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No. 52613-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TERYSA BRAKE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

BRIEF OF APPELLANT

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A. INTRODUCTION

Charged with possessing stolen property, Terysa Brake faithfully attended her court dates. But when her abusive husband, whom she was in the process of divorcing, returned to Kitsap County and began threatening her, she became so distressed that she accidentally missed a court date. Once Ms. Brake realized her mistake, she promptly contacted her attorney and quashed the warrant. Rather than cut Ms. Brake some slack, the prosecutor filed an amended information charging her solely with felony bail jumping. Following a bench trial, the court concluded Ms. Brake was guilty because she had been provided notice of the court date and had not proved “uncontrollable circumstances” prevented her attendance. The court sentenced Ms. Brake as a first time offender.

This Court should hold the offense of bail jumping requires proof that the defendant received notice of her court date and *knowingly* failed to attend. Because the trial court failed to find Ms. Brake knowingly failed to attend the scheduled court date, her conviction must be reversed. The conviction should also be reversed because the judge who presided over Ms. Brake’s trial became a witness in violation of ER 605 and due process.

B. ASSIGNMENTS OF ERROR

1. The court erred by entering a conviction for bail jumping

without finding Ms. Brake *knowingly* failed to personally appear at her court hearing on June 28, 2018.

2. If deemed to be a finding of fact rather than a conclusion of law, the trial court erred by entering “finding” 2 in the “ruling” section of its written findings. CP 24.¹

3. In violation of ER 605 and the due process right to an impartial judge under article I, section 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution, the court erred by presiding over the case.

4. The court erred by entering its written findings of fact and conclusions of law, which adjudicated Ms. Brake guilty of bail jumping.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is presumed that criminal statutes require proof of a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct. Bail jumping requires proof that the defendant failed to personally appear for a mandatory court date. Consistent with the presumption in favor of a mental state and to avoid criminalizing an innocent mistake in missing a court appearance, does bail jumping require proof that the failure to appear was knowing?

¹ A copy of the findings are attached in the appendix.

2. To convict a person of a criminal offense, the trier-of-fact must find all the essential elements of the offense proved beyond a reasonable doubt. The trial court did not find Ms. Brake's failure to appear was knowing. Uncontroverted evidence does not show Ms. Brake knowingly failed to personally appear. Must her conviction be reversed?

3. Due process and ER 605 forbid a judge from being a witness in a trial the judge presides over. The judge presiding over Ms. Brake's trial for bail jumping was the same judge who (1) released Ms. Brake on bail with the requirement to appear; (2) presided over the hearing where the court set the date for the hearing Ms. Brake did not attend; and (3) presided at the hearing Ms. Brake did not attend, issuing a bench warrant for her arrest. During the bench trial on bail jumping, the judge made comments showing his personal involvement in the case. Was due process and ER 605 violated by the judge being a witness in the trial he presided over?

D. STATEMENT OF THE CASE

Terysa Brake was charged with possession of stolen property in the second degree. CP 1; Ex. 1. At her arraignment in February 2018, Ms. Brake pleaded not guilty. Ex. 2. Judge Jeffrey Bassett set bail and ordered Ms. Brake released with conditions. Ex. 2-4.

Over the next four months, Ms. Brake personally appeared for her court dates. Exs. 5-7, 13-14; Supp. CP __ (sub. nos. 4, 11, 15, 17). On June 5, Ms. Brake appeared for a court hearing. Exs. 5-7. Judge Bassett ordered the case continued and set an omnibus hearing for June 28, 2018. Exs. 5-7. The order setting the court date was not signed by Ms. Brake. Ex. 6. And while the minute entry states written and oral notice was given to Ms. Brake, the transcript from the hearing does not show Judge Bassett told Ms. Brake she must personally appear on June 28. Exs. 5, 7.

On June 28, Ms. Brake did not personally appear. Exs. 8, 10. After orally stating he had made sure the handwritten “eight” in the June 28 date of the previous order was legible, Judge Bassett issued a bench warrant for Ms. Brake. Ex. 9; Ex. 10, p. 2.

On realizing she missed the court date, Ms. Brake promptly appeared on July 3 to quash the warrant. Exs. 11-12. The court, Judge William Houser presiding, quashed the warrant. Exs. 11-12. Ms. Brake personally appeared at her following court dates. Supp. CP __ (sub. no. 26; Ex. 15; RP 2, 14.

On October 1, 2018, the prosecution filed an amended information charging only bail jumping and dismissing the original charge. CP 8-9. Ms. Brake waived her right to a jury trial and the court held a bench trial

on October 8, 2018. RP 14-16; CP 18. Judge Bassett presided over the bench trial. CP 18.

The court heard testimony from Mary Allen, a records manager and supervisor for the Kitsap County Clerk's Office. RP 28. During her testimony and following the admission of exhibits showing Judge Bassett's involvement in the case, Judge Bassett remarked, "I'm all over this case, aren't I?" RP 39. When defense counsel's cross-examination showed one of the minute entries likely contained a mistake, Judge Bassett interrupted, exclaiming he hoped the defense was not implying he had made a mistake earlier when he issued the bench warrant for Ms. Brake. RP 48.

Ms. Brake testified in her defense. RP 56-65. She testified "she had been embroiled in a bitter separation and pending dissolution with her husband and that she was the victim of verbal abuse." CP 22 (FF 16).² Shortly before the scheduled hearing on June 28, and after her estranged husband heard she intended to divorce him, he moved back to Bremerton, close to where she lived in Port Orchard. RP 58, 62; CP 22 (FF 16). Her estranged husband threatened her and was mentally abusive. RP 58-59, 64. He threatened to come after her, told her not to get a lawyer, and said he

² The court mistakenly issued two findings of fact labeled as number 16. CP 22.

would make her pay (presumably for trying to divorce him). RP 58; CP 22 (FF 18).

