

67444-7

67444-7

NO. 67444-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAMAL ALI,

Appellant.

2012 JUN -4 PM 3:20  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA DOYLE  
THE HONORABLE MICHAEL HEAVEY

**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS .....	2
C. <u>ARGUMENT</u> .....	6
1. A RATIONAL TRIER OF FACT COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT ALI KNEW HIS PRESENCE WAS REQUIRED AT THE DECEMBER 3, 2010 HEARING AND THAT HE FAILED TO APPEAR.....	6
a. Ali Knew The Court Rescheduled The Omnibus Hearing For December 3, 2010 .....	8
b. Ali Knew That His Presence At The December 3 Hearing Was Required .....	15
c. The State Proved That Ali Failed To Appear At The December 3 Hearing .....	18
2. JUDGE DOYLE HAD NO REASON TO DOUBT ALI'S COMPETENCY .....	20
a. Ali's Personal History .....	21
b. Legal Competence – Procedural History.....	22
c. “Cultural Competence” – Procedural History.	30
d. The Law Governing Competency Findings ...	33
e. Legal Incompetency Versus “Cultural Incompetency” .....	41

3.	THE TRIAL COURT HAD THE AUTHORITY TO ORDER ALI NOT TO CONSUME NONPRESCRIPTION DRUGS .....	44
4.	THE STATE CONCEDES THAT THE TRIAL COURT ERRED WHEN IT ORDERED MENTAL HEALTH TREATMENT AS A COMMUNITY CUSTODY CONDITION .....	47
D.	<u>CONCLUSION</u> .....	49

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Godinez v. Moran, 509 U.S. 389 (1993)..... 35

Medina v. California, 505 U.S. 437,  
112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992) ..... 37

Miranda v. Arizona, 384 U.S. 436,  
86 S. Ct. 1602, 16 L. Ed. 2d 694,  
10 A.L.R.3d 974 (1966) ..... 32

Washington State:

State v. Bahl, 164 Wn.2d 739,  
193 P.3d 678 (2008)..... 44, 45

State v. Ball, 97 Wn. App. 534,  
987 P.2d 632 (1999)..... 9, 10, 17

State v. Benn, 120 Wn.2d 631,  
845 P.2d 289 (1993)..... 37

State v. Brooks, 142 Wn. App. 842,  
176 P.3d 549 (2008)..... 47, 48

State v. Bryant, 89 Wn. App. 857,  
950 P.2d 1004 (1998)..... 9, 12, 17

State v. Carver, 122 Wn. App. 300,  
93 P.3d 947 (2004)..... 9, 10

State v. Coleman, 155 Wn. App. 951,  
231 P.3d 212 (2010)..... 19

State v. Crenshaw, 98 Wn.2d 789,  
659 P.2d 488 (1983)..... 34

<u>State v. Dodd</u> , 70 Wn.2d 513, 424 P.2d 302 (1967).....	34
<u>State v. Downing</u> , 122 Wn. App. 185, 93 P.3d 900 (2004).....	8, 18
<u>State v. Fiser</u> , 99 Wn. App. 714, 995 P.2d 107 (2000).....	8, 17
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	7
<u>State v. Hahn</u> , 106 Wn.2d 885, 726 P.2d 25 (1986).....	35
<u>State v. Harris</u> , 114 Wn.2d 419, 789 P.2d 60 (1990).....	35, 37
<u>State v. Jones</u> , 118 Wn. App. 199, 76 P.3d 258 (2003).....	48, 49
<u>State v. Minor</u> , 162 Wn.2d 796, 174 P.3d 1162 (2008).....	12, 13, 14, 19
<u>State v. Myers</u> , 133 Wn.2d 26, 941 P.2d 1102 (1997).....	7
<u>State v. Ortiz</u> , 104 Wn.2d 479, 706 P.2d 1069 (1985).....	34, 35, 38, 39, 40, 41
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	7
<u>State v. Sanchez</u> , 166 Wn. App. 304, 271 P.3d 264 (2012).....	14
<u>State v. Shipp</u> , 93 Wn.2d 510, 610 P.2d 1322 (1980).....	9
<u>State v. Smith</u> , 31 Wn. App. 226, 640 P.2d 25 (1982).....	7

<u>State v. Valencia</u> , 169 Wn.2d 782, 239 P.3d 1059 (2010).....	45, 46
<u>State v. Wicklund</u> , 96 Wn.2d 798, 638 P.2d 1241 (1982).....	33, 34, 35
<u>State v. Wilson</u> , 136 Wn. App. 596, 150 P.3d 144 (2007).....	12, 13, 14, 19

Other Jurisdictions:

<u>Commonwealth v. Banks</u> , 513 Pa. 318, 521 A.2d 1 (1987).....	36, 39
<u>People v. Kelly</u> , 1 Cal.4th 495, 3 Cal.Rptr.2d 677, 822 P.2d 385, <u>cert. denied</u> , 506 U.S. 881, 113 S. Ct. 232, 121 L. Ed. 2d 168 (1992).....	38, 39
<u>People v. Mack</u> , 638 P.2d 257 (Colo.1981).....	38
<u>State v. Buxton</u> , 643 A.2d 172 (R.I. 1994) .....	36, 39
<u>State v. Potter</u> , 109 Idaho 967, 712 P.2d 668 (1985).....	38
<u>State v. Sanders</u> , 209 W.Va. 367, 549 S.E.2d 40 (2001) .....	38, 39

Constitutional Provisions

Federal:

U.S. Const. amend. XIV .....	33
------------------------------	----

## Statutes

### Washington State:

Former RCW 9.41.047 .....	13
Former RCW 9.94A.505.....	47
Former RCW 9A.76.170.....	10
Former RCW 10.77.060 .....	36, 37
LAWS 2009, CH. 28, § 41.....	2
LAWS 2012, CH. 256, § 3 .....	36
RCW 9.94A.030 .....	45
RCW 9.94A.505 .....	45
RCW 9.94A.533 .....	2
RCW 9.94A.602 .....	2
RCW 9.94A.703 .....	46
RCW 9.94A.825 .....	2
RCW 9.94B.080 .....	47, 48, 49
RCW 9A.08.010 .....	9
RCW 9A.36.021 .....	2
RCW 9A.52.010 .....	13
RCW 9A.76.170 .....	2, 8, 10
RCW 10.77.....	36
RCW 10.77.010.....	35
RCW 10.77.050.....	34, 35

RCW 10.77.084.....	37
RCW 71.24.025.....	48

Rules and Regulations

Washington State:

CrR 3.2.....	16
CrR 3.5.....	31
CrR 6.1.....	2

Other Authorities

Dr Andre Le Sage, <i>Stateless Justice in Somalia/Formal and Informal Rule of Law Initiatives Report</i> , § 3. “Formal Judicial Systems,” Centre for Humanitarian Dialogue, July 2005.....	42
<a href="http://www.mballi.info/doc399.htm">http://www.mballi.info/doc399.htm</a> .....	42

**A. ISSUES PRESENTED**

1. Whether sufficient evidence supports Ali's conviction for bail jumping.

2. Whether three judges properly declined to order a second mental health evaluation after Ali had been found competent and then failed to present any new evidence or change of circumstances that gave any judge a reason to doubt Ali's competency.

3. Whether, as a condition of community custody, the trial court had the authority to order Ali not to consume nonprescription drugs where evidence demonstrated that Ali's apparent use of illicit drugs contributed to the crime charged.

4. Where the trial court ordered mental health treatment without following the required procedure, but overwhelming evidence supports a finding that Ali was mentally ill and the illness contributed to his crime, is remand for entry of the proper findings or for striking the condition if such findings are not supported by the record, the appropriate remedy.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

By Amended Information, the State charged the defendant, Jamal Ali, with one count of second degree assault,<sup>1</sup> while armed with a deadly weapon,<sup>2</sup> and one count of bail jumping.<sup>3</sup> CP 38-39. Ali opted for a bench trial before the Honorable Michael Heavey. CP 41. Judge Heavey found Ali guilty as charged and entered written findings, as required by CrR 6.1(d). CP 28-29. The court imposed a standard range sentence.<sup>4</sup> CP 51-58. Ali timely appeals. CP 60.

