

FILED
Court of Appeals
Division II
State of Washington

NO. 52613-1-II
10/21/2019 2:55 PM
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TERYSA ANN BRAKE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-01865-18

BRIEF OF RESPONDENT

CHAD M. ENRIGHT
Prosecuting Attorney

JOHN L. CROSS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 328-1577

SERVICE

Richard Wayne Lechich
1511 3rd Ave Ste 701
Seattle, Wa 98101-3647
Email: richard@washapp.org;
wapofficemail@washapp.org

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED October 21, 2019, Port Orchard, WA *Elizabeth Allen*
Original e-filed at the Court of Appeals; Copy to counsel listed at left.
Office ID #91103 kcpa@co.kitsap.wa.us

TABLE OF CONTENTS

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

 A. PROCEDURAL HISTORY.....1

 B. FACTS.....1

III. ARGUMENT4

 A. THE BAIL JUMPING STATUTE IS PLAIN AND UNAMBIGUOUS AND NEED NOT BE CONSTRUED AND EVEN IF IT REQUIRED CONSTRUCTION BRAKE’S MAXIM OF CONSTRUCTION REQUIRES THIS COURT TO INSERT A WORD THE LEGISLATURE DID NOT USE.....4

 B. THE TRIAL JUDGE DID NOT TESTIFY, PROVIDED NO EVIDENCE IN THE MATTER, AND CORRECTLY FOUND GUILT ON OVERWHELMING EVIDENCE.15

IV. CONCLUSION.....19

TABLE OF AUTHORITIES

CASES

<i>In re Murchison</i> , 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955).....	17, 18
<i>State v. Bryant</i> , 89 Wash. App. 857, 950 P.2d 1004 (1998).....	12
<i>State v. Carver</i> , 122 Wn. App. 300, 93 P.3d 947 (2004).....	12
<i>State v. Ervin</i> , 169 Wn.2d 815, 239 P.3d 354 (2010).....	4, 5
<i>State v. Fredrick</i> , 123 Wn. App. 347, 97 P.3d 47 (2004).....	14
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985).....	18
<i>State v. Hart</i> , 195 Wn. App. 449, 381 P.3d 142 (2016).....	17
<i>State v. Jacobs</i> , 154 Wn.2d 596, 115 P.3d 281 (2005).....	4
<i>State v. Lanphar</i> , 124 Wn. App. 669, 102 P.3d 864 (2004).....	6
<i>State v. Lord</i> , 117 Wash.2d 829, 822 P.2d 177 (1991).....	16
<i>State v. Lord</i> , 161 Wn.2d 276, 165 P.3d m1251 (2007).....	18
<i>State v. Smith</i> , 7 Wn. App.2d 304, 433 P.3d 821 (2019).....	5
<i>State v. Van Wagner</i> , 16 Wn.2d 54, 132 P.2d 359 (1942).....	10
<i>United States v. Class</i> , 930 F.3d 460 (D.C.Cir. 2019).....	9, 10

STATUTORY AUTHORITIES

8 U.S.C. 1101(a)(26).....	8
18 U.S.C. §922(g).....	8
18 U.S.C. §924.....	11
18 U.S.C. §924(a)(2).....	8
RCW 9A.08.110(1)(b)(i)	7
RCW 9A.76.010(4).....	13
RCW 9A.76.170.....	6, 7, 11, 12
RCW 9A.76.170.....	14
RCW 9A.76.170(1).....	5

RCW 9A.76.170(2)..... 13
RCW 10.95.060(4)..... 16

RULES AND REGULATIONS

ER 605 15, 19

ADDITIONAL AUTHORITIES

2001 *Wash. Legis. Serv. Chp.* (H.B. 1227)..... 6
O. Holmes, The Common Law (1881) 10

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the bail jumping statute is ambiguous and must be construed to allow Brake an “I forgot” defense?
2. Whether the trial judge was a witness in a case in which he did not testify?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Terysa Ann Brake was originally charged by information filed in Kitsap County Superior Court with second degree possession of stolen property. CP 1. A first amended information charged one count of bail jumping only. CP 8.

The bail jumping charge was tried to the bench. CP 17 (waiver of jury trial); RP 14-16 (oral colloquy). The trial court entered findings of fact and conclusions of law. CP 18 *et. seq.* The trial court found Brake guilty of bail jumping. CP 26.