In June, Ms. Brake's estranged husband came to her house four times, making threats. RP 60. She called the police, but was told they could not do anything because he had not physically assaulted her. RP 60, 65. Afraid to leave her house, she took precautions whenever she left, including having an escort. RP 60. Around June 28, she was not thinking about anything except how to stay safe. RP 62.

Shortly thereafter, she learned she missed her court date on June 28 and that the court had issued a warrant. RP 63. Ms. Brake immediately went to her lawyer's office, and quashed the warrant on July 3. RP 63; CP 23 (FF 22-23).

During closing arguments, the defense argued the evidence did not prove beyond a reasonable doubt that Ms. Brake had been notified her personal appearance was required on June 28. RP 71. Judge Bassett commented it was fortunate he was the person who had signed most of the court orders in the case. RP 71. Ms. Brake argued further she should be found not guilty because she had proved the defense of uncontrollable circumstances. RP 71-73.

The prosecution argued the affirmative defense did not apply because the evidence of psychological and verbal abuse inflicted on Ms.

Brake by her estranged husband was inadequate to constitute uncontrollable circumstances. RP 69. The prosecution contended Ms. Brake was guilty because the order setting the court date of June 28 contained boilerplate language stating “[t]he Defendant must personally be present at these hearings.” Ex. 6; RP 73.

The court found Ms. Brake guilty. CP 26. The court found Ms. Brake failed to personally appear on June 28 after having been advised her personal appearance was required. CP 24 (“finding” 2 in ruling). On the affirmative defense, the court found Ms. Brake had not contributed to the creation of any uncontrollable circumstances and had appeared quickly to address her nonappearance. CP 25 (“finding” 6 in ruling). The court, however, found Ms. Brake had not proved uncontrollable circumstances prevented her appearance on June 28. CP 25 (“finding” 7 in ruling).

Determining Ms. Brake was a first time offender, the court waived the imposition of a standard range sentence and sentenced Ms. Brake to seven days in jail. RP 84; CP 28. Ms. Brake appeals.

E. ARGUMENT

1. The crime of bail jumping requires the prosecution prove that the failure to appear was *with knowledge*. The court’s failure to find that the prosecution proved this element beyond a reasonable doubt requires reversal.

a. Criminal statutes presumptively require proof of a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct.

“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394 (1895). To overcome this presumption, due process demands the State prove all the elements of a criminal offense beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; In re Winship, 397 U.S. 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

It is fundamental that “wrongdoing must be conscious to be criminal.” Morrisette v. United States, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952). “[T]he understanding that an injury is criminal only if inflicted knowingly ‘is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.’” Rehaif v. United States, ___ U.S. ___, 139 S. Ct. 2191, 2196, ___ L. Ed. 2d. ___ (2019)

(quoting Morissette, 342 U.S. at 250); accord State v. Anderson, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000).

For these reasons, there is “a longstanding presumption, traceable to the common law,” that criminal statutes require proof of a “culpable mental state regarding ‘each of the statutory elements that criminalize otherwise innocent conduct.’” Rehaif, 139 S. Ct. at 2195 (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 72, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994)). Thus, courts presume a mental element or “scienter” is required, even where the text is silent or when it results in an ungrammatical reading. Id.; 2197; Anderson, 141 Wn.2d at 367 (courts are “loath . . . to conclude that the Legislature intended to jettison the normal requirement that mens rea be proved”). This “presumption applies with equal or greater force when [the legislative body] includes a general scienter provision in the statute itself.” Rehaif, 139 S. Ct. at 2195.

Rehaif is illustrative. There, a foreign student stayed in the country unlawfully. Id. at 2194. He was prosecuted for unlawful possession of a firearm after shooting a gun at a firing range. Id. The statute provided that a person who “knowingly violates” the section making it unlawful for certain persons to possess firearms was guilty of unlawful possession of a firearm. Id. The section forbidding certain persons from possessing firearms included “aliens” who were illegally or unlawfully in the United

States. Id. Applying the presumption in favor of a mental element, the Supreme Court held the crime required proof the defendant knew not only that he possessed a firearm, but also that he knew *his status* barred his possession. Id. at 2196-98. The Court emphasized that a contrary conclusion would criminalize “innocent mistake[s] to which criminal sanctions normally do not attach.” Id. at 2197.

b. Properly interpreted, the bail jumping statute requires proof that the failure to appear was knowing.

Applying the presumption that a mental element is implied for each element that criminalizes otherwise innocent conduct, this Court should hold that the offense of bail jumping requires proof the defendant knowingly failed to make his or her required court appearance. Statutory interpretation is an issue of law reviewed de novo. State v. Conover, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015).

The “bail jumping” statute has a “with knowledge” requirement:

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.

RCW 9A.76.170(1) (emphasis added).

As this Court has held, bail jumping requires proof the defendant knew he or she had to appear at a particular court at a particular time. State v. Cardwell, 155 Wn. App. 41, 47-48, 226 P.3d 243 (2010), remanded on different grounds, 172 Wn.2d 1003, 257 P.3d 1114 (2011). Proof the defendant generally knew he or she had to appear at some court in the future is insufficient. Id.