**2. SUBSTANTIVE FACTS<sup>5</sup>**

On July 12, 2010, Ali's cousin, Amal Ali (with whom he lived), called 911. 6/22/11 RP 102-03, 167. Amal<sup>6</sup> told the police dispatcher that Ali had smoked drugs, smashed a television, appeared dangerous and to be "going crazy." CP 46 (Finding of

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<sup>1</sup> RCW 9A.36.021(1)(c).

<sup>2</sup> RCW 9.94A.602, RECODIFIED AS § 9.94A.825 BY LAWS 2009, CH. 28, § 41, and RCW 9.94A.533(4).

<sup>3</sup> RCW 9A.76.170(1), 3(c).

<sup>4</sup> The State addresses Ali's challenges to two sentencing conditions in sections C.3 and 4 of the Brief of Respondent, infra.

<sup>5</sup> The facts that support the bail jumping conviction are discussed in sections C.1.a and b of the Respondent's brief, infra.

<sup>6</sup> For brevity and clarity, the State refers to Amal Ali by her first name. No disrespect is intended.

Fact 2); 6/22/11 RP 103, 165, 214-15; Ex. 40. Two King County Sheriff's Deputies (Benjamin Callahan and Paula Bates) responded to Amal's call. 6/22/11 RP 101, 163-65. Callahan knocked on the front door. No one answered, but he heard a yell from inside. Id. at 105, 166. Callahan announced "police," then opened the door. Id. 106-07. Ali stood at the top of the stairs. Id. at 106, 166.

When Callahan stepped into the house, Ali furtively moved a hand behind his back, possibly to a pants pocket. 6/22/11 RP 108. Bates repeatedly told Ali to show his hands. Id. at 167. Callahan drew his taser; Bates drew her gun. Id. at 108, 168. Ali fled to a room and slammed the door. Id. at 109.

Callahan raced upstairs and kicked the door in. Ali charged at Callahan with a steak knife (which had a straight blade that measured approximately four to four and one half inches) in his right hand.<sup>7</sup> 6/22/11 RP 109, 111, 171, 183. Ali got within two feet of Callahan. Id. at 186. If Callahan could have un-holstered his gun, he would have shot Ali because he feared Ali would kill him. Id. at 111-12. Bates, who also had raced up the stairs, could not

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<sup>7</sup> Bates described the knife as about 8 inches long, serrated, with a black handle and a silver blade. 6/22/11 RP 173.

shoot Ali because Callahan stood in her line of fire. Id. at 168-69, 172.

As Callahan backed up, he deployed his taser. 6/22/11 RP 113-15, 172. Ali's nearness to Callahan prevented the taser's full effect, *i.e.*, immobilization.<sup>8</sup> Id. at 114. The probes entered Ali's right shoulder. Id. Ali tried to lift his arm, but the taser's electric shocks temporarily paralyzed his arm. Id. at 151-53.

Ali collided with Callahan, who had backed into a wall. 6/22/11 RP 116. Callahan pushed Ali to the ground. Id. Ali lay on his stomach with his hand and the knife underneath him. Id. Callahan continued to shock Ali because he refused to comply with his commands to roll over and show his hands. Id. at 116, 123. When Ali finally showed his hands, Bates handcuffed him. Id. at 124.

Bates rolled Ali over; he had the knife underneath him. 6/22/11 RP 125, 172. Ali had blood on his head and hand. When Callahan kicked in the door, it struck Ali. Id. Ali had a half-inch cut, which looked consistent with a knife wound, on his left thumb. Id. at 195-96; CP 48 (Finding of Fact 20). King County Sheriff's

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<sup>8</sup> Callahan said that whenever a person is too close to immobilize, the goal is to achieve "pain compliance," *i.e.*, continue to send the impulse to the probes until the person no longer poses a threat. 6/22/11 RP 114-16.

Deputy Chris Myers took Ali to Northwest Hospital because he needed stitches above his eye. 6/22/11 RP 120, 193-94. Ali denied to Myers that he had a knife during the incident. He did, however, admit that he had a new knife in his room. Id. at 195.

Neither Callahan nor Bates seized Ali's knife immediately – their priority had been to get Ali into a patrol car. 6/22/11 RP 125. When Callahan and Bates returned to the house to retrieve the knife, the door was locked. Id. at 126, 176. After the deputies were permitted to re-enter the house, the knife was gone.<sup>9</sup> Id. at 128-29. Callahan seized a utility (not a steak) knife from the kitchen that looked consistent with Ali's knife, and he seized plastic packaging for a new knife from Ali's room. Id. at 128-29, 136, 174-75; CP 48 (Finding of Fact 17). Despite a thorough search, the deputies never recovered Ali's knife.<sup>10</sup>

Although Amal testified for the State (to verify that it was she who had called 911), her testimony stood in stark contrast to

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<sup>9</sup> Amal and her aunt (who came out of another apartment) unlocked Ali's front door and allowed the deputies back inside. CP 47 (Finding of Fact 15); 6/23/11 RP 237.

<sup>10</sup> The trial court concluded that the knife seized in the kitchen was not the knife Ali had used, but, rather, the packaging for a new knife that Callahan found in Ali's room likely belonged to the missing knife. CP 48 (Findings of Fact 18, 25). The court found that Ali had a knife when he assaulted Callahan. CP 48 (Finding of Fact 25); CP 49 (Conclusions of Law 3-6).

Deputy Callahan's and Bates' testimony. 6/22/11 RP 211-21; 6/23/11 RP 229-41. Amal conceded she had told the 911 dispatcher that Ali was "dangerous" and she feared for her life and his life, but she testified that she said those words "out of ignorance." 6/22/11 RP 220-21; Ex. 40. Amal consistently denied that she had seen Ali armed with a knife. 6/22/11 RP 220; 6/23/11 RP 235. Amal said that when Bates loaded her gun, she screamed, "Please don't kill us!" 6/23/11 RP 233. Amal also stated that Callahan threatened to call the FBI and pushed her aunt, who has cancer. Id. at 237.

The trial court found Deputies Callahan and Bates "totally credible." CP 48 (Finding of Fact 21). The court said that Ali's assault had traumatized the deputies and noted how fortunate Ali was that Callahan shot him with his taser and not his firearm. CP 48 (Finding of Fact 23).

**C. ARGUMENT**

- 1. A RATIONAL TRIER OF FACT COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT ALI KNEW HIS PRESENCE WAS REQUIRED AT THE DECEMBER 3, 2010 HEARING AND THAT HE FAILED TO APPEAR.**

Ali contends that the State provided insufficient evidence to support his conviction for bail jumping. Ali claims that the State

failed to prove that he: (1) knew of the December 3, 2010 hearing; (2) knew his presence was required; and (3) failed to appear. The Court should reject these arguments because direct and circumstantial evidence support the trial court's conclusion that Ali knew he was required to attend the hearing on December 3, 2010 and that he failed to do so. The Court should affirm Ali's conviction for bail jumping.

Evidence is sufficient to support a conviction only if after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). An insufficiency claim "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as reliable as direct evidence. State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). A factual sufficiency review "does not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt but rather whether any rational trier of fact could be so convinced." State v. Smith, 31 Wn. App. 226, 228, 640 P.2d 25 (1982) (emphasis omitted). This

Court defers to the trier of the fact on the persuasiveness of the evidence. State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107 (2000).

- a. Ali Knew The Court Rescheduled The Omnibus Hearing For December 3, 2010.

RCW 9A.76.170(1), as amended in 2001, provides:

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.

Thus, in order to convict a defendant of bail jumping, the State must prove that the defendant “(1) was held for, charged with, or convicted of a particular crime;<sup>11</sup> (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).

By statute, a person knows or acts knowingly or with knowledge when:

- (i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

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<sup>11</sup> Ali does not challenge the sufficiency of the State’s proof regarding the first element. He was charged with a crime when the court ordered him to appear at the December 3, 2010 hearing. See Exs. 31-32.

(ii) he has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

RCW 9A.08.010(1)(b). Subsection (ii) provides a permissive inference that the person acted knowingly; in other words, a jury could find that the defendant had knowledge if it finds that an ordinary person would have had knowledge under the circumstances. State v. Shipp, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980); State v. Bryant, 89 Wn. App. 857, 870, 950 P.2d 1004 (1998).