Brake was given a first-time offender waiver and sentenced to seven days in custody. CP 28.

Brake timely appealed. CP 38.

B. FACTS

Brake was investigated by the police for the possession of stolen property allegation. RP 24. An investigating detective penned a declaration of probable cause and, in court, related that probable cause statement to Brake and the information charging her. RP 24-25. The detective verified that Brake's name and proper case number are found in the order of bench warrant. RP 26.

The record manager and supervisor of the Kitsap County Clerk's Office testified about in-court record keeping by in-court clerks. RP 28-29. She testified that clerk's notes are kept to "keep track of what went on in the courtroom." RP 31.

From clerk's minutes of February 12, 2018 (exhibit 2), it was shown that Brake was in court. RP 35. The minutes indicate that Brake was orally advised of her next court date and given a piece of paper with that date on it (exhibit 3). RP 35. The order of February 12 included the requirement that Brake post \$10,00 in bail. RP 36. The paperwork given to Brake recited that a subsequent failure to appear would be a crime. RP 36.

Minutes of proceedings for June 5, 2018 (exhibit 5) show a reset of the omnibus hearing for June 28, 2018. RP 38. The minutes reveal that Brake was given oral and written notice of the June 28 date. RP 38. Further, a transcript of the June 5 hearing (exhibit 7) shows the parties

agreeing to the June 28 date in open court. RP 39.

The minutes for June 28, 2018 indicate that the courtroom was polled for Brake at 11:17 a.m. with no response. RP 40. The court issued a \$20,000 bench warrant. RP 41. Name, case number, and date of birth were matched as to each document the state offered. RP 41-42.

The minutes from July 3, 2018 indicate that Brake was present, moved to quash the warrant, and the warrant was quashed. RP 43. A transcript of that hearing (exhibit 12) indicates that because defense counsel was aware of the possibility of a bail-jump charge, he declined to explain Brake's absence on June 28. RP 44.

Brake testified that during the time-period involved (RP 59) she was in a divorce and was being threatened by her estranged husband. RP 57-58. She was concerned because this person had moved back to town and had found out that she, Brake, intended on filing for divorce. RP 59-60. She kept herself isolated. RP 60. In June the estranged husband ad come to her house making threats. RP 60. There were no physical assaults, just verbal. RP 64. Brake could not recall anything in particular that was happening on June 28. RP 60.

III. ARGUMENT

A. THE BAIL JUMPING STATUTE IS PLAIN AND UNAMBIGUOUS AND NEED NOT BE CONSTRUED AND EVEN IF IT REQUIRED CONSTRUCTION BRAKE'S MAXIM OF CONSTRUCTION REQUIRES THIS COURT TO INSERT A WORD THE LEGISLATURE DID NOT USE.

Brake argues that the bail jumping statute requires construction. She maintains that the statute, construed by her lights with the application of a maxim of statutory construction, has a missing element. Brake provides that element and then argues that since the trial court did not consider it, the evidence is insufficient to establish guilt beyond a reasonable doubt. This claim is without merit because the bail jumping statute as written does not require construction; the plain meaning is clear. Moreover, the claim fails because the authority relied upon does not compel a judicial change to the bail jumping statute.

Questions of statutory construction are reviewed de novo. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). The objective is to determine the legislature's intent. *Id.*, citing *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). If the meaning of a statute is clear, courts give effect to the plain meaning. *Id.* Plain meaning is derived from review of the text, statutory context, related statutes, and the whole statutory scheme. *Id.* A court "must not add words where the legislature

has chosen not to include them.” *State v. Yancey*, 193 Wn.2d 26, 30, 434 P.3d 518 (2019). If the meaning is not plain, courts then proceed to “statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.” *Ervin*, 169 Wn.2d at 820.

When engaged in statutory construction, courts “presume the legislature does not intend absurd results and, where possible, interpret ambiguous language to avoid such absurdity.” *Ervin*, 169 Wn.2d at 823-24 (page break omitted). Maxims of statutory construction create presumptions that may be overcome by the statutory language or by “unlikely or strained” consequences from its application. *See State v. Smith*, 7 Wn. App.2d 304, 310-11, 433 P.3d 821 (2019).

RCW 9A.76.170(1) defines the offense of bail jumping as

- (1) 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.

