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NO. 61731-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

NIKEEMIA COUCIL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SCHAFFER

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. It is generally improper for a witness to testify that he believes another witness is telling the truth or that the defendant is guilty. However, such testimony is only reversible error if the witness makes either a "direct comment" or a "nearly explicit" statement of opinion. Moreover, a defendant may render such testimony relevant by opening the door to the issue of the witness's belief(s). Here, the defendant's theory of the case was that the arresting officer had failed to properly investigate the incident and had arrested the defendant only because he was on probation. As part of the officer's testimony, he stated that he found the victim to be "the victim" and indicated that there was probable cause to arrest the defendant because he had threatened the victim. Was this testimony permissible?

2. Bail jumping is a class C felony if the defendant commits the crime while charged with an underlying crime that is a class C felony. Here, the defendant jumped bail while charged with felony harassment (a class C felony). Despite the fact that the defendant was ultimately convicted of only misdemeanor harassment, did his bail jumping conviction nevertheless constitute a class C felony?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant, Nikeemia Coucil, was charged with felony harassment, malicious harassment, and bail jumping. CP 19-20. The harassment charges were severed from the bail jumping charge. 2RP 3-9. In the first trial, the jury convicted Coucil only of the lesser included charge of misdemeanor harassment. CP 23-24. In the second trial, the jury convicted Coucil of bail jumping. CP 96. The court imposed a standard range felony sentence for the bail jumping conviction. CP 101-08. This timely appeal followed. CP 109-19.

**2. SUBSTANTIVE FACTS**

**a. The Harassment Charge**

At about 10:00 p.m. on June 29, 2007, the victim, Paul Carlson, boarded a King County Metro bus. 4RP 46-47.<sup>1</sup> The bus

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<sup>1</sup> The State will refer to the Verbatim Report of Proceedings as follows:

"1RP" = July 31, 2007;  
"2RP" = March 26, 2008;  
"3RP" = March 27, 2008;  
"4RP" = March 31, 2008;  
"5RP" = April 1, 2008;  
"6RP" = April 21, 2008;  
"7RP" = April 22, 2008; and  
"8RP" = April 25, 2008.

was relatively full and Carlson took a seat in the rear half, near the articulated section. 4RP 47-48. The defendant, Nikeemia Coucil, was seated several rows behind Carlson. 4RP 50-52. Carlson noticed that Coucil was playing music at a high volume without using earphones. 4RP 50-52, 66. Carlson motioned to Coucil to turn down the music. 4RP 50. This request seemed to anger Coucil, who responded by looking Carlson directly in the eyes and saying, "[W]hat's it to you, cracker[?]" 4RP 50. Coucil then turned up the music and told Carlson, "[W]hat's it to you, cracker[?] I kill people like you." 4RP 50. Coucil worked himself into a rage and continued shouting at Carlson, repeatedly calling him a "cracker" and finally telling him, "I'm going to kill you." 4RP 50-51.

Believing that Coucil was threatening him and that he was in imminent danger, Carlson called 911 on his cell phone. 4RP 51, 53-54. Coucil realized what Carlson had done and increased his threatening tirade, saying, "[G]o ahead, call the cops. I dare you. Call the cops. I'm going to kill you." 4RP 51. Coucil moved to a seat directly in front of Carlson, turned so they were sitting knee-to-knee, and continued shouting at him. 4RP 55-56. While making these threats, Coucil leaned forward so that he and Carlson were only inches apart. 4RP 56. Carlson stayed on the phone with

the 911 operator until police arrived and boarded the bus. 4RP 56-57, 61, 73.

Seattle Police Department Officer Carrell was the first officer to arrive at the scene. 3RP 116-18.<sup>2</sup> He boarded the bus and spoke briefly with the driver and a passenger seated at the front of the bus. 3RP 119-21. While doing this, Officer Carrell saw Coucil at the back of the bus, still swearing at Carlson. 3RP 121-22. Officer Carrell observed that Carlson was shaking and appeared genuinely frightened. 3RP 122, 29. Officer Carrell then spoke briefly with Carlson before making contact with Coucil, who was still yelling obscenities. 3RP 123-24.

