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Court of Appeals
Division II
State of Washington
11/20/2019 4:24 PM

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

- 1. Properly read, the crime of bail jumping requires the prosecution to prove that the failure to personally appear for court was *knowing*. Because the trial court failed to find the mental element of knowledge and this error is not harmless, the conviction should be reversed.**

a. Consistent with fundamental principles of statutory interpretation, the crime of bail jumping requires proof the defendant knowingly failed to personally appear for court.

Under common law principles still applied today, it is presumed that criminal statutes require proof of a “culpable mental state regarding ‘each of the statutory elements that criminalize otherwise innocent conduct.’” Rehaif v. United States, __ U. S. __, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019) (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 72, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994)); accord State v. A.M., __ Wn.2d __, 448 P.3d 35, 42-43 (2019) (Gordon-McCloud, J., concurring). Moreover, “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 these two fundamental rules of interpreting criminal statutes, the bail jumping statute must be read to require proof not merely that the person was released with knowledge of the requirement to

personally appear again, but that the failure to appear was a *knowing* failure. Br. of App. at 10-15; see Rehaif, 139 S. Ct. at 2194-2198 (holding that in prosecution for crime of unlawful possession of a firearm, prosecution must prove not only that the defendant knew he possessed a firearm, but that he knew his status barred possession). Here, in adjudicating Ms. Brake guilty of bail jumping, the court did not find that Ms. Brake's failure to appear was a knowing failure. Because the court did not find this essential element, and the error is not harmless beyond a reasonable doubt, the conviction for bail jumping should be reversed. Br. of App. at 16-17.

In response to this argument, the prosecution sets out boilerplate rules of statutory construction, but fails to acknowledge the two specific rules relied upon by Ms. Brake. Br. of Resp't at 4. In response to Rehaif, the prosecution appears to contend it is unhelpful because it is a federal case interpreting a federal statute. Br. of Resp't at 9-10. This Court rejected a nearly identical argument in State v. Felipe Zeferino-Lopez, 179 Wn. App. 592, 319 P.3d 94 (2014), where this Court followed the United States Supreme Court's decision in Flores-Figueroa v. United States, 556 U.S. 646, 129 S. Ct. 1886, 173 L. Ed. 2d 853 (2009). In rejecting the prosecution's argument, the Court reasoned that Washington follows the

same general rules of statutory construction as the United States Supreme Court”:

The State contends *Flores–Figueroa* is not on point because the Court was interpreting a federal statute. But the State does not show there is a material difference between our rules of statutory construction and the rules employed by the United States Supreme Court.

Felipe Zeferino-Lopez, 179 Wn. App. at 598-99. Likewise, the prosecution’s contention that Rehaif is not on point or is unhelpful because the Court was interpreting a federal statute should be rejected.

The prosecution’s discussion of United States v. Class, 930 F.3d 460 (D.C. Cir. 2019) is misleading and the case is inapposite. Following a guilty plea for possessing firearms on the grounds of the United States Capital, the defendant brought constitutional and statutory challenges to the validity of his conviction. Class, 930 F.3d at 462. The guilty plea, however, waived the non-constitutional claims. Thus, the defendant had waived statutory construction arguments regarding a lack of a scienter in the statute because this was not a constitutional argument. Id. at 469.

Here, Ms. Brake did not plead guilty. And it is well established that the failure by the trier-of-fact to find every essential element of the offense is manifest constitutional error that may be raised for the time on appeal. RAP 2.5(a)(3); see Neder v. United States, 527 U.S. 1, 10, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); State v. Mills, 154 Wn.2d 1, 6, 109

P.3d 415 (2005); State v. Banks, 149 Wn.2d 38, 44-45, 65 P.3d 1198 (2003).

The prosecution claims that a failure to appear before a court is not innocent conduct even if the person's failure to appear is not knowing. Br. of Resp't at 10. This assertion does not withstand scrutiny. For example, a person who accidentally appears at the wrong courthouse or mis-calendars a court date is guilty of bail jumping even though their failure to appear was not knowing. Moreover, most jurisdictions, including the federal government, require a knowing failure in their bail jumping statutes. E.g., 18 U.S.C.A. § 3146(c). This tends to show that what makes the conduct culpable is not the failure to appear for a court date, but that the failure to attend was knowing.

