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Supreme Court No. 99393-9
Court of Appeals No. 52613-1-II

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

TERYSA BRAKE,

Appellant.

PETITION FOR REVIEW

RICHARD W. LECHICH
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
richard@washapp.org
wapofficemail@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

Washington Supreme Court

Washington Court of Appeals

Statutes

Rules

Other Authorities

A. IDENTITY OF PETITIONER AND DECISION BELOW

Terysa Brake missed an omnibus hearing. Although she quickly appeared to quash the warrant that had issued and provided a reasonable explanation for the mishap, Ms. Brake was charged and convicted of felony bail jumping. After Ms. Brake was convicted, but while her case was on direct appeal, the legislature amended the bail jumping statute. The legislature decriminalized much of the conduct that previously constituted the crime of bail jumping and made some the conduct a misdemeanor rather than a felony. Under the change in the law, Ms. Brake's conduct was no longer criminal, and she would not have been convicted of bail jumping. Still, the Court of Appeals held this change in the law did not require that Ms. Brake's conviction be vacated.

Ms. Brake asks this Court to grant review of this decision terminating review.[1] Because a decision from this Court is pending in State v. Jenks, No. 98496-4,[2] which involves a similar issue, this Court should stay consideration until that case is decided.

[1] The decision, published in part, was issued on December 8, 2020. A copy is attached in the appendix.

[2] 196 Wn.2d 1001, 471 P.3d 211 (2020).

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. Do the 2020 amendments to the bail jumping statute apply to all cases on direct appeal which are not final?

2. Do the 2020 amendments to the bail jumping statute apply retroactively to all bail jumping offenses?

C. 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. The trial court set bail and ordered Ms. Brake released with conditions. Exs. 2-4.

Over the next four months, Ms. Brake personally appeared for her court dates. Exs. 5-7, 13-14; CP 49-52. On June 5, Ms. Brake appeared for a court hearing. Exs. 5-7. The court ordered the case continued and set an omnibus hearing for June 28. 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 the court 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 the court orally stating it had made sure the handwritten "eight" in the

June 28 date of the previous order was legible, the court 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 quashed the warrant. Exs. 11-12. Ms. Brake personally appeared at her following court dates. CP 53; 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. RP 14-16; CP 18.

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).[3] 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 Ms. Brake lived. 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

[3] 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. Ms. Brake called the police, but she 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).

Notwithstanding Ms. Brake's testimony, the court found Ms. Brake guilty. CP 26.

On appeal, the Court of Appeals rejected Ms. Brake's challenges to the conviction. In the published portion of the opinion, the Court of Appeals held that recent amendments to the bail jumping statute, under which Ms. Brake's conduct was no longer criminal, did not apply to her conviction. This Court should grant review on this issue and reverse the Court of Appeals.

D. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED.

Under a change in the law made during Ms. Brake's appeal of her conviction for bail jumping, the conduct constituting her conviction was decriminalized. This Court should grant review to decide whether Ms. Brake is entitled to the benefit of this remedial change in the law.

1. Recognizing the injustice and harshness of the bail jumping statute, the legislature revised the statute.

On March 7, 2020, the legislature amended the bail jumping statute. Laws of 2020, ch. 19, §§ 1, 2. The law took effect on June 11, 2020. Id.

Under the prior law, felony bail jumping required only failure to appear "before any court of this state." Former RCW 9A.76.170(1), (3). Under the change in the law, felony bail jumping requires failure to appear *for trial*. Laws of 2020, ch. 19, § 1 (1)(a). The legislature downgraded failure to appear for a court date *other than trial* to a gross misdemeanor or no crime at all. Id. at § 2. Failing to appear for court in a case like Ms. Brake's is not criminal if the person moves to quash the warrant within 30 days and has no prior warrants for failing to appear in the current case. Id. at § 2(1).

2. Ms. Brake is entitled to the benefit of the change in the law because her case is on direct appeal and not final.

Charged with the non-violent offense of possessing stolen property in the second degree, Ms. Brake failed to appear for an omnibus hearing.

Exs, 5-10. Less than a week after the court issued a bench warrant, Ms. Brake appeared and quashed the warrant. Exs. 11-12.

Under the change in the law, Ms. Brake's failure to appear was not a crime because she moved to quash the warrant for failure to appear within 30 days of it being issued, appeared at the hearing to quash, and had no prior warrants issued for missing a hearing in the case. Laws of 2020, ch. 19, § 2, (1)(b). And if she had failed to quash the warrant within this period, and the prosecution proved the other requirements of the statute, she would have been guilty of a gross misdemeanor, not a felony. This is because the charged offense of possessing stolen property is not a violent offense or a sex offense. Id. at § 1, (1)(b)(i); § 2, (1)(a).