Still, this Court has held defendants may be convicted without proof that their failure to appear was knowing. State v. Carver, 122 Wn. App. 300, 306-07, 93 P.3d 947 (2004). Rather, according to Carver, the prosecution need only prove that the person was notified of his or her court date. Id. Forgetting a court date is not a defense. Id. In other words, persons who mis-calendar or honestly fail to remember their court date are guilty. In the view of the Carver court, the statute does not distinguish between persons who skip town with the intent to not attend court and persons who intend to make their court appearances, but fail to do so due to an innocent mistake.

This Court is not obliged to follow Carver and should not do so. “An appellate court opinion that does not discuss a legal theory does not control a future case in which counsel properly raises that legal theory.” State v. Granath, 200 Wn. App. 26, 35, 401 P.3d 405 (2017) (internal

quotation omitted), aff'd, 190 Wn.2d 548, 415 P.3d 1179 (2018).

Relatedly,

Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court.

In re Stockwell, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) (internal quotation omitted). Moreover, panels on the Court of Appeals are free to reach different results than previous panels, even on identical issues. In re Pers. Restraint of Arnold, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018); see, e.g., State v. Morgan, 163 Wn. App. 341, 351, 261 P.3d 167 (2011). Thus, this Court is not obliged to adhere to Carver, which criminalizes “innocent mistake[s] to which criminal sanctions normally do not attach.” Rehaif, 139 S. Ct. at 2197.

Nowhere in the Carver decision is the presumption in favor of scienter or *mens rea* mentioned, let alone considered. And while the Carver Court noted the defendant's argument that a contrary interpretation would result in strict liability, Carver, 122 Wn. App. at 305, the Court failed to recognize that strict liability offenses are disfavored because they raise due process problems. See Lambert v. California, 355 U.S. 225, 228, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957) (strict liability registration scheme

violated due process when applied to a person who had no knowledge of the duty to register). Further, statutes are interpreted to avoid constitutional doubts when statutory language reasonably permits. Utter v. Bldg. Indus. Ass'n of Washington, 182 Wn.2d 398, 434, 341 P.3d 953 (2015); Gomez v. United States, 490 U.S. 858, 864, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989). Accordingly, because this Court did not consider the presumption that a mental element is implied for each element that criminalizes otherwise innocent conduct or the constitutional-doubt canon of construction, this Court should reach a different conclusion than Carver.

Following the United States Supreme Court's approach in Rehaif, the "who fails to appear" language should be read to be modified by the "with knowledge" language appearing at the beginning of the statute. Rehaif, 139 S. Ct. at 2196. This is consistent not only with the presumption of scienter, but with the rule that "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." Flores-Figueroa v. United States, 556 U.S. 646, 652, 129 S. Ct. 1886, 173 L. Ed. 2d 853 (2009); accord Rehaif, 139 S. Ct. at 2196.

Applying this rule, this Court held the term “knowingly” in the identity theft statute³ meant not only that the State must prove the defendant’s use or possession of a means of identification was with knowledge, but that the defendant knew the means of identification actually belonged to another person. State v. Felipe Zeferino-Lopez, 179 Wn. App. 592, 599-600, 319 P.3d 94 (2014).

The prosecution may argue that the statutory defense to bail jumping indicates the legislature intended to place the burden on defendants to prove an excuse for failing to make a court date. It is a defense to bail jumping that “uncontrollable circumstances” prevented court attendance. RCW 9A.76.170(2). It requires the defendant to prove that “uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.” RCW 9A.71.170(2). “Uncontrollable circumstances” is defined as:

an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of a human being such as an

³ RCW 9.35.020(1) (“No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.”).

automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

RCW 9A.76.010(4).

As the statutory language shows, this defense is limited and does not appear to encompass instances where a person mistakenly missed their court date. See State v. Fredrick, 123 Wn. App. 347, 353, 97 P.3d 47 (2004);⁴ United States v. Springer, 51 F.3d 861, 867 (9th Cir. 1995) (interpreting identical statutory defense to federal failure to appear statute). Notably, the analogous federal failure to appear statute, which requires proof of a *knowing* failure to attend, contains an identical defense 18 U.S.C.A. § 3146(c). This shows the purpose of the affirmative defense is aimed at circumstances other than when a defendant knowingly failed to appear.

Applying the presumption that a mental element is implied for each element that criminalizes otherwise innocent conduct, along with the rule a scienter requirement extends to all the elements that follow, this Court should hold that bail jumping requires proof that the person *knowingly* failed to personally attend his or her court date.

⁴ Fredrick follows Carver's incorrect conclusion that bail jumping does not require proof that the failure to appear was with knowledge.

c. The court did not find that Ms. Brake knowingly failed to personally appear for her court date. Uncontroverted evidence does not support the missing finding, requiring reversal.

The court rules require the trial court to enter written findings of fact and conclusions of law. CrR 6.1(d). The findings must establish that all essential elements have been met. State v. Banks, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003).

Here, the trial court adjudicated Ms. Brake guilty of bail jumping without finding she knowingly failed to personally appear for her court date on June 28, 2018. CP 23-25. This is unsurprising because the court proceeded on the basis that Carver correctly stated the law. See CP 14; RP 17 (granting motion in limine based on Carver); RP 66-67 (court stated that it had before it pattern instructions for bail jumping, WPICs 120.40 and 120.41, which are also premised in part of Carver).⁵

Failure by the trier-of-fact to find an element of an offense satisfied by proof beyond a reasonable doubt is subject to harmless error analysis. Neder v. United States, 527 U.S. 1, 10, 119 S. Ct. 1827, 144 L.

