

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

No. 37663-6-II

Respondent,

v.

DAVID GIBSON,

PART PUBLISHED OPINION

Appellant.

Bridgewater, P.J. — David Gibson appeals his conviction for one count of unlawful manufacture of a controlled substance. He contends that the trial court erred in denying his CrR 3.6 motion to suppress evidence. We disagree. Contrary to Gibson’s argument, the initial traffic stop of his vehicle was not pretextual. Gibson also urges this court to find the search unreasonable under *Arizona v. Gant*, \_\_ U.S. \_\_, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). But *Gant* does not compel reversal of Gibson’s conviction, even though the deputy searched incident to arrest, because the search was reasonable under the “open view” exception and exigent circumstances. We can uphold the trial court on any valid basis. Finally, Gibson contends, without merit, that he was prejudiced when the trial court untimely filed written findings of facts

and conclusions of law. We affirm.

#### FACTS

On February 22, 2007, several Pierce County Sheriff Department deputies visited a residence located in Pierce County, Washington, near the Pierce-King County line, in an attempt to serve an arrest warrant on an individual not involved in this action. The deputies were unsuccessful in locating the named individual and began to leave the property.

Deputy Jeff England was the first to leave. As he neared the end of the driveway, Deputy England saw a vehicle, about 100 feet away, turn from State Route 165 into a driveway without signaling the turn. Deputy England stopped the vehicle, learned that Gibson was the driver, obtained Gibson's driver's license, and ran a check for warrants. He learned that Gibson had an outstanding Auburn<sup>1</sup> arrest warrant for third degree theft.<sup>2</sup>

After confirming the arrest warrant, Deputy Robert Tjossem arrested Gibson, handcuffed him, and placed him in the back of a patrol vehicle.

Deputy Tjossem proceeded to walk around Gibson's locked vehicle,<sup>3</sup> looked through the windows,<sup>4</sup> and immediately saw

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<sup>1</sup> Pierce County Sheriff's Department policy does not prohibit deputies from arresting individuals on warrants, contacting the Auburn Police Department, and transferring custody of the individual after confirming the warrant. Deputies may transfer individuals directly to the Auburn jail depending on call volume.

<sup>2</sup> Gibson conceded before the trial court that the warrant was for third degree theft.

<sup>3</sup> Gibson testified that he locked his vehicle upon exiting and that the officers "proceeded to walk around my vehicle" before opening the wing window and starting the search. II Verbatim Report of Proceedings (VRP) (Jan. 18, 2008) at 56.

<sup>4</sup> Gibson testified that his Suburban had "windows going [all] around." II VRP (Jan. 18, 2008) at

<sup>5</sup> a few items inside that caught his attention: a bottle of “Drano,” a bottle of “Drain Out,” and a bag of ammonia sulfate. Clerk’s Papers (CP) at 70; VRP (Apr. 3, 2008) at 38-40; II VRP (Jan. 18, 2008) at 24; Ex. 8. Deputy Tjossem had extensive experience in identifying various narcotic-related crimes, particularly methamphetamine manufacturing. Based on his training and experience, Deputy Tjossem recognized that the drain cleaners and ammonium sulfate were chemicals commonly used to manufacture methamphetamine. Deputy Tjossem then pushed open the wing window of Gibson’s vehicle, reached in to unlock the door, and entered to secure the items used to manufacture methamphetamine.

Inside Gibson’s vehicle, Deputy Tjossem found a 20-pound bag of ammonium sulfate, drain cleaner, dry ice, toluene, coffee filters, a funnel, used coffee filters with white powder, a small bag of white powder, and a coffee grinder that had white residue on the inside. The white residue was later found to be pseudoephedrine. Deputy Tjossem also found a receipt for a 20-pound bag of ammonium sulphate when he searched Gibson’s person.