Because her case is on direct appeal and is not final, Ms. Brake is entitled to the benefit of the change in the law. "[S]tatutes generally apply prospectively from their effective date unless a contrary intent is indicated." State v. Jefferson, 192 Wn.2d 225, 245, 429 P.3d 467 (2018). Another rule must also be considered in determining whether a statutory change applies to a given case: "the rule that a newly enacted statute or court rule generally applies to all cases pending on direct appeal and not yet final." Id. at 246.

A statutory amendment applies prospectively when the precipitating event for application of the statute occurs after its effective

date. State v. Ramirez, 191 Wn.2d 732, 749, 426 P.3d 714 (2018). "[A] newly enacted statute or court rule will only be applied to proceedings that occurred far earlier in the case if the triggering event to which the new enactment might apply has not yet occurred." Jefferson, 192 Wn.2d at 246 (cleaned up). To make this determination, a court analyze "whether the new provision attaches new legal consequences to events completed before its enactment.'" Id..

> Washington courts
>
> > generally hold that when the new statute concerns a postjudgment matter like the sentence or revocation of release . . . then the triggering event is not a past event but a future event. In such a case, the new statute or court rule will apply to the sentence or sentence revocation while the case is pending on direct appeal, even though the charged acts have already occurred.

Id. at 247 (cleaned up).

In Ramirez, for example, this Court held the 2018 statutory amendments addressing legal financial obligations (LFOs) applied prospectively to cases pending on direct appeal. 191 Wn.2d at 747-49. The Court held the precipitating event for the imposition of LFOs was the termination of the defendant's case. Id. The 2018 amendments therefore applied to the imposition of LFOs in Mr. Ramirez's judgment and sentence because his case was pending on direct appeal and not final. Id. at 749.

Applying the analysis in Ramirez and Jefferson, the triggering event for imposition of Ms. Brake's sentence is the termination of her appeal, which had not yet happened. The legislature downgraded bail jumping from a felony to a gross misdemeanor or no crime at all, impacting Ms. Brake's judgement and sentence. The amendments apply prospectively to her sentence "while the case is pending on direct appeal, even though the charged acts have already occurred." Jefferson, 192 Wn.2d at 24. Because the change in the law applies prospectively to a triggering event that has not yet occurred (the termination of the appeal), Ms. Brake is entitled to benefit of the change in the law.

Ignoring Jefferson, the Court of Appeals reasoned that this Court's decision in Ramirez did not require that the bail jumping statute be applied to all cases pending on direct appeal. Slip op. at 4-5. The appellate court reasoned that Ramirez's holding was limited to costs imposed following conviction. Slip op. at 5. But while Ramirez involved costs, the Court of Appeals failed to explain why this was material. Costs are part of the sentence. The difference is immaterial. Under Ramirez, Ms. Brake was entitled to the benefit of the change in the law because her case was on direct appeal and not final.

3. The change in the law applies retroactively.

The constitutional prohibition against ex-post facto laws only forbids the retroactive application of laws that increase punishment or create punishment where none existed before. Dorsey v. United States, 567 U.S. 260, 275, 132 S. Ct. 2321, 183 L. Ed. 2d 250 (2012). Consistent with the common-law, where a criminal statute is repealed or modified to the benefit of a defendant, the prior statute "is regarded as though it had never existed regarding all pending litigation." State v. Grant, 89 Wn.2d 678, 682, 575 P.2d 210 (1978).

The legislature in 1901 purported to modify this common-law rule by enacting what is referred to as the savings statute, RCW 10.01.040. Laws of 1901 ex. s. ch. 6 § 1.[4] Because this statute is in derogation of the

[4] No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures,

common-law, this Court has interpreted it narrowly and reasoned that the legislature may enact a retroactive criminal law to the benefit of the defendant if the statute "fairly convey[s] that intention." Grant, 89 Wn.2d at 683; State v. Zornes, 78 Wn.2d 9, 13, 475 P.2d 109 (1970).