⁵ Oddly, the Court wrote in its findings that the prosecution was required to prove that Ms. Brake “knowingly failed to appear before the Court, having been on bail with the requirement of a subsequent personal appearance before the Court.” CP 24 (finding 2). But in the same finding, the court does not find that Ms. Brake “knowingly” failed to appear. Instead, the court found the prosecution had proved Ms. Brake had been on bail with the requirement that she personally make all future court appearances, and that Ms. Brake had failed to personally appear on June 28, 2018 after having been advised her personal appearance was required. CP 24 (finding 2).

Ed. 2d 35 (1999); Banks, 149 Wn.2d at 44. Prejudice is presumed and the prosecution must prove the error harmless beyond a reasonable doubt. State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). The failure by the trier-of-fact to find a missing element may be harmless if the missing element is supported by uncontroverted evidence in the record. Neder, 527 U.S. at 18.

Here, the prosecution cannot prove beyond a reasonable doubt that the trial court would have found Ms. Brake knowingly failed to personally appear at her court date of June 28, 2018. Excluding June 28, Ms. Brake made her court appearances. Exs. 13-14; RP 48-52. The court found Ms. Brake appeared quickly to address her nonappearance. CP 25 (“finding” 6 of ruling). Ms. Brake testified she forgot about her court hearing on June 28. CP 25 (finding 9); RP 62-63. Because there is not uncontroverted evidence establishing the missing element, the error is not harmless. Neder, 527 U.S. at 19 (“where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—[the court] should not find the error harmless”).

Accordingly, the error is not harmless. The Court should reverse.

2. In violation of due process and the rules of evidence, the judge became a witness, depriving Ms. Brake of a fair hearing before an impartial judge.

a. ER 605 and the due process right to an impartial judge forbid judges from becoming a witness in proceedings they are presiding over.

A “fair trial in a fair tribunal is a basic requirement of due process.” In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955); U.S. Const. amend. XIV; Const. art. I, § 3. This includes the right to an impartial judge. State v. Lemke, 7 Wn. App. 2d 23, 28, 434 P.3d 551 (2018); State v. Romano, 34 Wn. App. 567, 569, 662 P.2d 406 (1983). Due process is violated where the trial judge presiding over a trial testifies as a witness against the defendant. Brown v. Lynaugh, 843 F.2d 849, 850-51 (5th Cir. 1988).

Consistent with due process, the rules of evidence provide that “[t]he judge presiding at the trial may not testify in that trial as a witness.” ER 605; accord State ex rel. Carroll v. Junker, 79 Wn.2d 12, 21-22, 482 P.2d 775 (1971) (“a judge is disqualified from hearing a cause if it appears that he will be called as a witness in it”). In interpreting the rules of evidence, interpretation by federal and state courts of analogous or identical rules may be persuasive. State v. McBride, 192 Wn. App. 859,

870, 370 P.3d 982 (2016). The language of federal rule of evidence 605⁶ is identical in substance to ER 605.

ER 605 expresses a policy that it is unfair and impractical for a judge to be a witness at a hearing where the judge is presiding. “The functions of a judge and a witness are incompatible and it is utterly impossible for one to exercise the rights of a witness and to perform the duties of a judge at one and the same time.” Cline v. Franklin Pork, Inc., 210 Neb. 238, 244, 313 N.W.2d 667 (1981); accord State v. Barker, 227 Neb. 842, 853, 420 N.W.2d 695 (1988) (dual roles of witness and judge “are inconsistent with and even antagonistic to a fair and safe administration of criminal justice”). Further, one of the purposes of ER 605 is “to protect the appearance of impartiality.” Bradley v. State ex rel. White, 990 S.W.2d 245, 248 (Tex. 1999). As explained in a leading treatise: “It should be obvious that if a judge has personal knowledge of a matter in dispute, the judge cannot be an impartial arbiter of that dispute.” Charles Wright & et al., 27 FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6062 (2d ed.).

ER 605 does not apply only when a judge formally testifies. In re Estate of Hayes, 185 Wn. App. 567, 599, 342 P.3d 1161 (2015); Tyler v.

⁶ “The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.” Fed. R. of Evid. 605.

Swenson, 427 F.2d 412, 415-16 (8th Cir. 1970). “[T]he rule [prohibiting a judge from testifying as a witness] would serve little purpose if it were violated only where a judge observes all the formalities—taking of an oath, sitting in the witness chair, etc.—of an ordinary witness.” United States v. Blanchard, 542 F.3d 1133, 1149 (7th Cir. 2008).

“Where a trial judge’s comments are based upon his own personal knowledge of matters external to the trial, those comments may constitute impermissible judicial testimony.” Id. at 1148-49. For example, it is error for a judge to rely on his own memory of testimony from a previous hearing the judge presided over.⁷ Vandercook v. Reece, 120 Wn. App. 647, 651-52, 86 P.3d 206 (2004); accord In re Welfare of Martin, 3 Wn. App. 405, 411, 476 P.2d 134 (1970) (improper for the trial court to take judicial notice of testimony from a prior hearing).

Because no objection is required, a claimed violation of ER 605 may be raised for the first time on appeal. ER 605 (“No objection need be made in order to preserve the point.”). And because it implicates a person’s due process rights, a claim that a person was deprived of his or her right to an impartial judge may be raised for the first time on appeal as a manifest constitutional error. RAP 2.5(a)(3); see In re Dependency of

⁷ A “judge’s own knowledge should not be confused with judicial notice.” State v. K.N., 124 Wn. App. 875, 882, 103 P.3d 844 (2004).

A.M.M., 182 Wn. App. 776, 790 n.8, 332 P.3d 500 (2014) (considering violation of due process right to notice as manifest constitutional error).

b. In violation of due process and ER 605, Judge Bassett became a witness for the prosecution.