The elemental instruction provides

- (1) That on or about (date), the defendant failed to appear before a court;
- (2) That the defendant was charged with a crime under RCW (fill in statute) a class B or C felony;
- (3) That the defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court; and
- (4) That any of these acts occurred in the [State of

Washington] [City of] [County of].

11A WA PRAC WPIC 120.41 (element of failing to report or surrender omitted). Brake claims that the first element should read “That on or about (date), the defendant knowingly failed to appear before a court.”

Previously, RCW 9A.76.170 was differently worded, it provided

Any person having been released by court order or admitted to bail with the requirement of a subsequent personal appearance before any court of this state, and who knowingly fails without lawful excuse to appear as required is guilty of bail jumping

See State v. Lanphar, 124 Wn. App. 669, 672, 102 P.3d 864 (2004). The statute was amended in 2001. The amendment text shows that the legislature intended that “knowledge of” the required court appearance replace “knowingly” failing to appear:

- 1) 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 <<-knowingly->> fails to appear <<+or who fails to surrender for service of sentence+>> as required is guilty of bail jumping.

2001 *Wash. Legis. Serv. Chp. 264* (H.B. 1227) (notation <<-knowingly->> refers to deletion of the term). The legislature found that “This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions...” *Id.* (section 9). Further, the 2001 amendment of RCW 9A.76.170 was part of a rewriting of related statutes.

Brake argues that the inclusion of the phrase “with knowledge of” in the second element is insufficient because she should know that she failed to appear as well as knowing that she was ordered to appear. RCW 9A.08.110(1)(b)(i), (ii), defines knowledge

A person knows or acts knowingly or with knowledge when:

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

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

Our Supreme Court has noted that subsection (b)(ii) “provides that when a person has information which would lead a reasonable person to believe that a fact exists the person has knowledge of that fact regardless of its actual existence.” *State v. Johnson*, 119 Wn.2d 167, 172, 829 P.2d 1082 (En Banc). Thus, one may ““know” something based upon a reasonable, subjective belief that a fact exists.” 119 Wn.2d at 174.

The knowledge definition adds to analysis of RCW 9A.76.170 in that the “with knowledge of” element constitutes a fact that the defendant was aware of, her next court date, the result of which is a crime upon noncompliance. Similarly, a defendant would have information, her next court date, which would lead a reasonable person to believe that in fact a crime will result upon failure to appear. Moreover, establishing knowledge of the required court date allows a reasonable inference that

the person knows when she has not appeared.

Brake relies on *Rehaif v. United States*, __U.S.__, 139 S.Ct. 2191, 204 L.Ed.2d 594 (2019). There, a conviction for unlawful possession of a firearm by an illegal alien was challenged because a general statutory “knowingly” requirement had been applied to the possession element of the offense but not the status element of the offense. 139 S.Ct at 2194. The issue raised the question of congressional intent and the Supreme Court applied the “interpretive maxim” “that Congress intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct.” 139 S.Ct. at 2195.

The *Rehaif* Court applied the maxim to 18 U.S.C. §924(a)(2) and related statute 18 U.S.C. §922(g). In relevant part, the statutes provide

18 U.S.C. § 924(a)(2)

“Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.”

18 U.S.C. § 922(g)

“It shall be unlawful for any person—

(5) who, being an alien—(A) is illegally or unlawfully in the United States; or (B) ... has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the *Immigration and Nationality Act* (8 U.S.C. 1101(a)(26)));

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”

Rehaif, appendix. Referring to the maxim, the Supreme Court held that the word “knowingly” in section 924 applies to both the final clause, firearm possession, and the status clause, subsection (5). *Rehaif*, 139 S.Ct. at 2200.

Significantly, the Supreme Court’s analysis does not turn on a violation of *Rehaif*’s constitutional rights; the United States constitution is not mentioned in the decision. *Rehaif* is a statutory construction case before the Supreme Court because a question of federal law. *See United States v. Class*, 930 F.3d 460, 460-780 (D.C.Cir. 2019)(*Rehaif* “resolved only questions of statutory construction, not the constitutional right to due process” (internal quotation omitted)). It is the structure of the legislation that drives the *Rehaif* decision and allows for the application of the maxim. *Rehaif*, 139 S.Ct. at 2195 (“The statutory text supports the presumption.”)