In interpreting RCW 10.01.040, Washington courts have appeared to overlook the fundamental principle that a legislature cannot bind a future legislature from exercising its legislative power. Washington State Farm Bureau Fed'n v. Gregoire, 162 Wn.2d 284, 301-02, 174 P.3d 1142 (2007); United States v. Winstar Corp., 518 U.S. 839, 872-73, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996). In interpreting the analogous federal saving statute to not impose an express intention of retroactivity, the United States Supreme Court has recognized this principle. Dorsey, 567 U.S. at 274. Rather, a statute applies retroactively not merely when there is express intent, but also when that intent can be inferred "by necessary implication." Id. The Court reasoned this was so "because statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified." Id. Thus, "no magical passwords" are required to make a law

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pending at the time of its enactment, unless a contrary intention is expressly declared therein.

retroactive. Id. (quoting Marcello v. Bonds, 349 U.S. 302, 310, 75 S. Ct. 757, 99 L. Ed. 1107 (1955)). The legislative body remains free to express its intention of retroactivity "either expressly or by implication as it chooses." Id.

Moreover, when the Legislature reduces the maximum punishment for a crime, that reduction is presumed to apply to all cases. State v. Wiley, 124 Wn.2d 679, 687, 880 P.2d 983 (1994). In such cases:

> the legislature is presumed to have determined that the new penalty is adequate and that no purpose would be served by imposing the older, harsher one. This rule has even been applied in the face of a statutory presumption against retroactivity and the new penalty applied in all pending cases.

State v. Heath, 85 Wn.2d 196, 198, 532 P.2d 621 (1975). Wiley recognized this is so because "the reclassification of a crime is no mere refinement of elements, but rather a fundamental reappraisal of the value of punishment." 124 Wn.2d at 687.

In contravention of these fundamental principles, the Court of Appeals reasoned that RCW 10.01.040 created a "bright-line rule" requiring explicit language stating the change in the law is retroactive. Slip op. at 5 (quoting State v. Kane, 101 Wn. App. 607, 618, 5 P. 3d 741 (2000)). The Court reasoned that unless there is "clear legislative intent"

that a statute is retroactive, the statute must be interpreted to apply only prospectively. Slip op. at 5.

This reasoning flies in the face of this Court's precedents, which hold RCW 10.01.040 must be interpreted narrowly and that the proper inquiry is simply whether the fair import of the statute indicates it was intended to apply retroactively. Grant, 89 Wn.2d at 683; Zornes, 78 Wn.2d at 13. It is inconsistent with the United States Supreme Court's decision in Dorsey, which applied the same rule of narrow construction to the analogous federal savings statute. 567 U.S. at 274.

In short, the proper analysis for whether a change in the law applies retroactively is one of statutory interpretation. The meaning of a statute is an issue of law reviewed de novo. State, Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The court uses the "plain meaning" rule, which examines not only the text of the statute, but related statutes and other provisions of the same act. Id. at 10-11. If there is ambiguity, it is appropriate to examine legislative history. Id. at 12.

The new law does not contain a formal statement of legislative intent. See Laws of 2020, ch. 19. The language of the statute does not expressly state whether the law was intended to have retroactive effect. The text of the law, however, impliedly indicates that retroactivity was

intended. The amended offense of bail jumping and the newly created lesser offense of failure to appear or surrender, do not impose criminal liability for missing non-trial hearings if (1) the person appears and moves to quash the resulting warrant within 30 days and (2) this is the first missed court appearance in the case where a warrant was issued. Laws of 2020, ch. 19, § 1 (1), § 2(1)(b). This statute recognizes that it is fundamentally unfair to impose criminal liability for missing a court appearance under these circumstances. Given the legislature's determination of the injustice of imposing criminal liability in circumstances like Ms. Brake's, no purpose is served by applying the old law to her case. See Heath, 85 Wn.2d 196 at 198 (when legislature has effectively created a new reduced penalty for a crime, "no purpose would be served by imposing the older, harsher one"). The fair implication or import of the law is that the legislature intended to not criminalize her conduct and that this change in the law should apply retroactively, or at least to cases that are not final.