Judge Jeffrey Bassett presided over Ms. Brake's bench trial. The record establishes that Judge Bassett presided at key hearings on the charge of possession of stolen property, which resulted in the bail jumping charge. Judge Bassett presided at Ms. Brake's arraignment, where he set bail along with conditions of release. Exs. 2-4. Judge Bassett presided on June 5, 2018, where he continued the case and set an omnibus hearing for June 28. Exs. 5-7. And Judge Bassett presided on June 28, where he issued a bench warrant when Ms. Brake did not appear. Exs. 8-10.

During the testimony from a supervisor in the Kitsap County Clerk's Office and a former in-court clerk, it became clear that Judge Bassett was a witness. While the supervisor was reading from the transcript from June 5, 2018, where the court had continued the case, Judge Bassett interrupted to clarify who was speaking. After being told it was "Judge Bassett," he observed he was "all over this case":

Q. Does that indicate at line 23 on page 2 -- what does it say?

A. "I can do Thursday, the 28th, at 10:30."

Q. And line 24.

A. Mr. McPherson indicates, “That would be fine.”

THE COURT: Who is the speaker of the “I can do Thursday”?

THE WITNESS: The court, which was Judge Bassett.

THE COURT: I’m all over this case, aren’t I?

RP 39 (emphasis added).

When Judge Bassett was identified as the judge at the hearing held on June 28, he remarked, “Again? I don’t remember these but that’s fine.”

RP 42. The witness then read the transcript into the record, which showed

Judge Bassett had expressed he had made sure the correct date had been

listed on continuance order:

A. Mr. McPherson: “Then we can go ahead and call Terysa Brake.” The Court: “17-1-0186518. Terysa Brake. The time is 11:17 a.m. I’ll just double check to make sure. She was out on \$10,000 at one point.”

THE COURT: And that’s the court speaking?

THE WITNESS: That’s correct.

THE COURT: Thank you.

THE WITNESS: Ms. Aruiza: “I believe that is the bail she’s currently out on, Your Honor.” The Court: “I set this over to today’s date. I noted specifically I made sure it said the 28th because the 8th was questionable. I made sure I set it and it should have been correct on all copies. 10:30, she’s not here. State?” Ms. Aruiza: “We request that a bench warrant issue in the amount of \$20,000 and ask to strike the trial date of July 30th.” The Court: “Granted.”

42-43 (emphasis added).⁸

This record establishes that Judge Bassett was a key witness to the bail jumping charge. He was the judge who set bail and the conditions of release. He entered orders at the June 5 hearing that purported to notify Ms. Brake that the next court date was June 28. And he was presiding when Ms. Brake did not appear in court on June 28. At that last hearing, before he issued the bench warrant, Judge Bassett commented that Ms. Brake was not there and that he had specifically corrected the handwriting in the orders to make clear that June 28 was the next court date.

These facts are analogous to Brown v. Lynaugh, 843 F.2d 849 (5th Cir. 1988). There, a defendant charged with burglary escaped from custody while in court. Brown, 843 F.2d at 849. After he was caught, he was charged with escaping from custody. Id. The same judge who had presided over the hearing where the defendant had escaped also presided over the trial on the escape charge. Id. at 849-50. He was called as a witness by the prosecution and provided testimony supporting guilt. Id. at 850. The Fifth Circuit held this violated due process. Id. at 850-51. The court reasoned, “It is difficult to see how the neutral role of the court could

⁸ Judge Bassett is referring to the handwriting on the order. Ex. 6.

be more compromised, or more blurred with the prosecutor's role, than when the judge serves as a witness for the state." Id. at 850.

Here, the error occurred in a bench trial rather than a jury trial. This does not matter because due process and ER 605 apply to trials before the bench. See Murchison, 349 U.S. at 139 (due process violation in bench proceeding); ER 605 (plain language not limited to jury trial). And that the judge in Brown formally took the witness stand does not matter because ER 605 can apply even where the judge does not formally take the witness stand. Blanchard, 542 F.3d at 1149. Reading Judge Bassett's comments from transcripts of the earlier proceedings was equivalent to the judge testifying. See id. (prosecutor's reading of judge's comments into the record at trial was error under ER 605). Thus, similar to Brown, Judge Bassett's involvement in the underlying case made him a witness and precluded him from presiding at Ms. Brake's trial.

A couple of comments Judge Bassett made to defense counsel, one during cross-examination and another during closing arguments, reinforces this conclusion and illustrates the problems that occur when judges become a witness in cases they are presiding over.

During cross-examination of the State's witness, defense counsel established it was probable one of the entries in the clerk's minutes was incorrect. RP 46-47. A minute entry from April 3, 2018 states that Ms.

Brake was in custody when in fact she had been released on bail. Ex. 13. When counsel asked the witness if it was possible the entry was incorrect, Judge Bassett interjected, stating he hoped the defense was not implying he had personally made a mistake in finding Ms. Brake to have been absent:

Q. Is it possible that that April 3rd clerk's note is erroneous as to whether or not she's in custody?

A. Yes.

Q. I'm going to take one or two and back from you.

THE COURT: Mr. McPherson, I hope you're not intimating that I made an error in my calling and then finding the defendant not present for the court date that is at the crux of this case.

MR. McPHERSON: No, Your Honor. I'm just – I'll discuss that in argument in the future.

THE COURT: All right.

RP 48 (emphasis added).