Coucil was escorted off the bus, but continued being belligerent and aggressive. 3RP 124-25, 131-32. However, Officer Carrell was able to learn that Coucil was on probation under the supervision of the Department of Corrections (DOC). 3RP 145. Officer Carrell contacted a DOC officer, who issued a detainer and asked Officer Carrell to arrest Coucil for violating the conditions of

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<sup>2</sup> The Verbatim Report of Proceedings provided by Coucil actually contains two different versions of volume 3RP. The first two pages of both volumes are identical. However, the rest of the two volumes are paginated differently: one is paginated as 3-46 while the other is paginated as 113-156. Other than this, the contents of the volumes appear identical. In his brief, Coucil cites to the version that is paginated 113-156. See Br. App. at 3, 10. For reasons of clarity, the State will do likewise.

his probation. 4RP 23-24. Officer Carrell also determined that there was probable cause to believe that Coucil had harassed Carlson and arrested him for that crime as well. 4RP 26-27.

Both Carlson and Officer Carrell testified to the above at trial. In addition, Carlson indicated that he believed Coucil's threats were serious and was genuinely afraid that Coucil would harm or kill him. 4RP 53-54, 63. Carlson was so afraid of Coucil that he started using a different bus route after the incident. 4RP 74.

**b. The Bail Jumping Charge**

On July 5, 2007, the State filed an information charging Coucil with felony harassment. 7RP 4-5; CP 1. Coucil was released from custody on July 31, 2007, and was given notice that he needed to reappear in court for a hearing on August 14, 2007. 7RP 7-11. Coucil failed to appear for that hearing and a bench warrant was issued. 7RP 11-15. Coucil was arrested on the warrant on December 29, 2007. 7RP 15-16, 33. At trial, Coucil admitted that he knew he was supposed to appear in court on August 14, 2007, but did not go because he believed there was a warrant for his arrest and he did not want to go to jail. 7RP 48-50, 58.

**C. ARGUMENT**

**1. OFFICER CARRELL'S TESTIMONY DID NOT DEPRIVE COUCIL OF HIS RIGHT TO A FAIR TRIAL.**

Coucil asserts that his conviction for misdemeanor harassment must be reversed because Officer Carrell both vouched for Carlson and opined that Coucil was guilty. Coucil's argument must be rejected for three reasons: (1) Coucil may not raise these issues for the first time on appeal; (2) Officer Carrell neither impermissibly vouched for Carlson nor improperly opined that Coucil was guilty; and (3) even if Officer Carrell's testimony would have been generally improper, it was allowable in this case because Coucil opened the door to its admission.

**a. Additional Facts**

During direct examination of Officer Carrell, the prosecutor asked him how he had initially come into contact with Coucil.

3RP 117. Officer Carrell replied, "I was dispatched to a 911 call from a complainant, later found to be the victim, for, he was being threatened. His life was being threatened on a Metro coach bus."

3RP 118. Coucil did not object to this testimony.

After the prosecutor elicited additional information regarding Officer Carrell's arrival at the scene, the following exchange took place:

[Prosecutor]: Did you eventually make contact with Mr. Coucil?

[Officer Carrell]: I did. I first made contact with who I later found to be the victim.

[Prosecutor]: Mr. Carlson?

[Officer Carrell]: Yes.

[Prosecutor]: How long did you talk to Mr. Carlson?

[Officer Carrell]: Very short. Very brief.

[Prosecutor]: And did Mr. Carlson identify the person who had threatened him?

[Officer Carrell]: He did.

[Prosecutor]: And who did he identify?

[Officer Carrell]: He identified the defendant, Mr. Coucil.

3RP 123-24. Coucil did not object to any of this testimony.

During cross-examination, Coucil's counsel asked Officer Carrell numerous questions drawing attention to the fact that he had not interviewed anyone else on the bus. 3RP 134-39; 4RP 8, 21-23. Counsel also extensively cross-examined Officer Carrell as

to why he had arrested Coucil. Counsel repeatedly asked questions that implied that Coucil had not been arrested for harassment, but merely for disorderly conduct and/or violating the terms of his probation. 3RP 143-45; 4RP 8-9. Counsel later suggested that Officer Carrell had arrested Coucil primarily because a DOC officer had told him to. 4RP 23-24.

On re-direct examination, the following exchange took place as the prosecutor followed up on this issue:

[Prosecutor]: [I]f the Department of Corrections had not asked you to put a detainer on Mr. Coucil, could you have still arrested him?

[Officer Carrell]: Yes.

[Prosecutor]: Why?

[Officer Carrell]: Because he maliciously harassed the victim.

[Prosecutor]: And did you have probable cause at the scene to believe that that had occurred?

[Officer Carrell]: Yes.