The United States Court of Appeals in *Class* was considering the same statutory framework as in *Rehaif*. The cases are procedurally different because *Class* had pled guilty. Nonetheless, the *Class* Court further established the difference between the statutory issue and possible due process concerns, saying

We therefore reiterate our prior holding that *Class* waived his

statutory claims [by pleading guilty]. And to succeed on his constitutional challenge, it is not enough for Class to show that the best reading of the law requires proof of scienter. Instead, Class must show that the law is so difficult for the average person to understand that the Constitution forbids his conviction without such proof.

Class, 930 F.3d at 460-780.

Rehaif, then, does not provide Brake with a constitutional reason to reconstruct the bail jumping statute. Moreover, the reasoning in *Rehaif* includes that

Applying the word “knowingly” to the defendant's status in § 922(g) helps advance the purpose of scienter, for it helps to separate wrongful from innocent acts. Assuming compliance with ordinary licensing requirements, the possession of a gun can be entirely innocent. *See Staples*, 511 U.S. at 611, 114 S.Ct. 1793. It is therefore the defendant's status, and not his conduct alone, that makes the difference. Without knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful. His behavior may instead be an innocent mistake to which criminal sanctions normally do not attach. Cf. *O. Holmes, The Common Law* 3 (1881) (“even a dog distinguishes between being stumbled over and being kicked”).

139 S.Ct. at 2197. Thus, the maxim applies because having a gun may be otherwise innocent conduct.

The same cannot be said about Brake's failure to appear. Failing to appear as ordered by a court of competent jurisdiction is simply not otherwise innocent conduct. *See, e.g., State v. Van Wagner* 16 Wn.2d 54, 132 P.2d 359 (1942)(by failure to appear defendant became fugitive from justice and bail was forfeited). For this reason, the scienter presumption is a bad fit.

Another reason the presumption is a bad fit for the present case is that “we have typically declined to apply the presumption in favor of scienter in cases involving statutory provisions that form part of a “regulatory” or “public welfare” program and carry only minor penalties.” *Rehaif*, 139 S.Ct. at 2197. As noted above, H.B. 1227, of which the amended RCW 9A.76.170 is a part, was to promote public health and safety and provide support for public institutions. RCW 9A.76.170 is a regulatory provision—it is not directed at *mala in se*. The statute’s ultimate purpose is to, in the first instance, compel defendants to comply with orders to appear and, then, to provide consequences when a defendant does not comply.

Perhaps the most vital reason *Rehaif* has no application here is the obvious difference in the text. Brake compares apples to oranges. The bail jumping statute has no general or introductory *mens rea* element as does 18 U.S.C. §924. The *Rehaif* Court merely expanded the application of a word extant in the statutory scheme. That court did not use the maxim of construction to import a new term into the statute as Brake attempts to do.

The gravamen of Brake’s argument here is that she should be allowed an “I forgot” defense. Washington court’s have rejected this argument:

Based on a plain reading of the current version of RCW 9A.76.170, we expressly hold that the State must prove only that Carver was given notice of his court date—not that he had knowledge of this date every day thereafter—and that “I forgot” is not a defense to the crime of bail jumping.

State v. Carver, 122 Wn. App. 300, 306-07, 93 P.3d 947 (2004). *see also* *State v. Bryant*, 89 Wash. App. 857, 869-70, 950 P.2d 1004 (1998) (holding that evidence that defendant received written and verbal warning six days before his omnibus hearing, and posted \$20,000 bail, was sufficient to prove that Bryant knew he was required to appear). Since the *Carver* Court found the plain meaning of the statute unambiguous, there was no need for it to consider any maxim of construction, including the one Brake advances.

Here Brake’s argument violates another rule of statutory construction: that the interpretation not lead to ‘unlikely or strained’ results. She claims that *Carver* is too harsh because one who miscalendars the court date would be guilty and because the statute thus does not distinguish persons who skip town from persons who fail to appear by innocent mistake. Brief at 11. True, perhaps, but the flip-side seems the larger question: if “I forgot” is a defense, how does a trier of fact distinguish the two when both say at trial that they forgot? At bottom, forgetting, purposefully or mistakenly, that a court of competent jurisdiction has ordered one to do an act is simply not “innocent” behavior.