To the extent that ambiguity remains, legislative history further supports a conclusion that the law was intended to apply retroactively. Consistent with the changes made in the law, legislative hearings show agreement that the existing scheme was overly harsh and not used as originally planned, which was to deter people from intentionally evading

justice (whether to improve their cases through delay or avoid prosecution entirely). See, e.g., Hearing on HB 2231 Before H. Pub. Safety Comm., 66th Leg. 2020 (Jan. 14, 2020) (statements of Rep. Pellociotti, Sponsor, 41:50-46:57, 47:43-48:21) (statement of opponent Rep. Klippert, Member, 46:57-47:34);[5] Hearing on ESHB 2231 Before S. Law & Just. Comm., 66th Leg. 2020 (Feb. 25, 2020) (statements of Rep. Pellociotti, Sponsor, 31:26-35:08, 39:16-40:25, 41:42-42:15) (statement of Sen. Holy, Member, 40:25-41:42).[6]

A committee report summarizing public testimony in support of the law recounts how bail jumping charges were being improperly used by prosecutors, resulting in convictions that were "fundamentally unfair":

> The charge of bail jumping is utilized as a tool to get convictions rather than to promote justice. Prosecutors frequently use the charge to coerce a plea even though evidence may be insufficient for the underlying charge. In many cases these are administrative hearings that people miss. This may be the 10-12th appearance because the prosecutor keeps moving for a continuance For indigent or near indigent clients, these hearings result in missed work, transportation costs, day care expenses, and reliance on calendaring tools or skills that these people do not have. In many cases, the defendant is not trying to abscond, but doesn't have the resources to appear at all the court dates. The Legislature should prohibit the prosecutor from using these charges inappropriately.

[5] Available at https://www.tvw.org/watch/?eventID=2020011091.

[6] Available at https://www.tvw.org/watch/?eventID=2020021343.

> This committee should be aware of what a felony represents. A felony means the inability to get housing, get a job, or show up to your child's school for events. Simply missing a court hearing can brand a person with a scarlet letter. Even an unranked felony counts as a sentence that increases a person's score and includes a maximum sentence of 365 days.
>
> These charges do not improve court appearance rates and have a disproportionate impact on marginalized and minority populations. Conviction of any felony will make a person ineligible for immigrant status. Persons frequently miss court dates for linguistic barriers or they are fearful of coming to court due to immigration enforcement.
>
> In one particular circumstance, a defendant showed up in court six days after a missed appearance. At trial, the defendant was acquitted by the jury of the underlying charge of residential burglary within 1 hour. Yet the prosecutor insisted on the bail jumping charge and the person walked out of trial a convicted felon. This is fundamentally unfair. In other situations, a person has been coerced into pleading to the underlying charge even if they didn't commit the crime as the crime has a lesser jail sentence than bail jumping. There are many solutions to this problem other than charging additional crimes.

2019 Washington House Bill No. 2231, Washington Sixty-Sixth Legislature - 2020 Regular Session. Prosecutors agreed that the "30 day grace period" was an appropriate response to the injustice of making felons out of those who miss a non-trial court hearing, but comply with the requirement to appear in a very short period. Id.

In other words, there was agreement that imposing criminal liability in cases like Ms. Brake's was unjust and should stop. The law

fairly conveys an intention to decriminalize Mr. Brake's conduct of missing a non-trial hearing when it was her first missed appearance and she quickly moved to quash the warrant for failing to appear. Regardless, any ambiguity must be resolved in her favor. See State v. Gradt, 192 Wn. App. 230, 235-36, 366 P.3d 462 (2016) (ambiguity in law that largely decriminalized marijuana possession was resolved in favor of retroactive application because purpose of law was stop all prosecutions for possessing small amounts of marijuana).

The Court of Appeals reasoned that the amended bail jumping statute was not "subject to statutory interpretation." Slip op. at 6. But statutory interpretation is necessary to decide if the "fair import" of the statute requires retroactive application. Additionally, the Court of Appeals erroneously reasoned that any silence in the statute regarding retroactivity did not create ambiguity. Contrary to the rule of fair import, the Court of Appeals reasoned that the legislature must include explicit language for a statute to apply retroactively. Slip op. 6. As explained, this reasoning is contrary to precedent from both this Court and the United States Supreme Court on how statutes should be analyzed to determine whether retroactive or prospective application is intended. Dorsey, 567 U.S. at 274; Grant, 89 Wn.2d at 683; Zornes, 78 Wn.2d at 13.

4. Review should be granted to decide these issues of substantial public interest and because the mode of analysis used by the Court of Appeals is in conflict with this Court's precedent.

This Court should grant review to decide whether the amended bail jumping statute applies to cases on direct appeal which are not final. The Court should also grant review to decide whether the amended bail jumping statute applies retroactively. Both of these issues are issues of substantial public interest that should be determined by this Court. RAP 13.4(b)(4). Review is also warranted because the mode of analysis used by the Court of Appeals in answering these questions is in conflict with this Court's precedent. RAP 13.4(b)(1).