The knowledge requirement – that the defendant knew or was aware that he was required to appear at the scheduled hearing – is satisfied when the State proves that the defendant has been given notice of the required court dates. State v. Carver, 122 Wn. App. 300, 305, 93 P.3d 947 (2004) (citing State v. Ball, 97 Wn. App. 534, 535-36, 987 P.2d 632 (1999)). In Ball, the State presented sufficient evidence for the jury to find that the defendant knew he was required to appear by offering both the order setting bail and releasing Ball on conditions, including that he appear as directed, and the notice, signed by Ball, by which the court set the sentencing hearing date. Ball, 97 Wn. App. at 535-37. Ball argued

that the State provided insufficient evidence of “knowledge” because it did not prove that, on the precise date of the scheduled hearing, he was aware of his duty to appear.<sup>12</sup> Ball, 97 Wn. App. at 536. The Court of Appeals rejected Ball’s argument, and held that knowledge on the specific date of the hearing is not an element of the crime. Id. at 536-37.

Similarly, in Carver, the defendant testified at trial that, although he had previously been given notice of the December 3, 2002 hearing, he failed to appear because he “forgot.” Carver, 122 Wn. App. at 303-04. Carver argued on appeal that because he forgot about the December 3 hearing, the State failed to prove that he had “knowledge” of the requirement of a subsequent personal appearance. Carver, at 305. The Court of Appeals rejected Carver’s argument. The court said,

Based on a plain reading of the current version of RCW 9A.76.170, we expressly hold that the State must prove only that Carver was given notice of his court date - not that he had knowledge of this date

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<sup>12</sup> Ball was convicted of bail jumping under former RCW 9A.76.170(1). Before 2001, RCW 9A.76.170 stated in pertinent part, “[a]ny person having been released by court order or admitted to bail with the requirement of a subsequent personal appearance before any court of this state, and who knowingly fails to appear as required is guilty of bail jumping.”

every day thereafter - and that "I forgot" is not a defense to the crime of bail jumping.

Id. at 306.

Ali had knowledge of the December 3 hearing. On November 4, 2010, Ali signed an order continuing the trial date until "12/13/10" and the omnibus hearing date until "12/3/10." Ex. 36. The superior court clerk's minute entry from the November 4 hearing states that the omnibus hearing is continued to "12-3-10." Ex. 37. The minute entry further states that, "Defendant present represented by Eric Makus (defense counsel)." Ex. 37. So, Ali received written and oral notice that the omnibus hearing was rescheduled for December 3.<sup>13</sup>

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<sup>13</sup> Ali argues that although the superior court clerk's minute entry reflects the omnibus hearing was rescheduled for December 3, 2010, the record "is silent as to whether that fact was communicated to Ali." Br. of Appellant at 23. The State is unsure how the information could have been imparted to the clerk but not to Ali who was present at that same hearing. In fact, the November 4 verbatim report of proceedings demonstrates that Ali was present and, in his presence, the court (The Honorable Michael Hayden) said, "So, that will be our next hearing, come back on 12/3. . . ." 11/4/10 RP 1, 6.

Additionally, on November 17, 2010 another hearing occurred before Judge Hayden. Ali was present. The deputy prosecutor said that, "[W]e have Omnibus on 12-3 and trial on 12-13." 11/17/10 RP 11. The court then said, "Mr. Ali, I will see you the next time." Mr. Ali responded, "I appreciate that. Thank you." Id. Moreover, on December 3, after Ali failed to appear, the court asked defense counsel, "Where is your client?" Counsel apologetically responded, "I notified my client telephonically, reminded him yesterday. I've left him two messages this morning. I'm not in communication with him." 12/3/10 RP 3.

Moreover, since a reasonable person would have known of the December 3 hearing, then the evidence is sufficient for a trier of fact to conclude that Ali knew, *i.e.*, had subjective knowledge of the hearing on December 3. See Bryant, 89 Wn. App. at 871. Ali's claim fails.

Ali challenges the portion of the order continuing trial date that reads:

"It is further ORDERED:

Omnibus hearing date is 12/3/10"

Ex. 36. Ali claims that because the box adjacent to the new omnibus hearing date is unchecked, the State failed to prove that he knew of the December 3 hearing. Br. of Appellant at 22-23. Ali relies on State v. Minor, 162 Wn.2d 796, 174 P.3d 1162 (2008) and State v. Wilson, 136 Wn. App. 596, 150 P.3d 144 (2007), cases that are distinguishable.

There is a meaningful distinction between being ignorant of the law and being affirmatively misled by a governmental entity. See Minor, supra, at 802. In Minor, the defendant was not given oral or written notice of his loss of firearm rights, as required by

former RCW 9.41.047(1).<sup>14</sup> Minor, 162 Wn.2d at 800. The Washington Supreme Court held that the defendant was affirmatively misled into believing he could possess firearms where the order on which the unlawful possession charge was based did contain a notification of the firearm prohibition, but the court did not check a box located beside the paragraph containing the notification. Id. at 803-04.

The defendant in Wilson was similarly misled. There, the issue was whether the evidence could sustain a first degree burglary conviction (which requires proof that a defendant enters or remains unlawfully in a building)<sup>15</sup> where a previously issued no-contact order prohibited Wilson from having contact with a woman, Sanders, but did not prohibit him from being at the residence they shared. Wilson, 136 Wn. App. 596. The trial court dismissed Wilson's burglary conviction because it determined that based on the unchecked adjacent box and blanks in the order

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<sup>14</sup> Former RCW 9.41.047(1) states:

At the time a person is convicted of an offense making the person ineligible to possess a firearm ... the convicting or committing court shall notify the person, orally and in writing, that the person ... may not possess a firearm unless his or her right to do so is restored by a court of record.

<sup>15</sup> A person unlawfully enters a building when he is not then licensed, invited, or otherwise privileged to enter or remain. RCW 9A.52.010(3).

prohibiting contact form that read: "( ) remain \_\_\_ feet from the above-listed person(s) residence(s), workplace(s) \_\_\_\_, school/daycare \_\_\_\_, Wilson's entry was lawful (especially where, by contrast, there were check marks in four other adjacent boxes that prohibited various forms of personal contact with Sanders). Id. at 604-05. The Court of Appeals affirmed because the no-contact order did not specifically exclude Wilson from Sanders' residence, although it could easily have done so simply by checking the box on the form and filling in the prohibited address. Id. at 611.

In this case, even assuming the court's failure to check the box adjacent to the statement that: "Omnibus hearing date is \_\_\_" somehow misled Ali, the handwritten date "12/3/10" in the blank, on the order Ali signed, undercuts his claimed lack of knowledge – and distinguishes this case from Wilson.<sup>16</sup> Ex. 36. Moreover, unlike the defendants in Minor and Wilson, Ali received oral notice (at the November 4 hearing)<sup>17</sup> and therefore knew the date on which he was required to appear. Ex. 37; see also CP 49.

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<sup>16</sup> Had the blank in the no-contact order been filled in with Sanders' address, the unchecked box would likely not have proved fatal. See State v. Sanchez, 166 Wn. App. 304, 310-11, 271 P.3d 264 (2012) (agreeing with the court's analysis in Wilson and saying that, "If a protection order is to exclude a person from the victim's residence, it must so state.").

<sup>17</sup> Ali received notice again at the November 17 hearing.

b. Ali Knew That His Presence At The  
December 3 Hearing Was Required.

Ali next claims that even if he knew of the hearing on December 3, the State provided insufficient evidence to show that he knew his presence was required at that hearing. Br. of Appellant at 23. This claim is without merit.

On July 10, 2010, the State filed an information that charged Ali with second degree assault and requested bail in the amount of \$40,000, cash or surety bond. Exs. 31, 32. On July 15, 2010, Ali posted a \$40,000 surety bond. Ex. 33. Pursuant to the bond, Ali had an obligation to appear at arraignment (date to be specified) to answer the charge and “from day to day thereafter as ordered. . . .” Ex 33.

That same day, Ali also executed a power of attorney that appointed the surety “Attorney-in-Fact.” Ex. 32. According to the power of attorney, the surety’s authority regarding Ali is “limited to the execution of appearance bonds and cannot be construed to guarantee . . . any other condition imposed by a court *not specifically related to court appearances.*” Ex. 32 (italics added).