The prosecution appears to contend that Ms. Brake's reading of the bail jumping statute contravenes the plain language of the statute and reads language that is not there. Br. of Resp't at 4-7, 14. This argument fails to recognize that the *mens rea* canon of statutory construction implements legislative intent rather than contravening it. As explained by Justice Gordon-McCloud:

In Washington, courts must "supplement all penal statutes of this state" with "[t]he provisions of the common law relating to the commission of crime and the punishment thereof" "insofar as not inconsistent with the Constitution and statutes of this state." RCW 9A.04.060.

We have held that compliance with this directive permits the courts to rely on the common law to determine the elements of crimes. *See State v. Chavez*, 163 Wn.2d 262, 273-74, 180 P.3d 1250 (2008). Indeed, “the judiciary would be acting contrary to the legislature’s legitimate, express expectations, as well as failing to fulfill judicial duties, if the courts did not employ long-standing common law definitions to fill in legislative blanks in statutory crimes.” *State v. David*, 134 Wn. App. 470, 481, 141 P.3d 646 (2006).

Washington courts must therefore follow the long-standing common law practice of reading mens rea into criminal offenses, absent express legislative intent to the contrary. Doing so is “not inconsistent with the Constitution and statutes of this state.” RCW 9A.04.060. Rather, as the United States Supreme Court has indicated, following that rule avoids a confrontation with the constitution. *Staples*, 511 U.S. [600, 616-19, 114 S. Ct. 1793], 128 L. Ed. 2d 608 (1994); *Smith v. California*, 361 U.S. 147, 150, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959) (citing *Lambert v. California*, 355 U.S. 225, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957)).

A.M., 448 P.3d at 43-44 (Gordon-McCloud, J., concurring). Thus, the prosecution’s contention that adopting Ms. Brake’s reading would be contrary to legislative intent should be rejected.

Rather, the failure to consider rule of construction presuming a *mens rea* element is contrary what is contrary to legislative intent. For this presumption to be rebutted, the legislature can include “an express statement that makes its intent” to exclude a mens rea clear. Id. at 43 n.2.

The prosecution discusses the legislative history of the bail jumping statute. Br. of Resp’t at 6. Legislative history is generally only

relevant if the statute remains ambiguous after using the rules of statutory construction. State, Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 12, 43 P.3d 4 (2002). Moreover, when a criminal statute is ambiguous, the Court applies the rule of lenity, which requires adoption of the interpretation that favors the defendant. A.M., 448 P.3d at 45 (Gordon-McCloud, J., concurring). Thus, courts “should not rely on legislative history to interpret criminal statutes when the rule of lenity suffices.” Id. The prosecution’s reliance on legislative history should be rejected.

The prosecution makes the specious claim that the bail jumping statute is “regulatory” or “public welfare” that carries only minor penalties. Br. of Resp’t at 11. To the contrary, bail jumping is a felony offense when the underlying charge is a felony. RCW 9A.76.170(3)(a)-(c). And it is not a public welfare offense. These are generally offenses that relate “to pure food and drugs, labeling, weights and measures, building, plumbing and electrical codes, fire protection, air and water pollution, sanitation, [and] highway safety” State v. Turner, 78 Wn.2d 276, 280, 474 P.2d 91 (1970). Bail jumping is not this type of offense. See A.M., 448 P.3d at 50. Contrary to the prosecution’s contention, that the bail jumping statute was enacted with an emergency clause stating it was necessary for the immediate preservation of the public peace, health, or safety does make it a public welfare offense. Br. of Resp’t at 6, 11. These

clauses are included to make legislation take effect immediately or sooner than normal and also to preclude referendums. Const. art. II, § 1(b); Washington State Farm Bureau Fed'n v. Reed, 154 Wn.2d 668, 673-74, 115 P.3d 301 (2005). The prosecution's argument based on the emergency clause is frivolous.