As of submission, this Court is reviewing a similar issue in State v. Jenks, No. 98496-4.[7] That case involves amendments to Washington's persistent offender accountability act, which removed convictions for second degree robbery as strike offenses. This Court is reviewing whether these amendments are retroactive or apply to persons whose cases are on direct appeal and not final. Jenks will impact this case. Accordingly, the Court should stay consideration of this petition until Jenks is decided.

E. CONCLUSION

For the foregoing reasons, this Court should grant Ms. Brake's

[7] 196 Wn.2d 1001, 471 P.3d 211 (2020).

petition for review or stay consideration of her petition until Jenks is decided.

Respectfully submitted this 4th day of January, 2021.

Richard W. Lechich – WSBA #43296
Washington Appellate Project – #91052
Attorney for Petitioner

Appendix

Filed
Washington State
Court of Appeals
Division Two

December 8, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TERYSA ANN BRAKE, Appellant.	No. 52613-1-II PUBLISHED IN PART OPINION

MELNICK, J. — Terysa Ann Brake appeals her 2018 bail jumping conviction. In the published portion of this opinion we address her argument that the 2020 changes to the bail jumping statute, RCW 9A.76.170, require vacating her conviction. We conclude that the 2020 changes to the bail jumping statute do not apply to Brake's conviction. In the unpublished portion of this opinion we address Brake's argument that the trial court erred by not finding that Brake knowingly failed to appear and by becoming a witness during Brake's bench trial in violation of ER 605 and due process. Finding no error, we affirm.

FACTS[1]

The State originally charged Brake with possession of stolen property in the second degree. On February 12, 2018, she appeared for her arraignment. The trial court released Brake after she posted bail. The court advised Brake of her rights and notified her that she must return on April 3, 2018 for an omnibus hearing. The release order stated that Brake must "make all Court

[1] The following facts are based on the trial court's findings of fact following Brake's bench trial, which are unchallenged and therefore verities on appeal. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

Appearances as directed." Clerk's Papers (CP) at 19. The court also "advised [Brake] orally that she was required to make her court appearances." CP at 19. Brake signed the order for release with these conditions.

Brake appeared at the next three scheduled omnibus hearings, all of which the court continued at Brake's request. At the third hearing, the court issued a written order stating that "[Brake] must personally be present" at the next hearing scheduled for June 28. CP at 21.

On June 28, Brake did not appear. The court issued a warrant for her arrest. Five days later, Brake appeared before the court and moved to quash the warrant. The court quashed the warrant. Brake did not explain why she failed to appear at the omnibus hearing.

The State charged Brake with bail jumping and dismissed the possession charge. The matter proceeded to a bench trial.

The trial court found Brake guilty, entering findings of fact and conclusions of law. The court labeled one section "FINDINGS OF FACT" and the other section "RULING." CP at 18, 24. In paragraph 2 of the ruling section, the court stated:

> [T]he State is required to prove beyond a reasonable doubt that [Brake] knowingly failed to appear before the Court, having been on bail with the requirement of a subsequent personal appearance before the Court. The State has proven beyond reasonable doubt that [Brake], on bail, was released with the requirement that she personally make all future court appearances. Further, the State has proven beyond reasonable doubt that [Brake] failed to personally appear before the Court on June 28, 2018 at 10:30 a.m. for omnibus, having been advised that her personal appearance was required.

CP at 24. Brake appeals.

ANALYSIS

I. RETROACTIVITY OF RCW 9A.76.170

We first address whether Brake's conviction should be vacated based on recent changes to the bail jumping statute, RCW 9A.76.170. We permitted the parties to provide supplemental briefing on this issue. Brake argues that the changes to RCW 9A.76.170 apply retroactively to her charge because her appeal is not final and for other reasons set forth below. We disagree.

A. Standard of Review and Legal Principles

Determining whether a statute is retroactive is a question of law that we review de novo. *State v. Schenck*, 169 Wn. App. 633, 642, 281 P.3d 321 (2012).

RCW 10.01.040 states that "[n]o offense committed . . . previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act." Moreover, statutes are presumed to be prospective unless there is a clear indication that the legislature intended a retroactive effect. *City of Ferndale v. Friberg*, 107 Wn.2d 602, 605, 732 P.2d 143 (1987). Thus, a statute in effect on the date of a criminal offense is the applicable statute "absent clear legislative intent to the contrary." *In re Pers. Restraint of Flint*, 174 Wn.2d 539, 559 n.9, 277 P.3d 657 (2012).