Ali failed to appear at the arraignment scheduled for July 22, 2010. Ex. 34. The court issued a bench warrant.<sup>18</sup> Ex. 35. On July 29, 2010, Ali appeared before the court. The court quashed the bench warrant and reinstated the bond after it found that, "Mr. Ali did not receive any notice for arraignment on 7/22/10."<sup>19</sup> Ex. 35.

The prior bench warrant and reinstatement of bond were not admitted as trial exhibits to demonstrate Ali's propensity to jump bail. 6/22/11 RP 205-06. Rather, the documents are circumstantial evidence from which a reasonable trier of fact could conclude Ali knew – actually and subjectively – that his presence was required at the hearing on December 3, 2010. See CP 49 ("The Court finds specifically that the defendant previously posted bail and that bail was reinstated prior to his non-appearance on December 3,

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<sup>18</sup> CrR 3.2(o) authorizes a trial court to issue a bench warrant when the accused fails to appear at a hearing where the accused's personal appearance is necessary.

<sup>19</sup> The surety bond did not have the arraignment date; rather, Ali or the bond company was to "call" for or with the date. Ex. 33. The court mistakenly dated the order quashing the bench warrant August 29, 2010. The Superior Court Clerk's date stamp and accompanying paperwork demonstrate that the date was July 29, 2010. Ex. 35.

2010.”).<sup>20</sup> See also Bryant, 89 Wn. App. at 871 (finding that the written and verbal notice of the required hearing and the additional fact that Bryant had posted a \$20,000 bond could allow a rational, fair minded jury to conclude that Bryant had knowledge of the hearing that he failed to attend).

Ali argues that because no language on the order continuing the trial date explicitly told him that he must appear for all hearings, the State failed to prove he knew his presence was required at the December 3 hearing. Br. of Appellant at 23 (citing Ball, 97 Wn. App. at 536 (in which the knowledge element was satisfied by bold, capitalized language that said, “The defendant shall appear for all of the above scheduled court hearings.”)). The Court should reject this argument because it puts form over substance. The issue is not *how* Ali knew his presence was required at the December 3 hearing, but rather *whether* he knew his presence was required.

This Court defers to the trier of fact regarding the persuasiveness of the evidence. Fiser, 99 Wn. App. at 719. Here,

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<sup>20</sup> Furthermore, Ali was present at the November 4, 2010 hearing, despite his out-of-custody status. 11/4/10 RP 1. And, when Ali ran late for his November 17 court appearance, he called his attorney and explained that traffic would delay his arrival. 11/17/10 RP 2. It is fair to infer that Ali knew his presence was required.

the trial court considered the surety bond, power of attorney and Ali's prior unknowing failure to appear coupled with the reinstatement of his bond and concluded that Ali had the requisite knowledge. CP 49. The trial court – a rational trier of fact – concluded that the State had proved Ali's knowledge beyond a reasonable doubt. This was not error.

c. The State Proved That Ali Failed To Appear At The December 3 Hearing.

Ali next argues that because the November 4, 2010 continuance order did not specify a time for the omnibus hearing on December 3, the State presented insufficient evidence to prove he failed to appear at that hearing. The Court should reject the claim because the specific time – as opposed to the specific date – is not an essential element of bail jumping.

As stated above, the State must prove, among other things, that the defendant “had knowledge of the requirement of a subsequent appearance.” Downing, 122 Wn. App. at 192. There is no concomitant requirement that the court specify a time when the defendant must appear. Ali does not cite any statute or court rule to the contrary, rather he relies on this Court's decision in State v.

Coleman, 155 Wn. App. 951, 231 P.3d 212 (2010), a case that is inapposite.

In Coleman, the Court did not add an implied element to bail jumping, *i.e.*, that the State must prove the precise time of the subsequent appearance. Rather, the Court held that when a defendant is notified to appear at a specific time, evidence of his failure to appear at a different time on the specified day is insufficient to establish that the defendant failed to appear. Coleman, 155 Wn. App. at 963-64.

Coleman signed an order that required him to appear on February 4, 2009 at 9:00 A.M. Id. at 963. A court clerk's minute entry from Coleman's 8:30 A.M. status hearing stated that the hearing was stricken and the defendant is on "bench warrant status." Id. At trial, the evidence established only that Coleman had not appeared at the status hearing. Id. Coleman argued, and this Court agreed, that evidence of his failure to appear at the 8:30 A.M. status conference did not show he failed to appear at the time indicated on his notice – 9:00 A.M.<sup>21</sup> Id. at 963-64. The Court should reject Ali's overly-broad reading of Coleman.

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<sup>21</sup> Coleman involved a governmental entity affirmatively misleading a defendant, as in Minor and Wilson, *supra*.

Finally, Ali contends that, “[I]t is speculation that [he] did not appear in court at some time on December 3.” Br. of Appellant at 25. The bench warrant demonstrates that Ali was not present at any time on December 3. Ex. 39. The court granted the State’s motion for a bench warrant and signed an order to that effect on December 3. Ex. 38. The warrant, however, did not issue until December 6. Ex. 39. If Ali had appeared at any time on December 3, the warrant would not have issued.

The State proved each essential element of bail jumping beyond a reasonable doubt. CP 49. The Court should affirm Ali’s conviction for bail jumping.

**2. JUDGE DOYLE HAD NO REASON TO DOUBT ALI’S COMPETENCY.**

Ali asserts that Judge Doyle erred when she did not order a second mental health evaluation three months after Western State Hospital (WSH) evaluated Ali and the presiding court found Ali competent. Judge Doyle did not err. Ali expressed frustration at his seven-month incarceration, not an inability to understand the nature of the proceedings or assist his counsel. Ali’s misperception of the American criminal justice system, also raised issues of “cultural competency,” not legal competency. Because there was

no reason to doubt Ali's competence, Judge Doyle properly denied a second mental health evaluation.

a. Ali's Personal History.

On July 2, 1982, Ali was born in East Africa (Somalia). CP 30-31; 6/21/11 RP 77. He immigrated to the United States in 2000. CP 31.

Between 2008 and 2009, Ali suffered from mental illness and had multiple contacts with mental health professionals. CP 32. In February 2008, Ali's employer wanted Ali to have a work evaluation due to "signs of paranoia," delusional thoughts and psychotic symptoms that he had exhibited over the previous four months. CP 32.

On November 13, 2009, Northwest Hospital (Northwest) evaluated Ali. CP 32. Ali had delusional thoughts and exhibited paranoia. CP 32. According to Amal, Ali had not eaten or slept without sleep medication. CP 32. Northwest said that this was possibly Ali's first "psychotic break" and he would likely decompensate if he refused psychiatric medication. CP 32. Northwest discharged Ali because he did not meet detention criteria. CP 32.

In December 2009, Amal called King County Crisis and Commitment Services to report that Ali's paranoia had worsened. CP 32. A petition was filed to civilly commit Ali based on "danger to others" and "grave disability." CP 32. Navos<sup>22</sup> admitted Ali, and then detained him between December 23 and 29, 2009. CP 32. Navos diagnosed Ali with "Psychosis Not Otherwise Specified" and prescribed medication for his delusions. Then, after Ali refused mental health referrals, Navos discharged him. CP 32.

b. Legal Competence – Procedural History.

On November 17, 2010, Judge Hayden presided over defense counsel's (Eric Makus's) motion to withdraw. CP 25-26; 11/17/10 RP. Makus said that there had been a "fracture in communication" between himself and Ali. 11/17/10 RP 5. Makus believed that Ali needed a mental health evaluation to determine his competency, but Ali refused to cooperate. Id. at 6. Makus said that until November 4, 2010, he did not have competency concerns, but currently he had "bona fide" competency concerns. Id. The court responded, "[Ali] seems very lucid to me today."<sup>23</sup> Id.

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<sup>22</sup> Navos provides in-patient and out-patient psychiatric treatment.

<sup>23</sup> Judge Hayden also presided over the November 4, 2010 hearing.

Makus explained that Ali's past medical records raised some very serious concerns. 11/17/10 RP 7. The court replied,

There may be a mental health history, but for me to be sending him for an evaluation of lack of competency, I have to be convinced by what I view that that exists. I am looking at him. He seems as lucid as many, many defendants we have. I see he is understanding what I tell him. And I see no real evidence of a lack of competency. Competency is not that high of a standard. He has to know what is going on, know the charges and has to be able to cooperate.