This comment shows Judge Bassett was likely taking personal offense at the notion he could have made a mistake in the underlying proceedings.⁹ In providing for an automatic objection to testimony by a

⁹ Judge Bassett echoed this sentiment during the defense's closing argument when he remarked that it was a "good idea" for defense counsel to not critique the Kitsap County Clerk's Office. RP 70.

judge, the drafters of federal rule of evidence 605 reasoned judges would likely feel their integrity attacked by an objection:

To require an actual objection would confront the opponent with a choice between not objecting, with the result of allowing the testimony, and objecting, with the probable result of excluding the testimony but at the price of continuing the trial before a judge likely to feel that his integrity had been attacked by the objector.

Fed. R. of Evid. 605 advisory committee's note. Similarly, Judge Bassett expressed offense at the implication he had made a factual mistake at the earlier hearing. This shows he was a witness.

During closing arguments, defense counsel argued it was questionable whether Ms. Brake had actually been given proper notice that she was required to appear on June 28, 2018, and asked the court to carefully review the admitted evidence. RP 71. In response, Judge Bassett remarked it was fortunate he had been the presiding judge on the key dates:

MR. McPHERSON: . . . But the question I'm asking is, was Ms. Brake given notice that her personal appearance was actually required at that date? And that's something that I would just ask Your Honor to turn to the records before you to examine that. There's transcripts of those hearings and there are documents on which the court can rely.

THE COURT: And fortunately I'm the one who signed most of them.

RP 71 (emphasis added).

This comment shows Judge Bassett thought he could use his personal knowledge outside the evidence to interpret the evidence before him. But because Ms. Brake could not cross-examine Judge Bassett on his knowledge (which could antagonize the judge), this was a violation of due process and ER 605, not a boon.

As the Eighth Circuit put it, “it runs against the grain of fairness to say that the same judge may consider his own crucial testimony and recollection rebutting petitioner’s claim and simultaneously pass upon the credibility of all witnesses in weighing the evidence.” Swenson, 427 F.2d at 415 (8th Cir. 1970). Judge Bassett’s statement that he could interpret the meaning of orders he previously entered shows he became a witness in violation of ER 605 and due process. See Murchison, 349 U.S. at 138 (judge was not impartial because he relied on knowledge personal to himself, which could not be tested by cross-examination); Bartlett v. Bank of Carroll, 218 Va. 240, 248, 237 S.E.2d 115 (1977) (error for judge to testify and to explain or interpret the meaning a decree which he entered).

Given this record, the Court should hold that Judge Bassett became a witness in violation ER 605 and deprived Ms. Brake of her due process right to an impartial judge.

c. Reversal is required along with instruction that another judge preside in any retrial.

When a person is deprived of his or her due process right to an impartial judge, the error requires reversal. Murchison, 349 U.S. at 139; Lemke, 7 Wn. App. 2d at 28. Similarly, because a violation of ER 605 is essentially a rule of competency, its violation is not subject to harmless error analysis. Bradley, 990 S.W.2d at 249 (“testimony created the appearance of bias that Rule 605 seeks to prevent and such a potential for prejudice to [the appellant] that inquiry into actual prejudice is fruitless”).¹⁰ Accordingly, this Court should reverse and remand for proceedings before a different judge. Lemke, 7 Wn. App. 2d at 28.

F. CONCLUSION

To convict a person of the crime of bail jumping, the prosecution must prove the defendant’s failure to appear was knowing. Because the trial court failed to find this essential element was satisfied, Ms. Brake’s conviction should be reversed. The conviction should also be reversed because the judge became a witness in violation of due process and ER 605.

¹⁰ This Court in Hayes reasoned if the trial judge violated ER 605 by inserting his personal experiences into the decision making process, the error was harmless. Hayes, 185 Wn. App. at 600. The Court, however, cited no authority showing ER 605 was subject to harmless error analysis. In fact, the Court had recharacterized an argument of improper judicial notice under ER 201 as an ER 605 claim, indicating the issue was not briefed by the parties. Id. at 597-98.

DATED this 22nd day of August 2019.

Respectfully submitted,

/s Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project – #91052
Attorney for Appellant

Appendix

RECEIVED AND FILED
IN OPEN COURT

OCT - 8 2018

Honorable Jeffrey P. Bassett
Trial Date: 10/01/18, 10/08/18

ALISON H. SONNTAG
KITSAP COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

STATE OF WASHINGTON,

NO. 17-1-01865-18

Plaintiff,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

vs.

TERYSA ANN BRAKE,

Defendant.

This case was tried before the Honorable Judge Jeffrey P. Bassett in a bench trial on October 1, 2018 and October 8, 2018, on a First Amended Information filed October 1, 2018 charging the Defendant with one count of Bail Jumping. Anna Aruiza, Kitsap County Deputy Prosecuting Attorney, appeared for the State. Defendant Terysa Ann Brake appeared and was represented by Attorney Joseph McPherson.

FINDINGS OF FACT

Considering the evidence and testimony, the Court makes the following

Findings of Fact:

FINDING OF FACT NO. 1:

The Defendant, Terysa Ann Brake, was charged by Information on November 17, 2017 with one count of Possession of Stolen Property in the Second Degree, a class C felony. (Exhibit 1)

FINDINGS OF FACT AND
RULING-1

17-1-01865-18
FNFL 44
Findings of Fact and Conclusions of Law
4006011



JEFFREY P. BASSETT
Kitsap County Superior Court
614 Division Street, MS-24
Port Orchard, WA 98366
(360) 337-7140

1 **FINDING OF FACT NO. 2:**

2 The Defendant appeared before the Court on February 12, 2018 for
3 arraignment. She was out of custody, having posted \$10,000.00 bail in this matter. The
4 court clerk's notations indicate that the Defendant appeared in person, was advised of
5 her rights, and was released on conditions, with return court dates of April 3, 2018 at
6 10:30 a.m. for omnibus and May 7, 2018 for trial at 9:00 a.m. The notations further
7 indicate that written and oral notice was given to the Defendant for these dates. (Exhibit
8 2)