And the legislature recognized and resolved this knowledge conundrum and any apparent harshness in the statute by allowing for a defense. The “I forgot” defense is likely bilaterally unprovable. That is, as in this case, the defendant can only support this defense by her own assertion. The statutory defense

It is an affirmative defense to a prosecution under this section 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.76.170(2). In turn, an “uncontrollable circumstance” is

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 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). The statutory defense allows the defendant to prove that she was impeded from appearance by circumstances not in her control. Moreover, the statutory defense answers Brake’s mis-calendarling hypothetical: mis-calendarling would be an example of the person contributing to the circumstances in reckless disregard of the requirement; calendarling is in fact in her control.¹

The analysis of the United States Supreme Court in *Rehaif* case has

¹ In this case, the trial court can be seen as finding the contrary because it concluded that Brake had not contribute to her failure to remember. CP 25.

no application to RCW 9A.76.170. This primarily because the bail jumping statute is unambiguous and does not require statutory construction. Courts do not add words to unambiguous legislative enactments. Brake's statutory construction issue fails.

It follows that since the trial court found sufficient evidence under the proper reading of the statute, Brake's claim that the evidence was insufficient also fails. On review of a sufficiency of the evidence claim, the court takes the evidence in a light most favorable to the state. *State v. Fredrick*, 123 Wn. App. 347, 354, 97 P.3d 47 (2004). "The defendant admits the truth of the State's evidence and all inferences that can be reasonably drawn from it." *Id.*

Here, the trial court found beyond a reasonable doubt that Brake received written and oral notice of the date she missed. CP 20 (finding 7). On that date, she was not present. CP 20 (finding 9). The trial court concluded that Brake "simply forgot" about the hearing and that that is not an uncontrollable circumstance under the statute thus rejecting the affirmative defense. CP 25. There was sufficient evidence.

B. THE TRIAL JUDGE DID NOT TESTIFY, PROVIDED NO EVIDENCE IN THE MATTER, AND CORRECTLY FOUND GUILT ON OVERWHELMING EVIDENCE.

Brake next claims that the trial judge became a witness to the case because the judge hearing the bench trial was also the judge who issued the warrant of arrest on her failure to appear. This claim is without merit because the trial judge was not called as a witness, did not testify, and found guilt as the trier of fact based on overwhelming evidence..

First, it is apparent from the record that Judge Bassett was not in fact a witness for the state. There may be many potential witnesses in this case and Judge Bassett may be one of these. However, no evidence was taken from Judge Bassett and the elements of the crime were established beyond a reasonable doubt.

ER 605 provides that “The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.” Judge Bassett did not testify as a witness “that” trial. The plain language of the rule does not support Brake’s position. Further, although the rule allows review without objection, the lack of objection in this case is portentous: since Judge Bassett provided no evidence, there was nothing to object to. Moreover, there is no constitutional issue in the evidence rule. As such, Brake should be constrained to show prejudice to

her case by any of the trial court's actions.

For example, in *State v. Gentry*, 125 Wn.2d 570, 888P.2d 1105 (1995). Gentry challenged the admission of a judgment and sentence from a previous case that was signed by the trial judge in the present case. Gentry claimed that the trial judge had comment on the evidence. The Court rejected this claim

The Defendant also argues that because the trial judge was also the sentencing judge in the prior rape conviction that his signature on the judgment and sentence constituted a comment on the evidence in violation of Const. art. 4, § 16. An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question. At the penalty phase of a capital case, the merits of the case are whether the jury is convinced that there are not sufficient mitigating circumstances to merit leniency. RCW 10.95.060(4). Judge Hanley made no comment on that issue.

The Defendant does not contend that Judge Hanley made any statements in front of the jury of his opinions regarding what sentence was merited; he contends that the act of admitting the prior rape conviction in which Judge Hanley had imposed a sentence greater than the presumed sentence constitutes a comment on the evidence. However, the judgment and sentence of the prior rape was not a comment on the evidence; it was the evidence. This court in *State v. Lord*, 117 Wash.2d 829, 822 P.2d 177 (1991), *cert. denied*, 1146 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992) recently explained that the trial court is charged with using its discretion to ensure that proper evidence is admitted and improper evidence is excluded. The admission of evidence, standing alone, cannot be considered an unconstitutional comment on the evidence. Whether a remark constitutes a comment on the evidence is based upon the content of the communication, not only

on who made the remark. We conclude that the admission of penalty phase exhibit 3 did not constitute an unconstitutional comment on the evidence by the trial judge.

