.2d at 496. Moreover, our State Supreme Court under an Art. 1, sec. 7 of the Washington Constitution analysis has held that a citizen's privacy is most protected in his or her home, and any intrusion into the home without a warrant is per se unreasonable. State v. Young, 123 Wn.2d 173, 185, 867 P.2d 593 (1994).

One extremely narrow exception to the warrant requirement is officer safety. Under this exception an officer fearing for his safety may avoid the warrant requirement so long as: 1) there is a threat to the officer's safety, or 2) the possibility of destruction of evidence, or 3) a strong likelihood of escape. State v. Kull, 155 Wn.2d 80, 86, 118 P.3d 307 (2005); State v. Chrisman, 100 Wn.2d 814, 820-821, 676 P.2d 419 (1984) (Chrisman II). Under this extremely narrow exception, the sole basis proffered by the State as an exception to the warrant requirement in the instant case, the State has failed to justify the intrusion into Allen's home to find the second firearm (the basis for Count II). While it cannot be disputed that Deputy Simper had reason to fear for his safety upon knocking on the door of a residence to investigate a noise complaint and

having Allen open the door holding a firearm, it also cannot be disputed that, according to Deputy Simper's testimony at the suppression hearing, once he ordered Allen to drop the firearm, which Allen never pointed at Deputy Simper, at the same time grabbed Allen jerking him outside the residence and handcuffing Allen that all "officer safety" concerns had been alleviated. There was no justification beyond this point to enter and search Allen's home without a warrant given a person's home is a "highly protected area" under the Washington Constitution. At this point, the State bore the burden of establishing another justification for the warrantless search of Allen's home and having failed to do so the evidence related to Count II, a firearm, should have been suppressed. The State has failed to satisfy its burden of proof in establishing an exception to the warrant requirement that would justify the search of Allen's home. The search of Allen's home was an unconstitutional warrantless search with the result that Allen's conviction for unlawful possession of a firearm (Count II) cannot stand.

When "an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). Deputy Simper conducted an unconstitutional warrantless search that the State has failed to justify under an exception to the warrant

requirement. Deputy Simper then sought and received a telephonic search warrant based evidence/information improperly obtained during this unconstitutional warrantless search—the search warrant would not have been granted absent this information—resulting in the discovery of the evidence forming the basis for Count II—a firearm. Therefore, all evidence seized as a result of this unconstitutional search (the second firearm) must be suppressed. Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); State v. Soto-Garcia, 68 Wn. App. 20, 27-29, 841 P.2d 1271 (1992).

Allen’s conviction for unlawful possession of a firearm in the first degree (Count II) should be reversed and dismissed with prejudice.

c. Trial Court’s Findings and Conclusions.

While it is true, cases on appeal must be decided on the record made in the trial court; only evidence presented in the record can be considered on appeal. Irwin v. State Dept. of Motor Vehicles, 10 Wn. App. 369, 371, 517 P.2d 619 (1974), *citing* State v. Wilson, 75 Wn.2d 329, 450 P.2d 971 (1969); State v. Davis, 73 Wn.2d 271, 438 P.2d 185 (1968). On appeal, the court reviews solely whether the trial court’s findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court’s conclusions of law. Mairs v. Department of Licensing, 70 Wn. App. 541, 545, 954 P.2d 665 (1993).

The party challenging the findings bears the burden of demonstrating that the finding is not supported by substantial evidence. Id.

This court must be mindful when evaluating the trial court's findings of fact and conclusions of law that, as argued above, the State has failed to satisfy its onerous burden of proof regarding an exception to the warrant requirement. The trial court's findings and conclusions to the contrary demonstrate its failure to understand that it was in fact the State's burden in this regard and ignore the evidence presented at the suppression hearing.

First and foremost, as argued above, Conclusions of Law Nos. 5-10 are not supported by the "officer safety" exception to the warrant requirement. Moreover, Findings of Fact Nos. 16, 17, and 18 as well as Conclusions of Law 2, 5-10 seem to justify this unconstitutional search based on the doctrine of "inevitable discovery." Such a basis has never been countenanced by our State Supreme Court. *See State v. Gaines*, 154 Wn.2d 711, 116 P.3d 883 (2005), *citing State v. Coates*, 107 Wn.2d 882, 887, 735 P.2d 64 (1987) (which case observed that the doctrine of inevitable discovery has not been adopted by our state and is only applicable if evidence has been seized illegally). Here, the State did not properly argue "inevitable discovery" in that it never raised or addressed the matter by putting forth an Art. 1, sec. 7 Washington Constitution

analysis as was its burden nor did the State concede that Deputy Simper's actions were illegal—the first requirement for application of the “inevitable discovery” doctrine. More telling is the fact that the court made no such findings or conclusions simply made speculative statements unsupported by the record and caselaw. *See* Findings of Fact 5-20 and Conclusions of Law 2-10. [CP 30-33].