B. No Retroactive Intent

Brake committed her offense on June 28, 2018. At that time, former RCW 9A.76.170 (2001) stated, "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 . . . and who knowingly fails to appear . . . is guilty of bail jumping."

On March 7, 2020, the legislature amended RCW 9A.76.170. LAWS OF 2020, ch. 19, §§ 1, 2. The law took effect on June 11, 2020. LAWS OF 2020, ch. 19, §§ 1, 2.

Under the prior law, felony bail jumping required only failure to appear "before any court of this state." Former RCW 9A.76.170(1), (3) (2001). Under the 2020 law, felony bail jumping requires a person to fail to appear for trial. LAWS OF 2020, ch. 19, § 1(1)(a). The legislature also created a separate section for failure to appear for a court date other than trial and downgraded the crime to either a gross misdemeanor or no crime at all. LAWS OF 2020, ch. 19, § 2.[2] As part of the new crime of failure to appear or surrender for a non-trial court date, the State must either prove that the defendant did not appear and did not move to quash the warrant within thirty days of its issuance or that the defendant had a prior warrant issued in the case for failing to appear. RCW 9A.76.190(1)(b)(i)-(ii).

The legislature did not state that the statute would apply retroactively. Accordingly, we presume the revised statute is prospective only.

C. *State v. Ramirez*

Brake argues we should not presume RCW 9A.76.170 is prospective based on *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018), because the 2020 amendments became effective while her case was pending on direct appeal. We disagree.

Ramirez addressed whether the 2018 legislative amendments to the legal financial obligation (LFO) statutes applied to a case pending on direct appeal. 191 Wn.2d at 747-49. The defendant in *Ramirez* appealed the trial court's imposition of discretionary LFOs, arguing that the court had failed to make an adequate inquiry into his ability to pay. 191 Wn.2d at 736-37.

[2] This section has been codified as RCW 9A.76.190.

Ramirez concluded that the trial court had erred in imposing the LFOs without making an adequate inquiry into his ability to pay, which normally would have entitled the defendant to resentencing. *Ramirez*, 191 Wn.2d at 746. However, while the appeal was pending the legislature enacted amendments to the LFO statutes that prohibited the imposition of discretionary LFOs and the criminal filing fee on indigent defendants. *Ramirez*, 191 Wn.2d at 746. The defendant argued that these amendments applied to his appeal, and therefore the Supreme Court should strike the LFOs because he was indigent rather than remanding for resentencing. *Ramirez*, 191 Wn.2d at 746.

The court agreed and held that the 2018 LFO amendments "concern the court's ability to impose costs on a criminal defendant following conviction" and Ramirez's case was on appeal as a matter of right when the amendments became effective. *Ramirez*, 191 Wn.2d at 749. The court concluded that "[b]ecause [the LFO] amendments pertain to costs imposed upon conviction and Ramirez's case was not yet final when the amendments were enacted, Ramirez [was] entitled to benefit from this statutory change." *Ramirez*, 191 Wn.2d at 749.

Brake suggests that *Ramirez* adopted a rule of prospective application of statutory amendments to all cases pending on direct appeal. However, the court in *Ramirez* clearly limited its holding to "costs imposed on criminal defendants following conviction." *Ramirez*, 191 Wn.2d at 747. *Ramirez* did not state a rule of general application to all issues in all cases and it did not overrule precedent. We decline to adopt Brake's proposed rule on prospective application of new or amended statutes.

D. Other Reasons for Retroactive Application

Brake next argues that the 2020 revisions to RCW 9A.76.170 apply retroactively because RCW 10.01.040 has been interpreted too narrowly by Washington courts and because the lack of

a clause relating to retroactive application renders the bail jumping statute ambiguous and subject to statutory interpretation. We disagree.

We have previously held that RCW 10.01.040 "creates an easily-administered, bright-line rule." *State v. Kane*, 101 Wn. App. 607, 618, 5 P.3d 741 (2000). There is nothing fundamentally unfair in convicting offenders "in accordance with the law they presumably were aware of at the time they committed their offenses." *Kane*, 101 Wn. App. at 618. Moreover, we have recently held that when the legislature downgrades the culpability of an offense and does not include any indication that the legislature intended the change to apply retroactively then RCW 10.01.040 applies. *State v. Molia*, 12 Wn. App. 2d 895, 904, 460 P.3d 1086 (2020). We decline Brake's invitation to construe RCW 10.01.040 differently.