The prosecution invokes the canon of construction against interpretations that result in unlikely, absurd, or strained results. Br. of Resp't at 12. The prosecution argues it is absurd to make it prove guilty knowledge. Actually, this canon supports Ms. Brake's argument. "As the United States Supreme Court has recognized, it would be 'not merely odd, but positively absurd' to conclude that a felony statute criminalizes unwitting conduct." A.M., 448 P.3d at 45 n.5 (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 69, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994)). Making the prosecution prove knowledge is not impossible because knowledge, as the prosecution points out, may be inferred based on circumstantial evidence.¹ State v. Shipp, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980). The sky has not fallen in jurisdictions with bail jumping statutes that require the prosecution to prove that a failure to appear was knowing.

¹ Of course, this still requires the trier-of-fact to find actual knowledge. State v. Allen, 182 Wn.2d 364, 374-75, 379, 341 P.3d 268 (2015).

b. The constitutional error by the trier-of-fact in not finding the essential element of a knowing failure to appear has not been proved by the prosecution to be harmless beyond a reasonable doubt. Reversal is required.

As Ms. Brake explains in her opening brief, the failure by a trier-of-fact to find all the essential elements of the offense is constitutional error. Br. of App. at 16-17. The prosecution has the burden of rebutting the presumption of prejudice and proving the error harmless beyond a reasonable doubt. Br. of App. at 16-17.

The prosecution has not met its burden. The prosecution incorrectly frames the issue as whether there is sufficient evidence to prove guilt. This is not the standard. See A.M., 448 P.3d at 40. Because the prosecution has attempted to prove the error harmless, the presumption of prejudice stands and reversal is required. State v. Lamar, 180 Wn.2d 576, 588, 327 P.3d 46 (2014).

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.

In violation of due process and ER 605, Judge Bassett became a witness for the prosecution. He presided at the key hearings on the underlying charge of possession of stolen property. He was a witness to acts that formed the basis for the bail jumping charge. He commented during the hearing about his knowledge and interjected when the defense

elicited evidence that could have called into question whether he made a mistake in the earlier hearings. He had personal knowledge that was outside the admitted and for which he could not separate from his assigned task as the trier-of-fact. The violation of due process and ER 605 requires reversal of the bail jumping conviction. Br. of App. at 21-28.

The prosecution takes the position that a judge must formally take the stand and testify for ER 605 to apply. This is incorrect. States v. Blanchard, 542 F.3d 1133, 1149 (7th Cir. 2008). For example, in a recent decision, this Court held that a judge in a bench trial had testified in violation of ER 605. In re Det. of T.C., ___ Wn. App. 2d ___, 450 P.3d 1230, 1235 (2019). There, a witness testified about working at a courthouse in Seattle in 1999. Based on his own personal knowledge outside the evidence about the existence of this courthouse, the judge rejected the witness's testimony and found his testimony incredible. Id. at 1234-35. This Court held the judge improperly relied on his own personal knowledge outside the evidence. Id. at 1235.

In support of its argument that there was no due process violation or violation of ER 605, the prosecution cites cases that do not address the issue. One case concerned a claimed error that the judge had commented on the evidence. State v. Gentry, 125 Wn.2d 570, 638-39, 888 P.2d 1105 (1995). Another addressed a claim that the defendant's confrontation

clause rights were violated. State v. Hart, 195 Wn. App. 449, 461-62, 381 P.3d 142 (2016). Because these cases do not address the due process or the ER 605 issues, they are unhelpful.

Judge Bassett's being a witness and testifying not only violated ER 605, but also Ms. Brake's due process right to an impartial judge. The error in him presiding over the case and inserting his personal experiences in the underlying proceedings is the type of error not amendable to harmless error inquiry. The error is per se prejudicial and requires reversal. Williams v. Pennsylvania, ___ U.S. ___, 136 S. Ct. 1899, 1900, 195 L. Ed. 2d 132 (2016); State v. Lemke, 7 Wn. App. 2d 23, 28, 434 P.3d 551 (2018); Bradley v. State ex rel. White, 990 S.W.2d 245, 249 (Tex. 1999).

B. CONCLUSION

Without the court finding that Ms. Brake knowingly failed to personally appear for her court date, Ms. Brake was convicted of bail jumping. And the judge who presided over her case testified and considered evidence outside the proceedings in violation of due process and ER 605. For either reason, the conviction for bail jumping should be reversed.

DATED this 20th day of November 2019.

Respectfully submitted,

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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 BRAKE,)	
)	
Appellant.)	

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November 20, 2019 - 4:24 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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