Deputy Tjossem had entered Gibson’s vehicle to ensure that the items were secure, as he knew that moving items used to manufacture methamphetamines without proper safety equipment could pose health risks to him and other officers. Once he determined they were secure, he left the items in place, until Deputy Fry obtained a warrant to search and seize the evidence of

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56, 61.

<sup>5</sup> Specifically, Deputy Tjossem testified that after Gibson was under arrest, “I went up and looked inside his [S]uburban and immediately saw several items that caught my attention, the first being a bag of ammonium sulfate. There was a can of Drano and a second can of . . . [Drain Out] . . . I could see those three items just by looking through the window, then I began to search the vehicle incident to Mr. Gibson’s arrest.” VRP (April 3, 2008) at 38-40; Ex. 8.

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methamphetamine manufacturing.

Deputy England cited Gibson for failing to signal turn (RCW 46.61.305), no splash

apron/fenders (RCW 46.37.500), and unsafe tire tread (RCW 46.37.425). He put the citation in Gibson's pocket. Gibson was transported to Pierce County jail.

On February 23, 2007, Pierce County charged Gibson with one count of unlawful manufacture of a controlled substance. Gibson filed a motion to suppress the evidence under CrR 3.6, claiming that the evidence was unlawfully obtained. During the CrR 3.6 hearing, Gibson argued that the evidence was illegally seized because the initial stop was pretextual, the arrest was invalid, and, due to the invalid arrest, the search incident to arrest was unlawful. The trial court rejected Gibson's arguments and denied his motion for suppression. It entered findings of fact and conclusions of law as to the CrR 3.6 ruling on March 28, 2008.

Gibson waived his right to a jury and proceeded to a bench trial. The trial court found Gibson guilty as charged. Gibson appeals.

## ANALYSIS

### I. Pretextual Traffic Stop

To review a trial court's ruling on a suppression motion, we examine whether substantial evidence supports the challenged findings and whether those findings support the trial court's conclusions of law. *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001), *review denied*, 145 Wn.2d 1016 (2002). Substantial evidence is "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises." *State v. Jeannotte*, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997) (quoting *Olmstead v. Dep't of Health*, 61 Wn. App. 888, 893, 812 P.2d 527 (1991) (quoting *Green Thumb, Inc. v. Tiegs*, 45 Wn. App. 672, 676, 726 P.2d 1024)). We do not review credibility determinations on appeal, leaving them to the fact finder. *State v.*

*Frazier*, 82 Wn. App. 576, 589 n.13, 918 P.2d 964 (1996) (citing *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990)). And we treat unchallenged findings as verities on appeal. *Ross*, 106 Wn. App. at 880.

Pretextual traffic stops are warrantless seizures that violate article I, section 7 of the Washington State Constitution. *State v. Ladson*, 138 Wn.2d 343, 358, 979 P.2d 833 (1999). A pretextual traffic stop occurs when an officer does not stop a citizen to enforce the traffic code but rather to investigate suspicions unrelated to driving.<sup>6</sup> *Ladson*, 138 Wn.2d at 351. When the officer stops to actually enforce the traffic code, however, the stop is not pretextual even if the officer also suspects other criminal activity. *State v. Hoang*, 101 Wn. App. 732, 742, 6 P.3d 602 (2000), *review denied*, 142 Wn.2d 1027 (2001). In determining whether a traffic stop is pretextual, we consider the totality of the circumstances of the stop, including the officer's subjective intent and the objective reasonableness of the officer's behavior. *Ladson*, 138 Wn.2d at 358-59.

Gibson relies on *Ladson*, *State v. DeSantiago*, 97 Wn. App. 446, 983 P.2d 1173 (1999), and *State v. Myers*, 117 Wn. App. 93, 69 P.3d 367 (2003), *review denied*, 150 Wn.2d 1027 (2004), to support his pretext argument. These cases are factually distinguishable.