[Prosecutor]: And is that the standard you need to arrest somebody?

[Officer Carrell]: Yes.

[Prosecutor]: Would you have arrested Mr. Coucil absent the Department of Corrections detainer?

[Officer Carrell]: Yes.

4RP 26. Coucil did not object to any of this testimony.

On recross-examination, Coucil's counsel again returned to the issue of exactly what Coucil had been arrested for. The following exchange took place:

[Counsel]: Officer, you didn't arrest Mr. Coucil until after the Department of Corrections told you to; isn't that correct?

[Officer Carrell]: Sir, I arrested him, and those are the charges that I filed. So those are the crimes that were committed that I had probable cause for. It is irregardless whether I arrest him for the malicious harassment first or the [Department of Corrections] detainer first. The fact of the matter is he was arrested, we take him away, he is still arrested for one or the other.

4RP 26-27.

In closing argument, Coucil's counsel made the defense theory of the case explicit – that Officer Carrell improperly investigated the case because he simply presumed that Coucil was guilty once he found out that Coucil was on probation. Counsel argued:

And Mr. Coucil was on probation. Basically, you are guilty right then. There is a presumption of guilt. And that's what has been going on in this case up until now. And it should stop here. But that's what happened.... Because basically all they know for sure, and that's all you know for sure, is that Mr. Coucil wasn't being very pleasant with the police officer on the bus. That's disorderly conduct on the bus. That's what that is. But they weren't arresting him until after Officer Carrell talks to the Department of Corrections, and told them his one-sided version of what took place. And then Mr. Coucil was arrested.... There is no evidence in this case unless you believe that the presumption of guilt applies.

4RP 116-17.

**b. Coucil May Not Raise These Issues For The First Time On Appeal.**

Coucil did not object to any of the testimony he now challenges. As a general rule, issues may not be raised for the first time on appeal. RAP 2.5(a). An exception exists for issues involving a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). However, the rule that this Court may consider such issues is "not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional

issue not raised before the trial court." McFarland, 127 Wn.2d at 333. Instead, the error must be "manifest." Id.

As a matter of law, witness testimony that is not objected to is not a "manifest constitutional error" unless the witness makes a "nearly explicit" statement that he believes the victim or that the defendant is guilty. State v. Kirkman, 159 Wn.2d 918, 934-38, 155 P.3d 125 (2007). Moreover, no error is "manifest" unless the defendant can demonstrate that it actually affected his rights. McFarland, 127 Wn.2d at 333. It is not enough for a defendant to merely allege prejudice or even to show how he *might* have been prejudiced; rather, actual prejudice must appear in the record. Id. at 334.

Because Coucil did not object to any of the testimony he now challenges, he has waived review by this Court unless Officer Carrell's comments were "nearly explicit" statements of opinion *and* they caused a demonstrable prejudice. Here, neither is true. First, as will be discussed below, Officer Carrell's comments were not actually improper, let alone "nearly explicit" statements of impermissible opinion.

Second, even if these comments were improper, there was no prejudice to Coucil. The outcome of this case depended on the

jury's evaluation of Carlson's credibility. Carlson testified and was subject to a vigorous cross-examination. Thus, the jury had the opportunity to observe him testify and make its own independent judgment as to his veracity and credibility.<sup>3</sup> In contrast, any improper opinion testimony from Officer Carrell on this point was brief and was not relied on by the prosecutor in closing. Furthermore, the jurors were properly instructed that they were the sole judges of the credibility of each witness and of the weight to be given to the testimony. CP 78.

As a result, the jury had the opportunity to judge credibility for itself and must be assumed to have followed the trial court's instructions that it do so. As the Washington Supreme Court held in Kirkman, "Even if there is uncontradicted testimony on a victim's credibility, the jury is not bound by it. Juries are presumed to have followed the trial court's instructions, absent evidence to the contrary." 159 Wn.2d at 928 (citations omitted). Thus, despite Coucil's assertion to the contrary, this Court should not presume that any testimony by Officer Carrell prevented the jury from making

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<sup>3</sup> Despite Coucil's assertion, the fact that the jury only convicted him of the lesser included charge does not prove that the jury necessarily concluded that Carlson was not credible. Br. App. at 11-12. Indeed, there are a number of reasons that the jury might have believed Carlson's testimony that Coucil had threatened him, but still chose to convict only of misdemeanor harassment.

its own determination. "Only with the greatest reluctance and with the clearest cause should judges – particularly those on the appellate courts – consider second-guessing jury determinations or jury competence." Kirkman, 159 Wn.2d at 938.