Id. Makus stated, "In all those areas, I have bona fide concerns of his inability to do so." Id.

The court then had a colloquy with Ali,

Q. Do you understand what you are charged with here, sir?

A. Yes, sir.

Q. What are you charged with?

A. Second Degree Assault with an officer.

Q. Who am I?

A. You are a judge.

Q. Who is he?

A. My attorney.

Q. Do you know who she is?

A. Yes, sir.

Q. Who is she?

A. The defendant --

Q. You are the defendant.

A. Sorry about that. The plaintiff, the state.

Q. You understand that we will have a trial with a jury?

A. Absolutely.

Id. at 7-8. Following a sidebar, which was not memorialized, the court ruled,

[B]ased on what I see, there is no sufficient basis for me to doubt Mr. Ali's competency. There is no sufficient basis for me to order him to go to Western State (Hospital) to be evaluated.<sup>24</sup>

11/17/10 RP 10.

On December 10, 2010, Ali was booked into the King County Jail after his missed court appearance (the December 3 omnibus hearing discussed above). CP 31. The jail noted no signs or symptoms of mental illness. CP 31.

Dr. Muscatel, a forensic psychologist, interviewed Ali on December 16, 2010 and on January 10, 2011. CP 31-32. Dr. Muscatel opined that Ali was "mentally ill," but "competent to proceed with his legal matters."<sup>25</sup> CP 32.

On February 2, 2011, the deputy prosecutor and defense counsel expressed concern to the presiding court about Ali's ability to assist counsel. 2/2/11 RP 7-8. Makus said that it would be in

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<sup>24</sup> Ali has not challenged this ruling on appeal.

<sup>25</sup> The defense hired Dr. Muscatel. 11/4/10 RP 4.

Ali's "best interests" to have a mental health evaluation. 2/2/11 RP 8-9. Based on Makus's recommendation, the court (The Honorable Ronald Kessler) ordered a mental health evaluation. 2/2/11 RP 9; CP 71-75.

On March 10, 2011, Joanna Johnson, a licensed psychologist at WSH, conducted a forensic interview with Ali. CP 30-36. In addition, Johnson reviewed: (1) Dr. Muscatel's report, dated January 13, 2011, (2) the discovery documents in the instant case, (3) the King County Jail records, and (4) Ali's clinical history. CP 31. Johnson said that Ali's thought process was "organized, logical and reality-based." CP 33. Ali explained the allegations against him in a "logical and goal-directed fashion." CP 33. He demonstrated "basic knowledge about court proceedings." CP 34.

Johnson wrote in her report that,

Mr. Ali appreciates the charges and allegations against him and he recognizes the peril he could face if convicted. ... He was able to rationally consider his legal options and possible outcomes. Given Mr. Ali's limited experience with the legal system, there was (*sic*) some concepts of the legal proceedings that he misunderstood or lacked knowledge of; however if adequately explained to him, he is able to learn new information and apply it to his situation.

[Ali] is capable of providing relevant information and he can reasonably communicate with his defense counsel. Mr. Ali would be able to participate in a

planned defense strategy, to make reasoned choices during courtroom proceedings and to testify relevantly.

CP 34. Johnson concluded, **“Therefore, it is my opinion that Mr. Ali has the capacity to understand the nature of the proceedings against him and the capacity to assist in his own defense.”** CP 34 (emphasis in original).

On March 14, 2011, after Judge Kessler reviewed Johnson's report, he found Ali competent. 3/14/11 RP 3; CP 28-29. Although Makus supported a competency finding, he said, “I find that while there may be an ability, Your Honor, *there certainly is not a willingness to communicate and assist Defense Counsel in representation.*” 3/14/11 RP 4. Judge Kessler asked Ali to speak to another attorney because of the “absolute breakdown” in communication with Makus. 3/14/11 RP 6, 17; CP 91. One week later, Mr. Swaby, an attorney with The Defender Association, became Ali's counsel. 3/21/11 RP 12-13.

On April 6, 2011, Ali told the court that he wanted to represent himself.<sup>26</sup> 4/6/11 RP 15. The court continued Ali's motion until the following day. 4/6/11 RP 15-17; CP 93. The next

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<sup>26</sup> The Honorable Theresa Doyle presided over the April 6 and 7, 2011 hearings.

day, Ali expressed his frustration. Ali said that he had already been in jail for four months. He just wanted his case to move forward. 4/7/11 RP 20-26; CP 76-93.<sup>27</sup> Each time Ali appeared in court, there was “another setback.” 4/7/11 RP 26. Judge Doyle confirmed with Ali that he was frustrated because he believed his lawyers had not moved his case toward a resolution.<sup>28</sup> 4/7/11 RP 27. The court continued the matter for Ali to consider whether he wanted to represent himself at trial.<sup>29</sup> 4/7/11 RP 27-29; CP 94-95.

On June 14, 2011, the parties again appeared before Judge Doyle. Swaby told the court that he was unprepared for trial because, “I don’t believe he’s (Ali’s) prepared to cooperate with me on a trial issue.” 6/14/11 RP 31. Swaby was unsure whether Ali had competency issues or if “Ali does not trust or want to work with me.” 6/14/11 RP 38. The court asked Swaby, “[D]oes it appear

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<sup>27</sup> The clerk’s papers document the length of the proceedings, *i.e.*, the number of case-setting or trial continuances.

<sup>28</sup> During the November 17, 2010 hearing, Ali expressed the same frustration to Judge Hayden. Ali stated that he wanted new counsel because, “I felt the process wasn’t going as fast as I would like.” 11/17/10 RP 3-4. Ali said that, “The process, the trial ... took more time than I expected.” *Id.* at 4. Judge Hayden asked Ali if his concern was how long it was taking to resolve the case or if he had problems with his attorney. Ali responded, “Mostly is the timing.” *Id.* at 5. After Ali decided that Makus could continue as his counsel, Makus raised his competency concerns (discussed above), which the court said did not provide a “sufficient basis ... to doubt Mr. Ali’s competency.” *Id.* at 10.

<sup>29</sup> On April 13, 2011, Ali withdrew his motion. 4/13/11 RP; CP 96.

that it's not really a question of ability but rather desire to assist at this point?" 6/14/11 RP 38. Swaby responded, "I truly don't know - -" 6/14/11 RP 38. The court noted that Ali had previously been evaluated and found competent. 6/14/11 RP 39.

Ali said that he had spent seven months in jail – and his case got continued over and over again while he remained jailed. 6/14/11 RP 33-35, 43; CP 76-84, 86-107. Ali stated his unwillingness to either plead guilty or proceed to trial. 6/14/11 RP 43-44. Judge Doyle acknowledged that seven months is a "long time" and that she understood the delays were "really frustrating" and made Ali "really angry." 6/14/11 RP 33, 44.

Swaby suggested that Ali might not understand his situation. 6/14/11 RP 4-48. Ali replied, "No, I do understand." 6/14/11 RP 47. The deputy prosecutor said that perhaps Ali simply did not wish to understand. 6/14/11 RP 48. The prosecutor remarked, "I think clearly from what I've heard, Mr. Ali understands, uh, what the situation is, he just doesn't like his options and this case needs to be tried." 6/14/11 RP 49.

The prosecutor asked the court to have a brief colloquy with Ali to determine whether he understood the charges against him and was still competent to proceed. 6/14/11 RP 39-40. The court

spoke to Ali about his options – plead or go to trial. 6/14/11 RP

40-48. After discussing Ali's options with him, the court ruled:

[G]iven my interaction, uh, with Mr. Ali today and previously, and the information that I have gleaned from the file and the prior reports, *I find no reason to doubt his ability to go forward*. I think there's an issue of coming to grips with the options that are available, but not an inability to understand or assist Counsel.

6/14/11 RP 49-50; CP 107.

On June 20, 2011, Swaby told Judge Kessler that he and Ali had a “fundamental breakdown in communication.” 6/20/11 RP 18.<sup>30</sup> Swaby said some of the difficulty might be attributed to his client's “lack of competence at this point.” 6/20/11 RP 18. Swaby stated Ali felt strongly that the matter had already been resolved. 6/20/11 RP 18. Swaby asked Judge Kessler to have a colloquy with Ali. 6/20/11 RP 18. Judge Kessler said, “All right. Mr. Ali, what do you wish to say?” Ali responded, “Nothing really.” 6/20/11 RP 18. The court then denied Ali's motion for new counsel and determined that another mental health evaluation was unwarranted. CP 40; 6/20/11 RP 18.