In *Ladson*, the officers admitted that they relied on a vehicle's expired license tabs as pretext to stop a vehicle and investigate suspected drug activity. The officers were part of a "proactive gang patrol" that stopped citizens for traffic code violations, not to enforce the traffic

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<sup>6</sup> Pretext is a "false reason used to disguise a real motive." *Ladson*, 138 Wn.2d at 359 n.11 (internal quotations and citations omitted).

code. *Ladson*, 138 Wn.2d at 346.

In *DeSantiago*, while an officer was monitoring an apartment building for suspected drug activity, he saw the defendant quickly enter and exit the building and drive away. The officer, looking for a reason to stop defendant's vehicle, followed it for several blocks, eventually stopping the vehicle for an illegal left turn. The appellate court reversed the defendant's conviction, holding that the stop was pretextual because the officer was clearly looking for an excuse to investigate suspected drug-related activity. *DeSantiago*, 97 Wn. App. at 452-53.

Finally, in *Myers*, the defendant drove past an officer who recognized the defendant as having had a suspended license about one year before. The officer was in the area on business, not a routine patrol. The officer suspected that the defendant was driving with a suspended license and followed his vehicle. The officer ran a license check in the midst of following the defendant, but, the officer stopped the defendant before the results of the check returned. *Myers*, 117 Wn. App. at 95, 97. The court held that the stop was pretextual because the officer's real purpose in stopping the defendant was to investigate him for driving with a suspended license. *Myers*, 117 Wn. App. at 97.

Unlike in each of these cases, in which the officers suspected criminal activity and followed the vehicles looking for an opportunity to stop them for a traffic violation, the deputies here did not follow Gibson's vehicle waiting for him to commit a traffic violation. *Ladson*, 138 Wn.2d at 346; *DeSantiago*, 97 Wn. App. at 452-53; *Myers*, 117 Wn. App. at 97. Instead, the deputies were leaving a residence after unsuccessfully attempting to serve an arrest warrant on another named individual when Deputy England observed a driver, later identified as Gibson, turn

without signaling. Further, Deputy England routinely patrols the area in which he stopped Gibson and he regularly writes infractions for failing to signal turns. These findings are unchallenged and are verities on appeal. *Ross*, 106 Wn. App. at 880. Therefore, unlike *Ladson*, *DeSantiago*, and *Myers*, Deputy England did not state, nor can it be inferred, that he intended to use a traffic violation as an excuse to investigate suspected criminal activity.

Moreover, the trial court considered all the testimony and found that the deputies' testimonies were more credible than Gibson's testimony. Gibson challenges one finding of fact, to which the deputies' testimonies amounted to substantial evidence to support the trial court's findings that the deputies stopped Gibson for a traffic violation, not to identify him for purposes of conducting a warrant check. *Hoang*, 101 Wn. App. at 742; *see also Ross*, 106 Wn. App. at 880. Thus, the trial court properly denied the suppression motion on the basis that the stop was not pretextual. *Hoang*, 101 Wn. App. at 743.

## II. Fourth Amendment Search of Vehicle<sup>7</sup>

Next, Gibson challenges the trial court's suppression ruling. He asserts that under *Arizona v. Gant*, 129 S. Ct. 1710,<sup>8</sup> the search of his vehicle was unlawful and the evidence discovered during that search must be suppressed. We decline to review the case under *Gant* because the contents in Gibson's vehicle were in open view and because exigent circumstances

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<sup>7</sup> Gibson does not challenge the search under the Washington Constitution.

<sup>8</sup> In *Gant*, the United States Supreme Court held that law enforcement officers may search a vehicle incident to arrest only if it is reasonable to believe that the arrestee could access the vehicle at the time of the search or that the vehicle contains evidence relevant to the arrest offense. *Gant*, 129 S. Ct. at 1719. Absent these justifications, "a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or *show that another exception to the warrant requirement applies.*" *Gant*, 129 S. Ct. at 1723-24 (emphasis added).



justified the deputies' warrantless search.

