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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count IV, bail jumping, from the jury for lack of sufficiency of the evidence.
02. The trial court erred in permitting Chambers to be represented by counsel who provided ineffective assistance by failing to properly present his claim that he did no knowingly fail to appear for a required appearance before the court.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was sufficient evidence that Chambers knowingly failed to appear for a required appearance before the court? [Assignment of Error No. 1].
02. Whether Chambers was the same person who had signed the order requiring the at the status conference hearing on September 26, 2007? [Assignment of Error No. 1].
03. Whether Chambers was prejudiced as a result of his counsel's failure to properly object present his claim that he did no knowingly fail to appear for a required appearance before the court? before the court. [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

David W. Chambers (Chambers) was charged by third amended information filed in Thurston County Superior Court on December 18, 2007, with three counts of possession of stolen property in

the second degree, counts I-III, and bail jumping, count IV, contrary to RCWs 9A.56.160 and 9A.76.170(1). [CP 20-21].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 10]. Trial to a jury commenced on December 17, the Honorable Anne Hirsch presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 12/18/07 71-74].

The jury returned a verdict of guilty of bail jumping but was unable to reach agreement on the other charges. [RP 12/18/07 120; CP 48-51]. Chambers was sentenced within his standard range and timely notice of this appeal followed. [CP 52-62, 65].

02. Substantive Facts¹

Through Deputy Prosecutor Don Smith, the State introduced the agreed order of trial continuance allegedly signed by Chambers on August 8, 2007, wherein he promised to next appear in court the following September 26 for a status conference hearing. The order further indicated that failure to appear could result in criminal prosecution for bail jumping. [RP 12/17/07 37-38; State's Exhibit 3]. When Chambers did not appear for the status hearing, Smith secured a bench warrant for his arrest. [RP 2/17/07 38-39].

¹ The facts are limited to the single offense for which Chambers was convicted.

Chambers testified that he always gave his mother the paperwork he was given in court: “(E)very single thing that was ever given to me I give to her and she’s made sure I’m here.” [RP 12/17/07 46]. He admitted he was not in court on September 26 for the status hearing. [RP 12/17/07 56].

D. ARGUMENT

01. THERE WAS INSUFFICIENT EVIDENCE THAT CHAMBERS KNOWINGLY FAILED TO APPEAR FOR A REQUIRED APPEARANCE BEFORE THE COURT.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. 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. 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.

To prove the charge of bail jumping, the State had to prove that Chambers knowingly failed to appear for a required appearance before the court, which, in this case, translated to proof that he was the same person who had signed the order requiring the appearance at the status conference hearing on September 26, 2007.

[W]hen criminal liability depends on the accused's being the person to whom a document pertains(,) ... the State must do more than authenticate and admit the document; it also must show beyond a reasonable doubt "that the person named therein is the same person on trial."

State v. Hubner, 129 Wn. App. 499, 502, 119 P.3d 388 (2005) (emphasis added) (footnotes omitted). If the State presents only a document bearing an identical name, the State produces insufficient evidence to support a criminal conviction beyond a reasonable doubt. State v. Hunter, 29 Wn. App. 218, 221, 627 P.2d 1339 (1981).

Here, the State produced the aforementioned order bearing Chambers's name, but it presented no evidence to show that Chambers was the person who had signed the document: no booking fingerprints, eyewitness identification or distinctive personal information. During his testimony, Chambers never actually admitted to signing the document. And the fact that his defense counsel stated during closing argument that

her client had “signed the piece of paper [RP 12/18/07 103](,)” does not save the day for the State, since such a remark is not evidence. See State v. Rice, 120 Wn.2d 549, 573, 844 P.2d 416 (1993) (any potential prejudice in closing argument was minimized by trial court’s instruction to the jury that counsel’s statements are not evidence and should not be considered); see also Court’s Instruction No. 1 [CP 24].

Chambers’s conviction for bail jumping must thus be reversed and dismissed.

02. CHAMBERS WAS PREJUDICED AS A RESULT OF HIS COUNSEL’S FAILURE TO TO PROPERLY PRESENT HIS CLAIM THAT HE DID NOT KNOWINGLY FAIL TO APPEAR FOR A REQUIRED APPEARANCE BEFORE THE COURT.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney’s performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney’s unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Should this court determine that counsel waived the issue presented in the preceding section by (1) stating during closing argument that Chambers had signed the order requiring the appearance on September 26 [RP 12/18/07 103], or (2) by introducing testimony and argument of the possibility that Chambers, who is hard of hearing, did not hear the oral instructions announced in court on August 8 that he was to appear the following September 26 [RP 12/17/07 45; 12/18/07 103], when in fact no such oral instructions were announced in court on that date [RP 08/08/07 3-4], or (3) by failing to object to Deputy Prosecutor Smith's

assertion that Chambers had signed the aforementioned order in court on August 8 [RP 12/17/07 37], for lack of proper foundation and authentication and where the record for August 8 does not indicate that Smith was even at the hearing [RP 08/08/07 1-4], then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have introduced or failed to object to this testimony, none of which worked to her client's benefit.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident: without this evidence, the State had no case.

Counsel's performance was deficient and was highly prejudicial to Chambers, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction for bail jumping.

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E. CONCLUSION

Based on the above, Chambers respectfully requests this court to reverse and dismiss his conviction for bail jumping.

Dated this 23rd day of July 2008.

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CERTIFICATE

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