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<sup>30</sup> There are two verbatim reports of proceedings from June 20, 2011. The citations in this paragraph refer to the June 20, 2011 hearing before Judge Kessler, in the volume with hearings from March 14 and July 8, 2011.

Later that same day, the parties appeared for trial before the Honorable Michael Heavey. 6/20/11 RP.<sup>31</sup> Swaby told Judge Heavey about the earlier hearing. 6/20/11 RP 4. Swaby said he had “real concerns about his (Ali’s) competence,” *i.e.*, his ability to assist counsel. 6/20/11 RP 4. Swaby assured the court that if something happened during trial that presents “new evidence, new support for [his] opinion,” he would bring it to the court’s attention. 6/20/11 RP 4.

c. “Cultural Competence” – Procedural History.

The following day, June 21, 2011, Swaby told Judge Heavey that Ali did not understand the proceedings. Swaby stated,

It may be an issue, Your Honor, of cultural competence. It may very well be that he has a different understanding or expectation of the criminal justice system.

6/21/11 RP 23. Swaby continued,

I have some sense that he feels that because . . . this really involves family, that this all ought to be done. He has served seven months in jail. That this all ought to just be over. He won’t do anything like this again. So we are done.

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<sup>31</sup> This citation refers to the verbatim report of proceedings dated June 20, 2011 and contained in Volume I.

I just think that I have failed in communicating to him that that is not the way that it works here.<sup>32</sup> That is not what is going to happen here.

6/21/11 RP 23-24.

Judge Heavey expressed reluctance to re-visit Judge Kessler's ruling from the previous day.<sup>33</sup> Ali voiced his frustration; he said, "I have had it with this case." 6/21/11 RP 25. The multiple continuances and substitution of counsel upset Ali. 6/21/11 RP 25-36; see also 11/17/10 RP 4-5; 4/7/11 RP 20-27; 6/14/11 RP 33-35, 43-44. Yet, Ali stated that he wanted a new attorney – one that he paid for, who would represent only him – because he did not have faith in Swaby. 6/21/11 RP 33-34. The court denied Ali's request. Id. at 36.<sup>34</sup>

Later that same day, Ali testified at a CrR 3.5 hearing to determine if his statements to the police were admissible. 6/21/11

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<sup>32</sup> Here in the United States, as opposed to Somalia.

<sup>33</sup> Judge Heavey inquired of Ali whether he understood the difference in potential jail time between pleading guilty or proceeding to trial and possibly getting convicted; Ali did. 6/21/11 RP 25-29. Ali told Judge Heavey that he understood the proceedings involved more than just the missed court appearance, *i.e.*, the bail jumping charge. 6/21/11 RP 28. Post-trial the court reiterated that, "While Mr. Ali is deemed by the court to be competent to stand trial, I do believe that he has some very serious mental health issues." 6/23/11 RP 265.

<sup>34</sup> In his opening brief, Ali contends comments by Makus regarding his being in "grave danger in jail," support his incompetency claim. However, viewed in context, Makus's remarks suggest the danger to Ali was his refusal to go to Mental Health Court or to take medication. 6/21/11 RP 34-36.

RP 73-77. Ali emigrated from Somalia 10 years ago and, although Somali is his native language, he spoke English before he arrived in the United States. 6/21/11 RP 77. Ali confirmed that the police officer had read – and he understood – his Miranda<sup>35</sup> rights.

6/21/11 RP 75-77. Ali nevertheless believed that he had to answer the police officer's questions. 6/21/11 RP 75.

Swaby urged the court to suppress Ali's statements. 6/21/11 RP 80-82. Swaby argued that whether Ali understood his rights is not cut and dried. Although Ali communicates effectively in English, and claimed that he understood his Miranda rights, he still believed that he had to respond to the officer's questions. 6/21/11 RP 80-81. Swaby said, "I think that that is because there is a cultural difference that informs one's understanding." 6/21/11 RP 80.

Swaby continued,

I believe that my client, based upon his lack of experience with the American criminal justice system, and whatever cultural references that he has from not being a native, I think that they affect his ability to understand the way that the court needs him to understand these rights.

6/21/11 RP 83.

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<sup>35</sup> 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

The trial court found that Ali knowingly, voluntarily and intelligently waived his rights.<sup>36</sup> 6/21/11 RP 82-83; CP 42-45.

During Swaby's closing argument, he urged the trial court to look at the "totality of the circumstances" in determining Ali's culpability. He stressed that English is neither Ali's, nor his cousin Amal's native language.<sup>37</sup> Swaby emphasized,

They are not as culturated (*sic*) as Americans. I suspect that they have -- that we could reasonably believe that there is a different -- they encounter law enforcement differently than you or I, or Mr. Ferrell (the deputy prosecutor) would.

That there is a different expectation, when dealing with law enforcement.<sup>38</sup>

6/23/11 RP 261-62.

d. The Law Governing Competency Findings.

Constitutional due process dictates that an incompetent person may not be tried, convicted, or sentenced as long as that incapacity continues. U.S. Const. amend. XIV; State v. Wicklund,

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<sup>36</sup> Either the trial court misspoke or the report of proceedings is in error. The record reads, "I find that it was a knowing, *involuntary* and intelligent waiver of his rights." 6/21/11 RP 83. In context, and in the court's written findings, it is clear that Judge Heavey found that Ali had voluntarily waived his rights. See CP 45.

<sup>37</sup> Amal Ali testified, albeit reluctantly, as a State's witness. 6/22/11 RP 211-21; 6/23/11 RP 229-41.

<sup>38</sup> Post-trial, Amal underscored this point. She told the court that, "I came from [a] different country. I don't know anything about the rules in America." 6/23/11 RP 273.

96 Wn.2d 798, 800, 638 P.2d 1241 (1982); see also RCW 10.77.050. "In Washington, a person is competent to stand trial if he has the capacity to understand the nature of the proceedings against him and if he can assist in his own defense." State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985).

The trial court may make its finding from many things, including the defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports, and the statements of counsel. State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302 (1967). A criminal defendant's previous commitment to a mental institution is not proof of current incompetence. Cf. State v. Crenshaw, 98 Wn.2d 789, 801, 659 P.2d 488, 494 (1983) (stating that, "Evidence of prior commitments to mental institutions is not proof that one was *legally insane at the time the criminal act was committed*")<sup>39</sup> (italics in original).

"Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to

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<sup>39</sup> Judge Hayden made this very point on November 17, 2010, when he responded to Makus's concern that Ali's past medical records raised some very serious concerns. He said, "There may be a mental health history, but for me to be sending him for an evaluation of lack of competency, I have to be convinced by what I view that that exists." 11/17/10 RP 7.

understand the proceedings and to assist counsel.” Godinez v. Moran, 509 U.S. 389 (1993). The ability to rationally assist is a minimal requirement. State v. Harris, 114 Wn.2d 419, 429, 789 P.2d 60 (1990). The Washington Supreme Court has rejected the argument that a defendant must be capable of suggesting a particular trial strategy in order to be competent. Ortiz, 104 Wn.2d at 483. A paranoid schizophrenic may be competent to stand trial. State v. Hahn, 106 Wn.2d 885, 889, 726 P.2d 25 (1986). In Ortiz, the court noted:

Petitioner has an IQ that ranges from 49 to 59, which places him in the category of mildly retarded. He knows that the flag is red, white and blue, that there are 12 months in a year, and that a thermometer shows how hot it is. He does not know, however, what the shape of a ball is or where rubber comes from. He cannot name four presidents, he thinks Longfellow was Jesus, and thinks that there is 1 day in a week. He has a speech impediment that affects his ability to speak. This speech impediment, however, does not prevent him from being able to communicate. Petitioner also alleges that it is very difficult, if not impossible, for him to remember past events.