As a general rule, a warrantless search is per se unreasonable, in violation of the Fourth Amendment to the United States Constitution, unless it falls within one or more of a few "jealously and carefully drawn" exceptions to the warrant requirement. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009) (quoting *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002); *State v. Johnson*, 128 Wn.2d 431, 446-47, 909 P.2d 293 (1996)). Two such exceptions are the "plain view" doctrine and "open view" doctrine. *State v. Seagull*, 95 Wn.2d 898, 632 P.2d 44 (1981).

The "plain view" doctrine applies *after* an officer intrudes into an area where a reasonable expectation of privacy exists. *Seagull*, 95 Wn.2d at 901. The officer may seize evidence without a warrant if he has made a justifiable intrusion and inadvertently sights contraband in plain view. *Seagull*, 95 Wn.2d at 901-02. Therefore, the "plain view" doctrine does not justify the initial intrusion into the protected area. *State v. Kennedy*, 107 Wn.2d 1, 9, 726 P.2d 445 (1986) (citing *Seagull*, 95 Wn.2d 898). Instead, the "plain view" doctrine justifies a seizure only when the officer has lawful "access" to the seized contraband under some prior Fourth Amendment justification and when the officer has probable cause to suspect that the item is connected with criminal activity. *Illinois v. Andreas*, 463 U.S. 765, 771, 103 S. Ct. 3319, 77 L. Ed. 2d 1003 (1983); Wayne R. LaFare, Jerold H. Israel, Nancy J. King, *Criminal Procedure*, § 3.2(b) at 55 (2d Ed. 1999); *see e.g.*, *Kennedy*, 107 Wn.2d at 13 (holding that a prior justification to look under driver's seat for weapons implicated the "plain view" doctrine); *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003) (officer justified under the "plain view" doctrine in seizing drug

paraphernalia that he saw in plain view on vehicle floorboard while searching defendant's person for identification).

In contrast, the "open view" doctrine applies when an officer observes an item of evidence from a nonconstitutionally protected area. *Kennedy*, 107 Wn.2d at 10 (citing *Seagull*, 95 Wn.2d 898). A person has a diminished expectation of privacy in the visible contents of an automobile parked in a public place. *State v. Young*, 28 Wn. App. 412, 416, 624 P.2d 725 (citing *United States v. Chadwick*, 433 U.S. 1, 12-13, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977)), *review denied*, 95 Wn.2d 1024 (1981). Thus, "if an officer, after making a lawful stop, looks into a car from the outside and sees a weapon or contraband in the car, he has not searched the car." *Kennedy*, 107 Wn.2d at 10; *e.g.*, *Young*, 28 Wn. App. 412. This is true even if the officer uses a flashlight to view the interior. *State v. Rose*, 128 Wn.2d 388, 399, 909 P.2d 280 (1996).

For example, in *Young*, an officer on routine patrol around 2:00 am noticed a vehicle parked at a shopping center away from other vehicles and businesses that were open. *Young*, 28 Wn. App. at 413-14. Moments later, the officer responded to a burglary at a nearby supermarket. *Young*, 28 Wn. App. at 414. After securing the building, the officer returned to the lone vehicle and noticed that the driver's door was slightly propped open. *Young*, 28 Wn. App. at 414. Using his flashlight, the officer observed a screwdriver and a wrench on the front seat, torn pieces of telephone yellow pages on the floorboard, and a claw hammer on the rear floorboard. *Young*, 28 Wn. App. at 414. With the suspect still at large, the officer seized the hammer and the yellow pages. *Young*, 28 Wn. App. at 414. We held that the seizure was reasonable under the Fourth Amendment because the defendant had minimal privacy of vehicle contents in open view and

because the officer was faced with exigent circumstances of potential evidence on hand that could help identify a suspect at large. *Young*, 28 Wn. App. at 419.