We also reject Brake's contention that the statute is ambiguous and subject to statutory interpretation. Our legislature clearly did not include language that the statute was meant to apply retroactively. We decline to view this omission as an ambiguity. *See State v. Delgado*, 148 Wn.2d 723, 731, 63 P.3d 792 (2003). Moreover, "we do not have the power to read into a statute that which we may believe the legislature has omitted, be it an intentional or an inadvertent omission." *State v. Martin*, 94 Wn.2d 1, 8, 614 P.2d 164 (1980).

We conclude that there is no clear legislative intent that the 2020 amendments to the bail jumping statute apply retroactively. Therefore, the version of the statute in effect on the date of Brake's offense is the one that applies to her.

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

ADDITIONAL FACTS

Mary Allen from the Kitsap County clerk's office testified. The State asked Allen to read transcripts from some of Brake's prior proceedings. The following colloquy occurred between her and the trial judge:

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

. . . .

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

ALLEN: The court, which was Judge Bassett.

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

Report of Proceedings (RP) (Oct. 8, 2018) at 39.

Later, Allen again stated that the trial judge had presided over the June 28 hearing. The judge commented, "Again? I don't remember these but that's fine." RP (Oct. 8, 2018) at 42. Allen continued reading court documents, "'Then we can go ahead and call [Brake]. . . . I'll just double check to make sure. She was out on $10,000 at one point.'" RP (Oct. 8, 2018) at 42. The judge then asked, "And that's the court speaking?" Allen responded, "That's correct." RP (Oct. 8, 2018) at 42.

The following questioning then took place between defense counsel and Allen:

> [DEFENSE COUNSEL:] Is it possible that that April 3rd clerk's note is erroneous as to whether or not [Brake was] in custody?
>
> [ALLEN:] Yes.
>
> . . . .
>
> THE COURT: Mr. McPherson, I hope you're not intimating that I made an error in my calling and then finding [Brake] not present for the court date that is at the crux of this case.

> [DEFENSE COUNSEL:] No, Your Honor. I'm just—I'll discuss that in argument in the future.
>
> THE COURT: All right.

RP (Oct. 8, 2018) at 48.

Brake testified that around June 28 she was involved in a contentious dispute with her husband. However, she could not recall anything specific about events occurring on June 28.

During closing argument, the State argued that it offered transcripts and documents showing that Brake had notice that she must appear at her hearings. The judge then interjected "And fortunately I'm the one who signed most of them." RP (Oct. 8, 2018) at 71.

ANALYSIS

I. KNOWLEDGE

Brake argues that the trial court erred by failing to make a finding that she knowingly failed to appear on June 28, 2018 and that such finding could not be made based on the evidence. We disagree.

A. Standard of Review and Legal Principles

After bench trials, a court must enter written findings and conclusions. CrR 6.1(d); *State v. Head*, 136 Wn.2d 619, 621-22, 964 P.2d 1187 (1998). The findings must address the elements of each crime separately and indicate the factual basis for each. *State v. Denison*, 78 Wn. App. 566, 570, 897 P.2d 437 (1995). If the written findings do not address each element of the offense, and there is no evidence in the record to support the omitted findings, reversing and dismissing the charge is warranted. *State v. Alvarez*, 128 Wn.2d 1, 19, 904 P.2d 754 (1995).

"'The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.'" *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014)

(quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). A defendant's claim of insufficient evidence admits the truth of the State's evidence and "'all inferences that reasonably can be drawn [from it].'" *State v. Condon*, 182 Wn.2d 307, 314, 343 P.3d 357 (2015) (alteration in original) (quoting *Salinas*, 119 Wn.2d at 201). For a fact finder to reasonably draw inferences from proven circumstances, the inference must be rationally related to the proven fact and reason and experience must support the inference. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999). "'A presumption is only permissible when no more than one conclusion can be drawn from any set of circumstances.'" *Bencivenga*, 137 Wn.2d at 708 (quoting *State v. Jackson*, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989)).

B. Knowledge Finding

Brake contends we must reverse because the trial court failed to make a written finding of knowledge. We disagree.

As set forth above, bail jumping has a knowledge element. The knowledge element the State must prove is that the defendant was "released . . . or admitted to bail with knowledge of the requirement of a subsequent personal appearance." Former RCW 9A.76.170(1).