In Washington, a person is competent to stand trial if he has the capacity to understand the nature of the proceedings against him and if he can assist in his own defense. RCW 10.77.010(6) and RCW 10.77.050. See also State v. Wicklund, 96 Wn.2d 798, 638 P.2d 1241 (1982). The trial court found that petitioner meets both those requirements. The court found that petitioner understands that there is a judge in the courtroom, that a prosecutor will try to convict

him of a criminal charge, and that he has a lawyer who will try to help him. In addition, the trial court found that petitioner has the ability to recall past facts and can relate these facts to his attorney

104 Wn.2d at 482-83.

There is a factual and a legal distinction between *inability* to assist and being *unwilling* to assist. For purposes of determining competency, the question is whether the defendant is capable of assisting his counsel, not whether he is willing to do so. See State v. Buxton, 643 A.2d 172, 176-77 (R.I. 1994); Commonwealth v. Banks, 513 Pa. 318, 343, 521 A.2d 1 (1987).

The statutes governing competency proceedings, set forth in Chapter 10.77 RCW, presume that a defendant is competent and require court findings of incompetency. Under former RCW 10.77.060, when there is reason to doubt a defendant's competency,<sup>40</sup> the court shall order an examination and report of the defendant's mental condition. After the examination is complete and the report is provided, the court must then make an affirmative finding of incompetency. The relevant statute provides, "If at any time during the pendency of an action and prior to

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<sup>40</sup> In 2012, the legislature amended Chapter 10.77 RCW. LAWS 2012, CH. 256, § 3, eff. May 1, 2012. The State cites to the statutes that were in effect during the pendency of the instant case.

judgment *the court finds*, following a report as provided in RCW 10.77.060, *a defendant is incompetent*, the court shall order the proceedings against the defendant be stayed. ..." RCW 10.77.084(1)(a) (emphasis added). The statute requires the court to make a finding of *incompetency*; it does not presume incompetency or place the burden on the State to establish competency.

Moreover, the United States Supreme Court and the Washington Supreme Court have held that, consistent with due process, a criminal defendant may be required to prove his incompetence. Medina v. California, 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992); State v. Benn, 120 Wn.2d 631, 661, 845 P.2d 289 (1993). The Washington Supreme Court has further held that a defendant is presumed competent and that the defendant bears the burden of showing that he is not competent. In Harris, 114 Wn.2d 419, supra, Harris claimed that he was not competent to be executed. The Supreme Court held that Harris was presumed competent and that he had the burden of establishing that he lacked competency. Id. at 432. After reviewing the testimony of Harris's mental health expert, the Court concluded

that “we do not believe that Harris has met his burden of proving his incompetency. . . .” Id.

Once a competency finding is made, the trial court is not required to revisit competency unless the defense produces evidence that the defendant’s mental condition has changed since the previous competency finding. Ortiz, 119 Wn.2d at 301. In State v. Sanders, 209 W.Va. 367, 378, 549 S.E.2d 40 (2001), the West Virginia Supreme Court summarized the state of the law as to when a trial court should re-visit the issue of a defendant’s competency:

[M]ost courts have nevertheless concluded that earlier competency determinations which follow professional evaluation and adequate hearing should not be without consequence. As the Colorado Supreme Court rightly surmised, “[a] final determination of competency entered during the pretrial phase of a case and in accordance with the statutory standards governing the resolution of that issue is not without legal significance to pending and as yet unresolved proceedings.” People v. Mack, 638 P.2d 257, 263 (Colo.1981); see also State v. Potter, 109 Idaho 967, 969-71, 712 P.2d 668, 670-71 (1985). In accord with this approach, most courts take the position that “when a competency hearing has already been held and defendant has been found competent to stand trial . . . a trial court need not suspend proceedings to conduct a second competency hearing unless it is presented with a *substantial change of circumstances or with new evidence casting a serious doubt on the validity of that finding.*” People v. Kelly, 1 Cal.4th 495, 3 Cal.Rptr.2d 677, 822 P.2d 385, 412 (citation

omitted), cert. denied, 506 U.S. 881, 113 S.Ct. 232, 121 L.Ed.2d 168 (1992).

Id. at 378 (italics added).

This Court reviews a trial court's competency finding for abuse of discretion. Ortiz, 104 Wn.2d at 482.

In the present case, Ali never presented Judges Doyle, Kessler or Heavey with a “substantial change of circumstances or with new evidence casting a serious doubt on the validity of [the March 14, 2011 competency finding].” See Sanders, 209 W.Va. 367, 549 S.E.2d 40, supra (internal quotation marks omitted); CP 28-29. Indeed, on March 14, 2011, immediately after Judge Kessler found Ali competent, Makus said, “I find that while there may be an ability, Your Honor, there certainly is not a willingness to communicate and assist Defense Counsel in his representation.” 3/14/11 RP 4. However, the competency finding depends on a defendant's ability – not willingness – to assist counsel. See Buxton, 643 A.2d at 176-77; Banks, 513 Pa. at 343, 521 A.2d 1.

Swaby raised Ali's unwillingness to communicate with Judge Doyle. 6/14/11 RP 31, 38. Judge Doyle confirmed with Ali that he understood his options. 6/14/11 RP 40-50. Judge Doyle recognized that Ali was frustrated and angry about how long he had

been in jail without a resolution. 6/14/11 RP 32-36, 44-48. The court focused on Ali's reluctance – as opposed to his inability – to assist counsel. Judge Doyle ruled that,

[G]iven my interaction, uh, with Mr. Ali today and previously, and the information that I have gleaned from the file<sup>41</sup> and the prior reports, *I find no reason to doubt his ability to go forward*. I think there's an issue of coming to grips with the options that are available, *but not an inability to understand or assist Counsel*.

6/14/11 RP 49-50; CP 107 (emphasis added). Judge Doyle considered many things, including Ali's appearance, demeanor, conduct, personal and family history (as detailed in the March 11, 2011 WSH), past behavior, psychiatric reports (that included Dr. Muscatel's opinion that, "Mr. Ali was mentally ill, although he was competent to proceed with his legal matters"),<sup>42</sup> and Swaby's statements before she determined that Ali remained competent. Judge Doyle's considered ruling was a proper exercise of the court's discretion.

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<sup>41</sup> It is fair to assume that the court's file included information related to the November 17, 2010 hearing, in which Judge Hayden understood Ali's frustration about his prolonged incarceration, but found that there was no reason to doubt his competency. 11/17/10 RP 7-11. As in Ortiz, 104 Wn.2d 479, supra, Ali understood that there is a judge in the courtroom, there is a prosecutor who represents the State and that Makus, his attorney at that time, would try to help him – a point Judge Hayden emphasized. 11/17/10 RP 7-8, 10-11.

<sup>42</sup> CP 32.

On June 20, 2011, Swaby told Judge Kessler that there had been a fundamental breakdown of communication between himself and Ali. 6/20/11 RP 18. Swaby did not produce evidence that Ali's mental health had changed since the March 14, 2011 competency finding (or since the hearing before Judge Doyle six days earlier); yet, that is the defendant's burden. Ortiz, 119 Wn.2d at 301. Judge Kessler had no reason to doubt Ali's competence. CP 40.

Also on June 20, 2011, Swaby told the trial court that if something happened during trial that presents "new evidence, new support for [his] opinion," he would bring it to the court's attention. 6/20/11 RP 4. He never did. Consequently, Judge Heavey did not have a reason to doubt Ali's competence.

In sum, Ali failed to produce evidence of a substantial change of circumstances or new evidence that called into question the prior competency finding. As a result, Judges Doyle, Kessler and Heavey had no reason to doubt Ali's competence or order a second mental health evaluation. Ali's claim fails.

e. Legal Incompetency Versus "Cultural Incompetency."

Swaby understood that Ali's inability to perfectly understand the procedures in the American criminal justice system may have

stemmed from “cultural competence.” 6/21/11 RP 22-23, 80-82; see also 6/23/11 RP 262. Ali emigrated from Somalia. He told Judge Doyle that, “I’m not understanding (*sic*) the way you operate this case.” 6/14/11 RP 33. In part, Ali’s frustration stemmed from his continued incarceration without a resolution. See CP 77-10; 11/17/10 RP 3-4; 4/7/11 RP 19-23; 6/14/11 RP 32-36, 44-46. But, it is also likely that Ali misunderstood the proceedings because of the vast differences between the American and Somaliland criminal justice systems.