9 **FINDING OF FACT NO. 3:**

10 The conditions of release imposed include a requirement that the Defendant
11 "make all Court Appearances as directed." The Defendant signed the Order for Pretrial
12 Release containing these conditions at her arraignment; the Order contained a next
13 appearance notation of April 3, 2018 at 10:30 a.m., indicating that "Defendant shall
14 appear" for said date. (Exhibit 3)

15 **FINDING OF FACT NO. 4:**

16 The Court specifically advised the Defendant orally that she was required to
17 make her court appearances. (Exhibit 4)

18 **FINDING OF FACT NO. 5:**

19 On April 3, 2018, the Defendant appeared at her omnibus hearing. The court
20 clerk's note incorrectly indicates that she was "in custody". It indicates further that her
21 counsel requested a continuance of court dates and that a new omnibus was set for May
22 8, 2018 at 10:30 a.m.; a new trial date was set for June 18, 2018 at 9:00 a.m. Again, the
23
24

1 form indicates that the Defendant was given written and oral notice of these dates.
2 (Exhibit 13)

3 **FINDING OF FACT NO. 6:**

4 On May 8, 2018, the Defendant again appeared in court, out of custody. Counsel
5 for the Defendant again requested the matter be continued. An omnibus hearing was
6 set for June 5, 2018 at 10:30 a.m.; trial was set for July 9, 2018 at 9:00 a.m. Again, the
7 court clerk's note indicates that the Defendant received written and oral notice of the
8 court dates. (Exhibit 14)

9 **FINDING OF FACT NO. 7:**

10 On June 5, 2018, the Defendant again appeared in court, out of custody. Counsel
11 for the Defendant again requested the matter be continued. An omnibus hearing was
12 set for June 28, 2018 at 10:30 a.m.; trial was set for July 30, 2018 at 9:00 a.m. Again,
13 the court clerk's note indicates that the Defendant received written and oral notice of the
14 court dates. (Exhibit 5)

15 **FINDING OF FACT NO. 8:**

16 The Order Setting Trial Date entered on June 5, 2018 contains specific language
17 that "the Defendant must personally be present at these hearings". (Exhibit 6)

18 **FINDING OF FACT NO. 9:**

19 On Thursday, June 28, 2018, the court clerk entered a note indicating that the
20 courtroom was polled for the Defendant at 11:17 a.m. for the 10:30 a.m. hearing with no
21 response, and that a bench warrant was issued in the amount of \$20,000.00; the trial
22 date of July 30, 2018 was stricken. (Exhibit 8)

23 **FINDING OF FACT NO. 10:**

1 The verbatim transcript of proceedings indicates that the Court had previously
2 taken special steps to ensure that the notice of hearing provided to the Defendant was
3 clear with respect to the date because of counsel's handwriting. (Exhibit 10)

4 **FINDING OF FACT NO. 11:**

5 On Tuesday, July 3, 2018, five days after the warrant was issued, the
6 Defendant appeared before the Court to quash the warrant. The request was granted
7 and court dates were reset. This was noted as the Defendant's "first FTA". (Exhibit
8 11)

9 **FINDING OF FACT NO. 12:**

10 On July 3, 2018, Counsel for the defense provided no explanation for Ms.
11 Brake's failure to appear on June 28, 2018 for her omnibus hearing. Counsel
12 indicated that he wasn't "going to get into the details about why she didn't come to
13 court given that she could be charged with a bail jump for that". (Exhibit 12)

14 **FINDING OF FACT NO. 13:**

15 For trial, the State presented two witnesses. Sergeant Ryan Heffernan laid the
16 foundation for the Information filed initially against the Defendant on November 17,
17 2017. The Court finds Sergeant Heffernan to be a credible witness and accepts his
18 testimony as provided.

19 **FINDING OF FACT NO. 14:**

20 Mary Allen, records manager and supervisor for the Kitsap County
21 Superior Court Clerk's Office also testified. Her testimony encompassed a
22 review of processes used by the clerk's office, an explanation of different court
23 proceedings, a review of pertinent court clerk notations, and an explanation
24

1 of procedure to set a quash hearing. Ms. Allen also verified the authenticity
2 of certain court records. The Court finds Ms. Allen to be a credible witness
3 and accepts her testimony as provided.

4 **FINDING OF FACT NO. 15:**

5 The Defendant testified on her own behalf. The Defendant did not
6 deny that she was required to be in court on June 28, 2018.

7 **FINDING OF FACT NO. 16:**

8 The Defendant testified that she had been embroiled in a bitter separation and
9 pending dissolution with her husband and that she was the victim of verbal abuse.

10 **FINDING OF FACT NO. 16:**

11 The Defendant testified that at the time in question, she was living with her
12 mother; she continues to live with her mother as of the date of trial. She further
13 testified that, shortly before the June 28, 2018 hearing, her husband had relocated
14 back to Bremerton and “got wind I was going to file for divorce”.

15 **FINDING OF FACT NO. 17:**

16 The Defendant testified that she stopped answering her phone and stopped
17 going out of the house by herself because of concerns for her safety.

18 **FINDING OF FACT NO. 18:**

19 The Defendant testified that her husband would tell her he would come after her
20 and make her pay.

21 **FINDING OF FACT NO. 19:**

22 The Defendant testified that her husband showed up at her home approximately
23 four times in June, though she could not provide specific dates. She testified that he was
24

1 “all hot and heavy” but that she “can’t remember anything specific”, though she states she was
2 the subject of verbal assault. She called police who could do nothing “because it was a
3 civil matter.” She denies having been the victim of any physical threat of harm.