**c. Officer Carrell's Testimony Was Not Improper.**

In a criminal case, one witness may generally not "vouch" for another by testifying that he believes the other witness. Kirkman, 159 Wn.2d 918. Similarly, it is generally improper for a witness to express a personal opinion that the defendant is guilty. State v. Garrison, 71 Wn.2d 312, 427 P.2d 1012 (1967). However, where – as here – the defendant does not object to the testimony at trial, there is not reversible error unless the witness made a "nearly explicit" statement that he believed the victim or that the defendant was guilty. Kirkman, 159 Wn.2d at 934-38. Here, Officer Carrell did neither.

First, Officer Carrell did not make a "nearly explicit" statement that he believed Carlson was telling the truth. Coucil identifies two statements that he claims were improper in this way. Br. App. at 10. However, neither actually constituted impermissible

vouching. Rather, each was merely an attempt by Officer Carrell to explain what he did and who was involved.

When Officer Carrell was asked to explain how he initially became involved in this incident, he described being dispatched to a 911 call from a complainant whom he "later found to be the victim." 3RP 123. Taken in the context of the entire line of testimony, this was not a "nearly explicit" statement that Officer Carrell believed that Carlson was telling the truth. Rather, it was merely Officer Carrell's explanation that he determined that Carlson (i.e., the "victim" of the alleged crime) was the same person who had actually called 911 (i.e., the "complainant").

Similarly, when Officer Carrell was asked if he had contacted Council, he indicated that he first made contact with the person he later found out was "the victim." When asked if he meant Carlson, Officer Carrell said "yes." Again, when taken in the context of the entirety of Officer Carrell's testimony, this merely constituted a clarification of the order in which he did things – in other words, that he contacted Carlson (the alleged victim) before contacting Council himself. Such an explanation is a far cry from a "nearly explicit" statement that he necessarily believed that Carlson was telling the truth about what had happened.

Second, Officer Carrell did not express an improper opinion that Coucil was guilty of the crime charged. Opinion testimony is not improper merely because it addresses an ultimate factual issue that is to be resolved by the jury. ER 704; State v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658 (1993). Such testimony is not improper so long as it is not a “direct comment” on the defendant’s guilt, is helpful to the jury, and is based on inferences from the evidence. Heatley, 70 Wn. App. at 578. Nor is such testimony improper merely because it supports the conclusion that the defendant is actually guilty.” The fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt.” Heatley, 70 Wn. App. at 579.

Here, Coucil’s cross-examination of Officer Carrell raised the question of why Coucil had been arrested. In response, Officer Carrell testified that he arrested Coucil both for his DOC detainer and because there was probable cause to believe that he had threatened Carlson. This testimony is analogous to that at issue in Heatley, where the officer testified that he arrested the defendant for driving under the influence because he was “obviously intoxicated and... could not drive a motor vehicle in a safe manner.”

70 Wn. App. at 577. This Court found that this statement was proper because it was based on the evidence, was helpful to the jury, and did not constitute a "direct comment" on the defendant's guilt. Id. at 578-82. Similarly, Officer Carrell's statement merely answered a lingering question that Coucil himself had raised. It was based on the evidence, was helpful to the jury, and was neither a "direct comment" nor a "nearly explicit" statement that Coucil was guilty of the crime charged. As such, the testimony was not improper.

**d. Even If Officer Carrell's Testimony Would Otherwise Have Been Improper, It Was Allowable Here Because Coucil Opened The Door To Its Admission.**

Under the "open door" doctrine, if a defendant raises an issue before the jury, the State may generally respond by asking additional questions about the same matter. State v. Gefeller, 76 Wn.2d 449, 454-56, 458 P.2d 17 (1969). This rule applies to impeachment in cross-examination, particularly when it involves allegations of potential misconduct by the witness. See, e.g., State v. Mak, 105 Wn.2d 692, 709-10, 718 P.2d 407 (1986), overruled on other grounds, State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994).