Somaliland has a mixed legal system of civil law, Islamic law (*shari’a*), and customary or clan law (referred to as *xeer*). Dr Andre Le Sage, *Stateless Justice in Somalia/Formal and Informal Rule of Law Initiatives Report*, § 3. “Formal Judicial Systems,” Centre for Humanitarian Dialogue, July 2005.<sup>43</sup> *Xeer* is the predominant justice system; it is a set of rules and obligations developed by traditional elders and applied after one violates a customary law. Id. at § 4.1, “The Xeer Process.” A *xeer* case is always heard at the “lowest and most genealogically recent level of the clan that is possible.” Id. This ranges from the nuclear family, up through the

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<sup>43</sup> Available at: <http://www.mwali.info/doc399.htm> (retrieved May 16, 2012).

closest relatives and sub-clans to the clan. Id. If the *xeer* case is resolved by mediation, rather than arbitration, the final judgment satisfies both parties and is highly advantageous to an accused, if he is likely to lose the case. Id.

Ali's misunderstanding of how American courts "operate" a case may, as Swaby suggested, have stemmed from cultural – not legal – incompetency. Ali apparently believed that because the charged incident involved family, and he had already served seven months in jail, the entire matter "ought to be done." 6/21/11 RP 24. Ali told Swaby that "He won't do anything like this again. So we are done." 6/21/11 RP 24. Ali's belief that his case "ought to be done" is consistent with Somaliland *xeer* law. More importantly, even if Ali demonstrated cultural incompetency, that did not provide Judges Doyle, Kessler or Heavey with a reason to doubt Ali's legal competency.

This Court should hold that, because there was no reason to doubt Ali's competence after the March 11, 2011 competency finding, it was not error to deny Ali's motions for a second mental health evaluation.

**3. THE TRIAL COURT HAD THE AUTHORITY TO ORDER ALI NOT TO CONSUME NONPRESCRIPTION DRUGS.**

Ali contends that the trial court exceeded its authority by imposing a prohibition on nonprescription drugs as a community custody condition. Ali argues that the proscription is too broad to be a valid crime-related prohibition because it includes legal, but non-prescribed medicine such as aspirin or cold medicine. This claim is without merit. A common-sense reading of the prohibition demonstrates that a person of ordinary intelligence would understand the condition applies to illicit drugs, not benign substances, as Ali claims.

This Court reviews whether a community custody prohibition is crime-related for abuse of discretion and will be reversed if it is manifestly unreasonable. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). Imposition of an unconstitutional condition is manifestly unreasonable. Id. It is axiomatic that if a condition is unconstitutionally vague, it is manifestly unreasonable. Id.

At sentencing, a trial court may impose “crime-related” prohibitions that directly relate to the circumstances of the crime for

which the defendant had been convicted. RCW 9.94A.030(10);<sup>44</sup> RCW 9.94A.505(8).<sup>45</sup> A sentencing requirement must be sufficiently specific that a person of ordinary intelligence could understand it. Bahl, 164 Wn.2d at 752-54.

A prohibition that is so broad that it encompasses possession of legal and illegal items is unconstitutionally vague. State v. Valencia, 169 Wn.2d 782, 793-95, 239 P.3d 1059 (2010). Citizens must have a fair warning of the proscribed conduct such that ordinary people can understand what is and is not allowed, and are protected against arbitrary enforcement of the laws. Id. at 791 (citing Bahl, 164 Wn.2d at 752-53).

For example, as a condition of Valencia's sentence for conviction of possession of a controlled substance with intent to deliver and conspiracy to commit that crime, the court imposed a community custody condition that prohibited the defendant from

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<sup>44</sup> "'Crime-related prohibition' means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department."

<sup>45</sup> "As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter."

possessing paraphernalia. Valencia, 169 Wn.2d at 785, 794-95. The Washington Supreme Court held that a general proscription against possessing *any* paraphernalia – as opposed to a specific proscription against possessing *drug* paraphernalia – was too broad, and thus unconstitutional. Id. at 794-95. The court reasoned that because the unqualified definition of any paraphernalia encompassed a wide range of everyday items, the condition did not provide ascertainable standards of guilt to protect against arbitrary enforcement. Id. at 795.

In this case, however, the community custody condition that the court imposed provided fair warning of the proscribed conduct. At sentencing, the court said that Ali was not to use alcohol or drugs – “illegal drugs, non-prescribed drugs.” 7/8/11 RP 31-32. The court entered an order that provided, “The defendant shall not consume any alcohol or non-Rx drugs.”<sup>46</sup> CP 58. An ordinary person would understand that the consumption of illegal drugs – not aspirin or cold remedies – was the proscribed conduct. The

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<sup>46</sup> Ali concedes that the trial court had the authority, pursuant to RCW 9.94A.703(2)(c), to order him to “ [r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions.” Br. of Appellant at 44.

condition provides ascertainable standards of guilt to protect against arbitrary enforcement. It is accordingly not unconstitutionally vague.

**4. THE STATE CONCEDES THAT THE TRIAL COURT ERRED WHEN IT ORDERED MENTAL HEALTH TREATMENT AS A COMMUNITY CUSTODY CONDITION.**

Ali contends that the trial court erred when it ordered Ali to obtain “mental health treatment (*sic*)<sup>47</sup> and follow treatment recommendations and take medications as directed,” because the court did not follow the statutory procedures. Br. of Appellant at 39 (quoting CP 58). The State agrees. This Court should remand for the trial court to either presently and lawfully comply with the statutory requirements or strike the condition.

The trial court may only order an offender to undergo mental health treatment as a condition of community custody if it complies with statutory procedures. RCW 9.94B.080; State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008) (addressing former RCW 9.94A.505(9), now codified as RCW 9.94B.080). The court must

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<sup>47</sup> The court ruled orally that Ali was to obtain a mental health evaluation. 7/8/11 RP 32.

find that reasonable grounds exist to believe that the offender is a “mentally ill person” as defined in RCW 71.24.025, and that the mental health condition likely influenced the offense. RCW 9.94B.080; Brooks, 142 Wn. App. at 851. An order requiring mental health treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender’s competency or eligibility for a defense of insanity. RCW 9.94B.080; Brooks, at 851. These requirements are mandatory. See id.; State v. Jones, 118 Wn. App. 199, 210, 76 P.3d 258 (2003).

Here, the trial court did not make the required findings. However, the evidence in this case overwhelmingly indicates that Ali does have a mental illness that contributed to his crime. The trial court’s uncontested findings of fact demonstrate that Ali had been at home for seven straight days, during which time he had acted crazy (paranoid).<sup>48</sup> Amal expressed concern that Ali was a danger to himself and others. CP 48 (Finding of Fact 22); Ex. 40.

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<sup>48</sup> Ali had bouts of depression because his parents had remained in Africa. 6/22/11 RP 214-15.

Amal testified that she called 911 because she wanted the police to take Ali to a hospital, not arrest him. 6/23/11 RP 229-30.

The trial court stated that, "While Ali is deemed by the court to be competent to stand trial, I do believe that he has some very serious mental health issues." 6/23/11 RP 265. At sentencing, Ali's counsel told the court that Ali needed to be in Mental Health Court, a sentiment shared by Amal and Ali's uncle. 7/8/11 RP 24-29.

This Court should remand for entry of the necessary findings or for striking the condition if such findings are not supported by the record. See Jones, 118 Wn. App. at 202 (the court remanded for the trial court to strike the condition, unless it determines that it can presently and lawfully comply with RCW [9.94B.080]).

**D. CONCLUSION**

For the reasons stated above, the State respectfully asks this Court to affirm Ali's convictions for bail jumping and second degree assault. The State further asks the Court to affirm the community custody condition that prohibits Ali from consuming nonprescription drugs, but to remand for entry of the necessary

findings that support mental health treatment or to strike the condition if unsupported by the record.

DATED this 4 day of June, 2012.

Respectfully submitted,

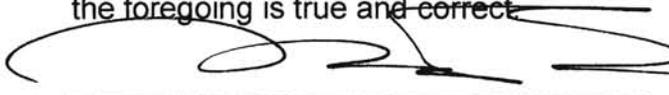
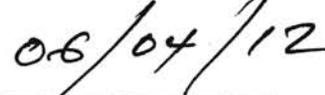
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of Brief of Respondent, in STATE V. JAMAL ALI, Cause No. 67444-7-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.

Name: Bora Ly  
Done in Seattle, Washington

Date