Here, Deputy Tjossem, while walking around Gibson's vehicle, looked inside and immediately saw a bottle of "Drano," a bottle of "Drain Out," and a bag of ammonia sulfate. Because Deputy Tjossem was outside Gibson's vehicle, which was parked in public, the "open view" doctrine applies, and merely looking through the vehicle's windows at the drain cleaners and bag of ammonia sulfate did not constitute a search. Like in *Young*, we hold that Gibson had a diminished expectation of privacy of the observable contents of his vehicle.

But to justify the warrantless seizure, the deputies must have had probable cause to believe that the contents of Gibson's vehicle were evidence of a crime and must have been faced with "emergent or exigent circumstances regarding the security and acquisition of incriminating evidence" that made it impracticable to obtain a warrant. *State v. Smith*, 88 Wn.2d 127, 137-38, 559 P.2d 970 (1977).

Here, Deputy Tjossem's training and experience reasonably led him to identify the drain cleaners and ammonium sulfate<sup>9</sup> as ingredients commonly used to manufacture methamphetamine. Deputy Tjossem was a narcotics investigator for the special investigations unit, was trained in identifying various narcotic-related crimes, and was a certified member of the Pierce County's clandestine lab team. To become certified with the clandestine lab team, Deputy Tjossem had to

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<sup>9</sup> Hazardous chemicals used or intended to be used in the manufacture of controlled substances are subject to seizure and forfeiture and no property right exists in them. RCW 69.50.505. Hazardous chemicals are defined as "the controlled substance or substances being manufactured, as defined in RCW 69.50.101." RCW 64.44.010(4)(c). "Immediate precursors" to a "controlled substance," as defined in RCW 69.50.101(n)(2), are substances that are "an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance."

undergo a 40-hour course that, among other things, involved coursework on methamphetamine manufacturing. Indeed, Deputy Tjossem's testimony demonstrated his firm grasp on the complexities of manufacturing methamphetamine. Based on his training and experience, Deputy Tjossem recognized drain cleaners and ammonium sulfate to be ingredients typically used in manufacturing methamphetamines; therefore, he had probable cause to believe that they were evidence of a crime. *State v. Cottrell*, 86 Wn.2d 130, 542 P.2d 771 (1975) (must consider officer's special expertise in identifying criminal behavior sufficient to support probable cause); *State v. Forrester*, 135 Wn. App. 195, 143 P.3d 880 (2006) (possessing lab equipment and partially processed methamphetamine is sufficient evidence to support convictions for manufacturing methamphetamine).

Here, the determinative question is whether there were sufficient exigent circumstances to justify the seizure without a warrant. Although no precise guidelines exist as to what constitutes exigent circumstances, courts have upheld warrantless seizures from vehicles under more broadly defined exigent circumstances than those permitted for buildings. *Young*, 28 Wn. App. at 419 (citing 2 W. LaFare, *Search and Seizure* § 7.5, at 592 (1978)); see *State v. Patterson*, 112 Wn.2d 731, 774 P.2d 10 (1989). "Washington courts have long held that 'danger to [the] arresting officer or to the public' can constitute an exigent circumstance." *State v. Smith*, 165 Wn.2d 511, 517, 199 P.3d 386 (2009) (quoting *State v. Counts*, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983)); *State v. Bakke*, 44 Wn. App. 830, 834, 723 P.2d 534 (1986) ("The need to protect or preserve life, avoid serious injury, or protect property in danger of damage justifies an entry that would otherwise be illegal absent an exigency or emergency"), *review denied*, 107 Wn.2d 1033 (1987).

We look at the totality of the circumstances to determine whether exigent circumstances exist. *Smith*, 165 Wn.2d at 518.