Here, Coucil's cross-examination of Officer Carrell focused extensively on the fact that he did not interview other potential witnesses on the bus and on the allegation that he did not actually arrest Coucil for harassment. In doing so, Coucil clearly implied that Officer Carrell had presumed that Coucil was guilty because he was on probation and that, as a result, Officer Carrell had not fully investigated the incident. By asking these questions and expressing this theory, Coucil opened the door for the State to address these issues in response. Thus, to the extent that Officer Carrell testified that he believed Carlson and that he had probable cause to arrest Coucil for harassment, it was allowable as a response to the implication that he had not properly handled the case. As a result, even if Officer Carrell's statements would have been otherwise improper, here they were a pertinent and allowable response to the issues that Coucil himself had raised.<sup>4</sup>

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<sup>4</sup> It is certainly true that Officer Carrell's testimony supported the conclusion that Coucil was guilty. But it was an inference that was an equivalent and fair response to the inferences favorable to Coucil created by his questions and argument.

## 2. COUCIL'S BAIL JUMPING CONVICTION CONSTITUTED A CLASS C FELONY.

Coucil argues that the bail jumping statute must be interpreted so that the penalty class of a bail jumping conviction is controlled by the penalty class of the underlying offense that the defendant is ultimately *convicted of*. Thus, he asserts that his bail jumping conviction should have been classified as a gross misdemeanor because he was only convicted of a gross misdemeanor in the underlying case. This argument must be rejected for two reasons. First, under the plain and unambiguous language of the statute, Coucil's bail jumping conviction was correctly classified as a class C felony because he failed to appear while *charged with* a class C felony. Second, even if the statute were ambiguous, Coucil's interpretation should be rejected because it would render a portion of the statute superfluous and lead to absurd results.

Under RCW 9A.76.170(1), a defendant commits the crime of bail jumping when, after "having been released by court order... with knowledge of the requirement of a subsequent personal appearance" at a hearing, he fails to appear for that hearing. To be convicted of bail jumping, the defendant must be held for, charged

with, or convicted of a particular underlying crime. State v. Pope, 100 Wn. App. 624, 627-28, 999 P.2d 51 (2000).

The crime of bail jumping is not divided into classes, but the penalties for the crime are. State v. Williams, 162 Wn.2d 117, 187-88, 170 P.3d 30 (2007). Thus, while the classification of the underlying crime is not an element of bail jumping, it is relevant to determining the penalty class for the purposes of sentencing. Id.; State v. Gonzalez-Lopez, 132 Wn. App. 622, 132 P.3d 1128 (2006). Bail jumping is:

(c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony;

(d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

RCW 9A.76.170(3).

Here, Coucil was originally charged with felony harassment (a class C felony). CP 1. Prior to trial, he was released by an order of the court and given notice that he needed to appear at a subsequent hearing. 7RP 7-11. When he failed to appear at that hearing, a warrant was issued. 7RP 11-15. After he was arrested on the warrant, the State filed an amended information that added a count of bail jumping, which alleged that Coucil had failed to appear

after being charged with the class C felony of felony harassment.

CP 8-9; 7RP 15-16, 33.

On the first day of trial, the State filed a second amended information that added a count of malicious harassment. CP 19-20; 2RP 3-4. The trial court severed the harassment charges from the bail jumping charge, with the former going to trial first. 2RP 6-9. The jury found Coucil not guilty of felony harassment and malicious harassment, but convicted him of the lesser included charge of misdemeanor harassment. CP 23-24. Coucil's bail jumping charge was assigned to a different court for trial. 6RP 1-2. The jury convicted Coucil of bail jumping. CP 96. The matter was sent back to the first trial court for sentencing. 7RP 92-93. That court imposed sentence for the bail jumping as a class C felony. CP 101-08.

Coucil concedes that the statute makes bail jumping a class C felony if the defendant committed the crime while "held for, charged with, or convicted of" a class C felony. RCW 9A.76.170(3)(c). However, he points out that the statute also makes bail jumping a misdemeanor if the defendant committed the crime while "held for, charged with, or convicted of" a gross misdemeanor. RCW 9A.76.170(3)(d). Coucil argues that this

creates an ambiguity in the statute as it applies to situations such as this – where a defendant committed the crime of bail jumping while *charged with* a class C felony, but was only *convicted* of a gross misdemeanor. He argues that, under the rule of lenity, this “ambiguity” must be resolved in his favor. This argument relies on two assumptions: (1) that the bail jumping statute is ambiguous (and thus subject to interpretation); and (2) that the statute must be interpreted as he asserts. Coucil’s argument should be rejected because both assumptions are incorrect.