Here, in paragraph 2 of the court's ruling section, the court stated:

> [T]he State is required to prove beyond a reasonable doubt that [Brake] knowingly failed to appear before the Court, having been on bail with the requirement of a subsequent personal appearance before the Court. The State has proven beyond reasonable doubt that [Brake], on bail, was released with the requirement that she personally make all future court appearances. Further, the State has proven beyond reasonable doubt that [Brake] failed to personally appear before the Court on June 28, 2018 at 10:30 a.m. for omnibus, having been advised that her personal appearance was required.

CP at 24. The court, in writing, set forth the knowledge element and the facts that support it. This ruling satisfies CrR 6.1(d). We next look to whether the record establishes that the State met its burden of proof.

C. Unchallenged Findings Establish Knowledge

The State must prove that a defendant had been given notice to appear at her required court dates. *State v. Cardwell*, 155 Wn. App. 41, 47, 226 P.3d 243 (2010). But the State is not required to prove that the defendant still had that date in mind on the hearing date. *See State v. Ball*, 97 Wn. App. 534, 536-37, 987 P.2d 632 (1999) (knowledge established where defendant signed a document that set the date for his next court appearance).

In the 10 years since *Cardwell*, we have repeatedly applied its holding: to prove bail jumping, the State must prove the court gave the defendant notice of the required court date. *E.g.*, *State v. Boyd*, 1 Wn. App. 2d 501, 517, 408 P.3d 362 (2017) (order stating defendant's presence was required on a particular date, signed by defendant, was sufficient evidence).

Here, based on the unchallenged findings of fact, the trial court advised Brake of her rights and notified her that she must return on April 3, 2018. The release order stated that Brake must "make all Court Appearances as directed." CP at 19. The court also "advised [Brake] orally that she was required to make her court appearances." CP at 19. Brake signed the order for release with these conditions. Brake subsequently appeared in court on three separate occasions. At each, she requested a continuance. At the last one, the court set the omnibus hearing for June 28, 2018. The order stated that "[Brake] must personally be present" at the June 28 hearing. CP at 20. These

unchallenged findings show Brake had knowledge that she was required to appear for court on June 28.[3]

II. TRIAL JUDGE AS WITNESS

Brake lastly argues that the trial judge violated ER 605 and her due process rights by becoming a witness at Brake's bench trial by commenting that he presided over her prior proceedings. We disagree.

A. Legal Principles and Standard of Review

ER 605 states, "The judge presiding at the trial may not testify in that trial as a witness." This may include when the trial judge does not formally testify but inserts his or her own personal experience into the decision-making process. *Vandercook v. Reece*, 120 Wn. App. 647, 652, 86 P.3d 206 (2004). But "judges do not leave their common experience and common sense outside the courtroom door." *In re Estate of Hayes*, 185 Wn. App. 567, 598, 342 P.3d 1161 (2015).

Due process rights under the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington State Constitution require that a defendant receive a fair trial. We review constitutional issues de novo. *State v. Vance*, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010).

B. Judge Not a Witness

It is apparent from the record that Judge Bassett was not a witness for the State. A judge who presided over a prior proceeding does not make the judge a witness in the current proceeding. We note that the judge's comments are troublesome, but he used no personal knowledge in

[3] Brake filed a statement of additional authority citing *State v. Bergstrom*, ___ Wn. App. 2d. ___, 474 P.3d 578 (2020), relating to properly instructing the jury regarding knowledge. Our case is distinguished from *Bergstrom* because our case involved a bench trial and the court expressly stated in its ruling that "The State is required to prove beyond a reasonable doubt that [Brake] knowingly failed to appear." CP at 24.

assessing whether the evidence was sufficient for guilt. He merely noted that he presided over Brake's prior proceedings. Whether Brake was present at the prior hearing was not a fact in dispute.[4] An impermissible comment from a trial judge is harmless when "[the] record provides overwhelming untainted evidence supporting each element of each count on which [the defendant] was convicted." *State v. Lane*, 125 Wn.2d 825, 840, 889 P.2d 929 (1995).

Because the trial judge did not testify in this matter, no ER 605 violation occurred. Similarly, because the trial judge provided no evidence of guilt to render Brake's trial unfair, there was no due process violation. Moreover, even if there was error it would be harmless because overwhelming untainted evidence showed she did not appear.

We affirm.

Melnick, J.

We concur:

Worswick, P.J.

Cruser, J.

[4] The State had to prove this element beyond a reasonable doubt; however, Brake never contested the fact she did not appear as ordered.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 52613-1-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent John Cross
[jcross@co.kitsap.wa.us]
KCPA@co.kitsap.wa.us]
Kitsap County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: January 4, 2021
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