125 W.2d at 638-39 (page breaks omitted).

This holding has application to the present case. First, there the issue was vital because a jury was involved as the trier of fact. Second, there is no apparent flaw in the proceedings by the mere fact that the trial judge had previously presided over another case wherein Gentry was a defendant even when the judge's signature appears on an exhibit. Third, there the trial court was presumed to admit proper evidence and exclude improper evidence.

In the present case, there was no jury to be swayed by any comments from the bench. There is no apparent flaw in the judge having previously presided over a hearing involving Brake. *See State v. Hart*, 195 Wn. App. 449, 461-62, 381 P.3d 142 (2016) *review denied* 187 Wn.2d 1011 (2017) (no confrontation violation where recording of judge at FTA hearing admitted because evidence not testimonial and harmless because cumulative). And, as stated, the trial court used no personal knowledge in assessing whether or not the evidence was sufficient for guilt; nothing in the record shows that Judge Bassett considered any inadmissible evidence in determining guilt.

Brake's reference to *In re Murchison*, adds nothing. There, the

evil being addressed was a judge acting as grand jury and then trial judge. 349 U.S. 133, 134, 75 S.Ct. 623, 99 L.Ed. 942 (1955). The reversal of a contempt citation charged by the same judge who found the defendant guilty was compelled by the rule that “Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.” *Murchison*, 349 U.S. at 137. Judge Bassett did not charge Brake with a crime.

Judge Bassett said what he said about the previous hearing. No jury heard his remarks. Judge Bassett was not called as a witness. Judge Bassett used no facts from himself in his findings of fact in this case. Brake does not say how she was prejudiced in the proceeding below. How is it that the Judge’s knowledge of pervious hearings prejudiced Brake on the bail jumping charge? The answer is that it did not. Absent the Judge’s comments, nothing in the case would change.

If there is error in this record, it is harmless. The evidence in the matter, aside from the possibly tainted trial court comments, was overwhelming. *See State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985). “If the untainted, admitted evidence is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. *State v. Lord*, 161 Wn.2d 276, 296, 165 P.3d m1251 (2007).

Here, on the questions of notice to the hearing and failure to

appear, there was no doubt in the record; the defense did not challenge these facts. The only issue in doubt in this case is the question of Brake's affirmative defense. Clearly, Judge Bassett knew nothing of the circumstances of Brake's life that led to her failure to appear. Thus the trial court's ruling on the affirmative defense included no facts that the trial court knew or was witness to.

The trial judge did not testify in this matter. ER 605 is not violated. The trial judge provided no evidence of guilt. Due process is not offended. The evidence of guilt was straight forward and overwhelming. Even if there was error, it was harmless. This claim fails.

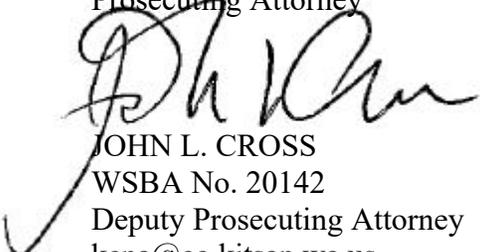
IV. CONCLUSION

For the foregoing reasons, Brake's conviction and sentence should be affirmed.

DATED October 21, 2019.

Respectfully submitted,

CHAD M. ENRIGHT
Prosecuting Attorney



JOHN L. CROSS
WSBA No. 20142
Deputy Prosecuting Attorney
kcpa@co.kitsap.wa.us

KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

October 21, 2019 - 2:55 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52613-1
Appellate Court Case Title: State of Washington, Respondent v. Terysa Ann Brake, Appellant
Superior Court Case Number: 17-1-01865-0

The following documents have been uploaded:

- 526131_Briefs_20191021145513D2661630_9777.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Brake Terysa 20191014 resp brief.pdf

A copy of the uploaded files will be sent to:

- KCPA@co.kitsap.wa.us
- greg@washapp.org
- richard@washapp.org
- rsutton@co.kitsap.wa.us
- wapofficemail@washapp.org

Comments:

Sender Name: Elizabeth Allen - Email: erallen@co.kitsap.wa.us

Filing on Behalf of: John L. Cross - Email: jcross@co.kitsap.wa.us (Alternate Email:)

Address:
614 Division Street, MS-35
Port Orchard, WA, 98366
Phone: (360) 337-7171

Note: The Filing Id is 20191021145513D2661630