Here, Deputy Tjossem, based on his training and experience, understood the dangers of chemicals used to manufacture methamphetamine. In particular, he knew that moving them around without proper safety equipment posed health risks to him and other officers. Without further searching Gibson's vehicle, Deputy Tjossem could not have ensured that it did not contain open containers of chemicals that would spill and become hazardous to either the tow truck operator or the officers who subsequently searched the vehicle. Further, leaving such chemicals in Gibson's vehicle, which was parked in a public area, also posed a potential threat to passersby. Accordingly, once Deputy Tjossem confirmed his suspicions that the chemicals he saw were used to manufacture methamphetamines, he entered Gibson's vehicle only to ensure that they were secure. After determining that the chemicals were secure, Deputy Tjossem *left them in place*. Although exigent circumstances permitted Deputy Tjossem to seize and remove the offending chemicals at the scene, Deputy Tjossem chose not to remove the chemicals for safety reasons, and Gibson's vehicle was towed to a secure impoundment lot where Deputy Fry obtained a warrant to search and seize the chemicals.

Combining the minimal expectation of privacy that Gibson had in the contents of his vehicle displayed in open view with the exigencies of safety to officers and to the public, we hold that the search was reasonable under the Fourth Amendment. Even though the trial court held that the search was valid under the doctrine of search "incident to arrest" that *Gant* now modifies, we can affirm the trial court on any ground. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54

(1986) (“[A]n appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court”). Thus, we hold that the deputies’ initial search of Gibson’s vehicle was reasonable under the “open view” exception and exigent circumstances. We also hold that the deputies’ observing chemicals used to make methamphetamine during the initial search was sufficient probable cause for the subsequent search warrant.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

### III. Findings of Fact and Conclusions of Law

Gibson next contends that reversal is required because the trial court untimely filed its findings of fact and conclusions of law. This argument fails.

A trial court must enter findings of fact and conclusions of law in a case tried without a jury. CrR 6.1(d). Although the practice of submitting late findings and conclusions is disfavored, a trial court may nevertheless enter them while an appeal is pending so long as the defendant is not prejudiced by the belated entry. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006).

Here, Gibson has failed to show prejudice. The trial court filed the findings of fact and conclusions of law on June 13, 2008. Gibson filed his appellate brief on October 24, 2008. Gibson fails to make any substantive argument suggesting that he was prejudiced by the trial court’s belated entry of the findings of fact and conclusions of law. Accordingly, we find no reversible error. *Brockob*, 159 Wn.2d at 343.

#### IV. Statement of Additional Grounds

Finally, Gibson makes two arguments in his statement of additional grounds (SAG).<sup>10</sup> First, he contends that the arresting deputies were on the property under “false pretense” because they had already arrested the person for which they had the arrest warrant. SAG at 1. Second, Gibson argues that the arresting deputies exceeded their authority because they arrested him on a nonextraditable warrant.

To the extent that these claims rely on evidence outside the record, we cannot consider them. *See State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995) (“a personal restraint petition is the appropriate means of having the reviewing court consider matters outside the record”). Here, Gibson relies on evidence outside of the record to support his first SAG argument. Accordingly, we cannot reach the merits of this alleged error. *See McFarland*, 127 Wn.2d at 338 n.5.

Gibson’s second SAG contention, that the arrest was illegal because it was a result of a nonextraditable King County warrant, lacks merit. Gibson fails to cite any authority,<sup>11</sup> and indeed there are no rules or case law prohibiting intrastate transfers of individuals to the appropriate law enforcement agencies. Gibson’s argument fails.

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<sup>10</sup> RAP 10.10.

<sup>11</sup> But note that references to the record and citations to authorities are not required in SAGs. RAP 10.10(c).

V. Conclusion

To conclude, we hold that the trial court properly denied the suppression motion on the basis that the stop was not pretextual. *Hoang*, 101 Wn. App. at 742. We affirm the trial court's order denying Gibson's motion to suppress evidence on the grounds of open view and exigent circumstances. Moreover, Gibson has failed to establish that he was prejudiced by the trial court's failure to timely file its findings of fact and conclusions of law. *Brockob*, 159 Wn.2d at 343. Finally, we cannot address Gibson's first SAG issue and his second SAG issue lacks merit.

Affirmed.

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Bridgewater, P.J.

We concur:

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Hunt, J.

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Quinn-Brintnall, J.