In addition, the court in its findings and conclusions attempted to justify the unconstitutional search of Allen's home by proffering arguments the State never set forth—not a pretext search but justifiable as an “open view” search. First, Allen never contended that the search of his home was a pretext, nor did the State attempt to explain that the search was not a pretext—both parties argued the issue of whether “officer safety” provided a justification for the warrantless search of Allen's home. Regarding the court's assertion that the warrantless search could be justified by the “open view” exception, the court's conclusions demonstrate a fundamental misunderstanding of the law. The “open view” exception applies when law enforcement observe evidence from a lawful vantage point. *See State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). It cannot be said that Deputy Simper observed the second firearm from a “lawful” vantage point in that he was standing at the door of the residence (a lawful vantage point) and only discovered the second

firearm upon his unlawful entry into Allen's home and search of a bedroom, i.e. the second firearm was not visible from the doorway.

Nor does the "plain view" doctrine, not cited by the court as a justification for the warrantless search of Allen's home should the court have "misspoken," satisfy the State's burden. The requirements of plain view are (1) a prior justification for intrusion, (2) inadvertent discovery of incriminating evidence—no search for evidence, and (3) immediate knowledge by the officer that he had evidence before him. State v. Kull, 155 Wn.2d 80, 85, 118 P.3d 307 (2005); State v. Chrisman, 94 Wn.2d 711, 715, 619 P.2d 971 (1980) (Chrisman I). It is well settled that under Art. 1, sec. 7 of the Washington Constitution, this exception to the warrant requirement is narrower than under the Fourth Amendment. Id at footnote 4, *citing* State v. O'Neill, 148 Wn.2d 564, 584, 62 P.3d 489 (2003) (the second prong, inadvertent discovery, is no longer a requirement to establish the "plain view" exception under the Fourth Amendment). The fatal flaw in this analysis would be the first requirement of a prior justification for the intrusion, and as set forth above there was no prior justification for the intrusion—Deputy Simper unconstitutionally entered and searched Allen's home to discover the second firearm forming the basis for Count II.

Finally, regarding the court's Findings of Fact, they are not supported by the record. Regarding Finding of Fact No. 5, there was no evidence at the suppression hearing that Deputy Simper heard someone "aggressively rush towards the door," rather he testified that the door was aggressively jerked open. Regarding Finding of Fact No. 6, there was no testimony at the suppression hearing that Allen held the firearm at "the low and ready position," rather the testimony established the gun was pointed to the ground at a 45 degree angle. Regarding Findings of Fact Nos. 8-10 there was no testimony as to the specifics of how many rounds of ammunition were loaded or available for either firearm. The remaining findings, Findings of Fact Nos. 11-15, are irrelevant as they deal with facts after the unconstitutional search and seizure.

Based on all of the above, this court should reverse and dismiss Allen's conviction in Count II for unlawful possession of a firearm in the first degree with prejudice as the State has failed to satisfy its burden of establishing an exception to the warrant requirement justifying the search of Allen's home and seizure of the second firearm and the court's findings of fact and conclusions of law as to the suppression hearing do not support its decision to deny the motion to suppress.

- (2) THE PLAIN LANGUAGE OF THE BAIL JUMPING STATUTE, RCW 9A.76.170, DOES NOT PROVIDE FOR A FAILURE TO APPEAR AT A REVOCATION OF CONDITIONS OF RELEASE HEARING TO BE SUBJECT TO THE STATUTE, OR IN THE ALTERNATIVE THE BAIL JUMPING STATUTE IS AMBIGUOUS AS TO WHETHER SUCH A HEARING IS SUBJECT TO THE STATUTE WITH THE RESULT THAT ALLEN'S CONVICTION FOR BAIL JUMPING BASED ON HIS FAILURE TO APPEAR AT THE HEARING FOR REVOCATION OF HIS CONDITIONS OF RELEASE MUST BE REVERSED AND DISMISSED.

When interpreting a statute, the court must give effect to the plain meaning of the statutory language. State v. Radan, 98 Wn. App. 652, 657, 990 P.2d 962 (1999). A court may not engage in statutory construction if the statute is unambiguous, State v. Bolar, 129 Wn.2d 361, 366, 917 P.2d 125 (1996), and should resist the temptation of rewriting an unambiguous statute to suit the court's notions of what is good policy, recognizing the principle that "drafting of a statute is a legislative, not judicial function." State v. Jackson, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999). While the court's goal in statutory interpretation is to identify and give effect to the Legislature's intent, State v. Spandel, 107 Wn. App. 352, 358, 27 P.3d 613 (citing State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996)), *review denied*, 145 Wn.2d 1013 (2001); if the language of a statute is unambiguous, the language of the statute is not subject to judicial interpretation. Id. When the legislature omits language from a statute,

intentionally or inadvertently, the court will not read into the statute the language it believes was omitted. State v. Moses, 145 Wn.2d 370, 374, 37 P.2d 1216 (2002). Under the rule of lenity, any ambiguity is interpreted to favor the defendant. State v. Spandel, 107 Wn. App. at 358.

RCW 9A.76.170, the statute under which Allen was charged and convicted, provides in pertinent part:

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.

[Emphasis added].