4 **FINDING OF FACT NO. 20:**

5 The Defendant was unable to recall anything specific about events occurring on
6 June 28, 2018.

7 **FINDING OF FACT NO. 21:**

8 The Defendant was asked about what she recalled from July 2 or July 3, 2018.
9 She visibly shrugged her shoulders and stated, “everything’s a blur really on the dates.”
10 When pressed by the State, she could not provide specific information on occurrences in
11 the month of June of 2018.

12 **FINDING OF FACT NO. 22:**

13 The Defendant testified that she had no idea she missed her June 28, 2018
14 hearing. She added that she had another court date for her license and “that’s actually when
15 I found out that I had a warrant for missing this court date.”

16 **FINDING OF FACT NO. 23:**

17 The Defendant testified that she appeared to quash her warrant on July 3,
18 2018.

19 **FINDING OF FACT NO. 24:**

20 The Defendant testified that she didn’t seek a protection order against her
21 husband until some time in the end of August of 2018.

22 **II. RULING**

23 **Based upon the foregoing Findings of Fact, the Court hereby finds :**

- 1 1. That the Defendant has been charged by First Amended Information with
2 the crime of Bail Jumping.
- 3 2. That the State is required to prove beyond a reasonable doubt that the
4 Defendant knowingly failed to appear before the Court, having been on bail
5 with the requirement of a subsequent personal appearance before the Court.
6 The State has proven beyond reasonable doubt that the Defendant, on bail,
7 was released with the requirement that she personally make all future court
8 appearances. Further, the State has proven beyond reasonable doubt that the
9 Defendant failed to personally appear before the Court on June 28, 2018 at
10 10:30 a.m. for omnibus, having been advised that her personal appearance
11 was required.
- 12 3. The State must also prove beyond a reasonable doubt that failure to appear
13 was for a hearing on a pending Class B or Class C felony. There has been no
14 testimony to counter this and the proof is beyond reasonable doubt that the
15 Defendant was on bail for a Class C felony at the time she failed to appear.
- 16 4. There exists a statutory defense to the charge of Bail Jumping if
17 uncontrollable circumstances prevented the Defendant from appearing before
18 the Court, the Defendant did not contribute to the creation of such
19 circumstances, and the Defendant appeared as soon as possible thereafter to
20 address the nonappearance.
- 21 5. While not exhaustive, an “uncontrollable circumstance” is described as a force
22 of nature, such as fire or windstorm, or a medical condition requiring
23 immediate hospitalization, or an act of man such as an automobile accident,
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1 or “threats of death, forcible sexual attack, or substantial bodily injury in the
2 immediate future for which there is no time for a complaint to the authorities
3 and no time or opportunity to resort to the courts.”

4 6. The Court is satisfied by a preponderance of the evidence that the Defendant
5 did not contribute to the creation of any uncontrollable circumstance. The
6 Court is further satisfied by a preponderance of the evidence that the
7 Defendant appeared quickly to address the nonappearance.

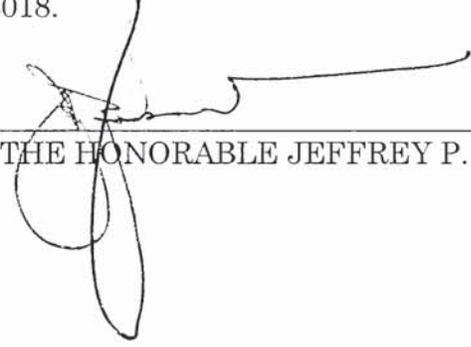
8 7. The Court, however, finds that the Defendant has not shown by a
9 preponderance of the evidence that uncontrollable circumstances prevented
10 her appearance on June 28, 2018. The Defendant was unable to provide any
11 specifics as to the events of June 28, 2018 that lead this Court to find by a
12 preponderance of the evidence that she was unable to attend her court
13 hearing.

14 8. Though the Defendant indicated her fear in leaving the house alone and her
15 concerns for her personal safety, she managed to appear before the Court on
16 May 8th and June 5th of 2018, after her husband had moved back to
17 Bremerton.

18 9. The Defendant’s own testimony was that she simply forgot about her court
19 hearing on June 28, 2018. She stated that it wasn’t until she appeared the
20 next week on another case dealing with her license that she found out that
21 she had missed the June 28, 2018 court hearing. The Defendant provided no
22 specific “uncontrollable circumstance” that prevented her from making her
23 June 28, 2018 court hearing.
24

1 10. Based on the foregoing, the Court finds the Defendant **GUILTY** as charged.

2 DATED: This ^{7th}8 day of October, 2018.

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5 _____
6 THE HONORABLE JEFFREY P. BASSETT
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 52613-1-II
v.)	
)	
TERYSA ANN BRAKE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF AUGUST, 2019, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS – DIVISION TWO AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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KITSAP COUNTY PROSECUTING ATTORNEY	(X)	E-SERVICE VIA
614 DIVISION ST.		PORTAL
PORT ORCHARD, WA 98366-4681		
[X] TERYSA ANN BRAKE	(X)	U.S. MAIL
6325 SW OLD CLIFTON RD	()	HAND DELIVERY
PORT ORCHARD, WA 98367	()	E-MAIL

SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF AUGUST, 2019.



X _____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Telephone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

August 22, 2019 - 4:40 PM

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Appellate Court Case Title: State of Washington, Respondent v. Terysa Ann Brake, Appellant
Superior Court Case Number: 17-1-01865-0

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