As an initial matter, Washington courts have previously examined the bail jumping statute and concluded that it is not ambiguous. Pope, 100 Wn. App. at 628. As a result, the statute’s plain language is not subject to interpretation and must be given its full effect. State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997). Under the plain language of the statute, the punishment class of a bail jumping conviction is based on the punishment class of the underlying crime at the time the defendant actually jumped bail. Thus, when a defendant commits the crime while charged with a class C felony, the punishment class of the bail jumping conviction is a class C felony. Here, Coucil failed to appear while charged with a class C felony. As a result, it is irrelevant that he

was ultimately convicted of only a gross misdemeanor – his bail jumping conviction was correctly classified as a class C felony.

Moreover, even if the bail jumping statute were ambiguous, it should not be interpreted as Coucil suggests. In interpreting a statute, this Court avoids constructions that render a portion of the statute “meaningless or superfluous.” State v. Keller, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). Similarly, this Court will avoid interpretations that lead to absurd results. State v. Fjermestad, 114 Wn.2d 828, 835, 791 P.2d 897 (1990). Here, Coucil’s interpretation of the statute would lead to both.

First, Coucil’s interpretation would render a portion of the statute meaningless and superfluous. As previously noted, the penalty provision of RCW 9A.76.170(3) bases the classification of a bail jumping conviction on the classification of the underlying crime the defendant was “held for, charged with, or convicted of.” In this context, each phrase describes a different situation. “Held for” refers to the defendant who has been taken into custody, but is released before charges have been filed. “Charged with” refers to the defendant who has been charged with a crime, but is released while the case is still pending. “Convicted of” refers to the defendant who has been released after conviction, but with some

further hearing that must take place (e.g., sentencing or a probation hearing). The fact that these phrases are listed in the disjunctive demonstrates that they are intended to have independent meaning, *with the punishment level being based on the situation as it existed when the defendant jumped bail.*

Under Coucil's interpretation, the only relevant inquiry would be what crime the defendant was "convicted of" in the underlying case. This would have the effect of reading out of the statute the phrases relating to a defendant who had been "held for" or "charged with" a crime, because those provisions would no longer have any meaning. As Coucil's interpretation would allow the one phrase to effectively "trump" the other two, it is a textbook example of why this Court does not interpret statutes in a manner that renders language meaningless or superfluous.

Second, Coucil's interpretation of the statute would lead to absurd results. For example, under Coucil's interpretation, a defendant who was convicted of only a lesser included crime in his underlying case would have the punishment class of his bail jumping conviction reduced as a result. However, it is well settled

that a defendant can be convicted of bail jumping even if the underlying charges are dismissed or the defendant is actually acquitted. See, e.g., State v. Downing, 122 Wn. App. 185, 93 P.3d 900 (2004) (defendant properly convicted of bail jumping even though underlying charges dismissed); State v. Gonzalez-Lopez, 132 Wn. App. 622, 132 P.3d 1128 (2006) (conviction for bail jumping affirmed even though defendant acquitted of underlying charges). In these cases, the punishment class of the bail jumping conviction is *not* reduced due to the acquittal or dismissal, but is still determined by reference to what the crimes the defendant was *charged* with. Gonzalez-Lopez, 132 Wn. App. at 627.

Thus, Coucil's interpretation of the statute would create a situation in which a defendant who was actually convicted in the underlying case (albeit of a lesser included crime) would be treated more leniently than a defendant who was actually acquitted of all underlying charges. As the Legislature could not have intended such an absurd result, Coucil's interpretation of the statute should be rejected.

**D. CONCLUSION**

For all the foregoing reasons, the State asks this Court to affirm Coucil's convictions.

DATED this 27 day of February, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

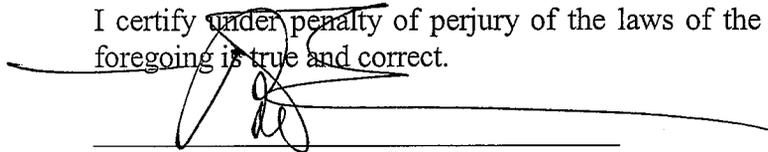
By: 

PATRICK HALPERN HINDS, WSBA #34049  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service

Today I deposited for delivery by United States Postal Service a properly addressed and stamped envelope directed to NIELSEN, BROMAN & KOCH, PLLC; 1908 East Madison; Seattle, WA 98122; ATTN: JENNIFER DOBSON or DANA LIND, containing a copy of the State's Brief of Respondent in State v. Nikeemia Coucil, Court of Appeals Cause No. 61731-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify ~~under~~ penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Done in Seattle, Washington

02/27/2009  
Date

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 FEB 27 PM 4:42