The plain language of RCW 9A.76.170 indicates two conditions necessary for a person to be guilty of bail jumping to-wit: 1) a person must be released on bail, and 2) there is a contemporaneous requirement for a future personal appearance of which the defendant knows with the defendant thereafter failing to appear at the acknowledge hearing. In other words, a person is released on bail subject to whatever conditions the court imposes and the person contemporaneously promises to appear at future hearings such as pretrial conferences, status hearings, omnibus hearings, and trial demonstrated by a scheduling order signed by the person and then fails to make an appearance at any one of the mentioned hearings. There

is no language in the statute that indicates a person can be guilty of bail jumping by failing to appear at a hearing to revoke bail that may or may not occur at some future date given a violation of his conditions for release. The remedy for a violation of conditions of release is merely to revoke the person's bail and take them into custody not charge them with bail jumping.

Despite the plain language of the bail jumping statute that is exactly what happened here. Allen was released on bail subject to certain conditions of release. Thereafter, the State filed a motion to revoke Allen's bail for a violation of his conditions of release and mailed Allen notice of a revocation hearing on February 11<sup>th</sup> which hearing was set for February 14<sup>th</sup>. Allen never made any promise nor had any knowledge that he was required to appear on February 14<sup>th</sup> at the time he was granted bail. Allen failed to appear at the February 14<sup>th</sup> hearing and the State charged him with bail jumping instead of merely revoking his bail and taking him into custody contrary to the plain language of the statute. Given the statutory language and the facts of this case this court should reverse and dismiss Allen's conviction for bail jumping as his actions did not constitute the crime of bail jumping.

In the alternative in reading RCW 9A.76.170 it becomes apparent that an ambiguity exists in that there are two possible meanings as to what

constitutes bail jumping. The statute could be read as set forth above to mean that a person can be found guilty of bail jumping only where he/she is granted bail and contemporaneously promises to appear on certain dates and fails to do so, or the statute could be read to mean that any failure to appear at any future hearing whether anticipated or not subjects a person to the charge of bail jumping. Given these two possible readings of the language of RCW 9A.76.170, under the rule of lenity, the statute must be read in favor of Allen i.e. that in order for him to be found guilty of bail jumping at the time of his release on bail he had made a contemporaneous promise to appear on February 14<sup>th</sup> for his bail revocation hearing. Allen made no such promise and his conviction for bail jumping must be reversed and dismissed.

(3) AS A MATTER OF LAW, THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT ALLEN WAS GUILTY OF BAIL JUMPING.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S.

Ct, 2781 (1979). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, 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). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Allen was charged and convicted of bail jumping pursuant to RCW 9A.76.170 which provides in pertinent part:

- (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, ... and who fails to appear ... as required is guilty of bail jumping....

An essential element, which the State is required to prove beyond a reasonable doubt, is that the person charged with bail jumping “knowingly” failed to make a required court appearance. The State’s burden on this element does not require that the State prove beyond a reasonable doubt that “on the precise date of the scheduled hearing” the defendant knew he was required to appear. State v. Ball, 97 Wn. App. 534, 536-537, 987 P.2d 632 (1999), *see also* Court’s Instruction to the

Jury No. 16 [CP 54]. The State must prove beyond a reasonable doubt that the person was aware of/knew of the date and duty to appear.

The sum of the State's evidence to prove this essential element consisted of Exhibits Nos. 6-10—the information charging Allen with a crime, conditions on Allen's release, the motion to revoke conditional release, a certified copy of notice of hearing mailed to Allen on February 11<sup>th</sup> stating the hearing was set for February 14<sup>th</sup>, a bench warrant issued after Allen's failure to appear on February 14<sup>th</sup>—and the testimony of Joseph Wheeler, a Thurston County Deputy Prosecuting Attorney, that Allen failed to appear on February 14<sup>th</sup>. [CP 3; Supp. CP Exhibits Nos. 6-10; RP 37-46].

However, as argued above, as a matter of law, Allen's failure to appear on February 14<sup>th</sup> was not subject to a charge of bail jumping as he did not contemporaneously promise or know he had to appear on February 14<sup>th</sup> at the time he was released on bail. Moreover, the evidence presented at trial, i.e. the fact that Allen was mailed notice on February 11<sup>th</sup> that he was required to appear at a hearing on February 14<sup>th</sup>, a mere 3-days between mailing and the hearing, does not establish beyond a reasonable doubt that Allen knew of his duty to appear and the date upon that appearance was required. Simply stated, Allen may have gotten the notice to appear after the date his appearance was required had passed. It was the

State's burden to establish this essential element beyond a reasonable doubt and the State failed to do so. Thus, the State has failed to elicit sufficient evidence to prove beyond a reasonable doubt that Allen was guilty of bail jumping (Count III). This court should reverse his conviction.

E. CONCLUSION

Based on the above, Allen respectfully requests this court to reverse and dismiss his conviction for unlawful possession of a firearm (Count II) and for bail jumping (Count III) and/or remand for resentencing.

DATED this 26<sup>th</sup> day of September 2008.

*Patricia A. Pethick*  
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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 26<sup>th</sup> day of September 2008, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 26<sup>th</sup> day of September 2008.

Patricia A. Pethick  
Patricia A. Pethick