IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TORRIE RENEE LYONS, Appellant.	No. 40369-2-II UNPUBLISHED OPINION

Penoyar, C.J. — Torrie Lyons appeals her convictions of two counts of bail jumping. She argues that (1) the trial court erred by rejecting her affirmative defense of "uncontrollable circumstances" on both counts; (2) substantial evidence does not support the trial court's findings that she "knowingly failed to appear" at two court hearings, and (3) substantial evidence does not support the trial court's finding that she had "the ability or likely future ability" to pay the legal financial obligations (LFOs) that it imposed. Further, she challenges (4) the amount of court-appointed attorney fees, incarceration fees, and subpoena fees that the trial court imposed. Finally, she raises several issues in her statement of additional grounds (SAG).[1] We affirm her convictions and sentence.

FACTS

The State charged Lyons with second degree assault. On September 22, 2009, she made a preliminary appearance in Lewis County Superior Court and signed a document instructing her to return to court on the morning of October 1. On September 29, her father died in Arizona. Lyons did not appear in court on October 1, and the trial court issued an arrest warrant. On

[1] RAP 10.10.

October 8, she appeared at the superior court's weekly criminal docket hearing. The trial court arraigned her, set a trial date, and quashed the warrant. At the hearing, she signed a document instructing her to return to court on October 29. On October 29, she again failed to appear, and the trial court issued an arrest warrant. Sometime later, police arrested her on the warrant.

The State eventually dropped the assault charge and charged Lyons with two counts of felony bail jumping[2] for failing to appear at the October 1 hearing (count I) and the October 29 hearing (count II). At trial, Lyons admitted that she failed to appear at both hearings, but she asserted the affirmative defense of "uncontrollable circumstances." RCW 9A.76.170(2).

The next three paragraphs summarize Lyons's trial testimony. On September 29, she learned that her father had died. She became immediately concerned about his estate because her father's partner was claiming to have married her father before his death. Lyons also heard that "there was all of a sudden an elusive handwritten will." Report of Proceedings (RP) (Feb. 4, 2010) at 40. She tried to contact her defense attorney and the superior court, apparently without success.

After learning of her father's death, she traveled to Port Angeles to find her brother to discuss estate matters. On October 1, she was in Port Angeles, trying to find her brother. She did not leave Washington State anytime between October 1 and October 8. There was no funeral; her father's partner cremated and disposed of the body on the day he died.

Sometime in late October, Lyons drove to Arizona to deal with estate matters and other "concerns" she had about her father's death. RP (Feb. 4, 2010) at 57. In Arizona, she hired an

[2] RCW 9A.76.170(1), (3) (bail jumping is a felony if the defendant is charged with a felony); *see also* RCW 9A.36.021(2) (second degree assault is a class B felony).

estate attorney. On October 29, she was either in Arizona or on her way home to Washington.

The trial court found Lyons guilty on both counts. In an oral ruling, the trial court rejected her affirmative defense:

> [A] death in the family under the circumstances as they are described here does not rise to the uncontrollable circumstance that is anticipated in this defense. Even if it were, I agree with the State that the defense has not proved that she appeared or surrendered as soon as the circumstances ceased to exist. So for both of those reasons I find that the defense of uncontrollable circumstances has not been met.

RP (Feb. 4, 2010) at 63-64.

Several months after trial, the trial court entered written findings and conclusions, including the following findings:

> 1.3 On October 1, 2009, at 10:20 a.m., the Defendant knowingly failed to appear before the Lewis County Superior Court for the Arraignment Hearing after having been released by court order or admitted to bail with knowledge of the requirement of the subsequent personal appearance before the Lewis County Superior Court in cause number 09-1-00559-6.
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> 1.5 On October 29, 2009, at 10:20 a.m., the Defendant knowingly failed to appear before the Lewis County Superior Court for the Omnibus Hearing after having been released by court order or admitted to bail with knowledge of the requirement of the subsequent personal appearance before the Lewis County Superior Court in cause number 09-1-00559-6.

Clerk's Papers (CP) at 42.

The trial court sentenced Lyons to 3 months' confinement on each count, to run concurrently. In the judgment and sentence, the trial court imposed several LFOs, including: (1) $1,200 for court-appointed attorney fees, (2) $1,000 for jail reimbursement fees, and (3) $163 for "[s]heriff service fees." CP at 23. At sentencing, the State described the $163 fee as a "subpoena service fee." RP (Feb. 17, 2010) at 10. Finding 2.5 in the judgment and sentence stated, in

relevant part:

> **Ability to Pay Legal Financial Obligations.** The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that:
>
> - The defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.
>
> . . . .
>
> - The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

CP at 21.

Lyons appeals her convictions and sentence.

ANALYSIS

I. Trial Court's Rejection of Affirmative Defense of "Uncontrollable Circumstances"

Lyons argues that the trial court should have acquitted her on both counts because she established the affirmative defense of "uncontrollable circumstances." Appellant's Br. at 6 (quoting RCW 9A.76.170(2)). Specifically, she asserts that (1) "the death of an immediate family member" is an "act of nature" that meets the statutory definition of an "uncontrollable circumstance[ ]," and (2) she appeared in court as soon as the relevant "uncontrollable circumstance"—which she characterizes as her father's death with regard to the October 1 hearing and the need to settle her father's affairs with regard to the October 29 hearing—ceased to exist. Appellant's Br. at 6, 7 (quoting RCW 9A.76.010(4)). These arguments fail.

A. "Uncontrollable Circumstances"

A defendant has established an affirmative defense to the crime of bail jumping where she can prove that:

> [U]ncontrollable 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). This affirmative defense excuses a defendant's failure to appear or surrender; it does not negate the crime's knowledge element. *See State v. Fredrick*, 123 Wn. App. 347, 353, 97 P.3d 47 (2004). The defendant must persuade the fact finder by a preponderance of the evidence that she has established this affirmative defense. *See State v. Riker*, 123 Wn.2d 351, 368, 869 P.2d 43 (1994) ("Generally, an affirmative defense which does not negate an element of the crime charged, but only excuses the conduct, should be proved [by the defendant] by a preponderance of the evidence."); *Fredrick*, 123 Wn. App. at 353.

The legislature defines "uncontrollable circumstances" as:

> [A]n 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).

B. Standard of Review

Here, Lyons does not challenge the sufficiency of the State's evidence but, rather, the trial court's rejection of her affirmative defense. Accordingly, because she had the burden to prove the affirmative defense by a preponderance of the evidence, the proper standard of review is "whether, considering the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove the defense by a preponderance of the

evidence."[3] *State v. Lively*, 130 Wn.2d 1, 17, 921 P.2d 1035 (1996).

C. Rational Trier of Fact Could Have Rejected Lyons's Defense

Here, the record supports the trial court's rejection of Lyons's defense to count I. Assuming without deciding that the death of an immediate family member is "an act of nature" that may in some circumstances meet the statutory definition of an uncontrollable circumstance, Lyons still had to prove that her father's death prevented her from appearing at her October 1 hearing. *See* RCW 9A.76.010(4), .170. According to Lyons, she learned of her father's death on September 29, became immediately concerned about his partner's interference with the estate, and traveled to Port Townsend to find her brother. On the morning of October 1, she was in Port Townsend looking for her brother. The trial court could have reasonably determined from this testimony that it was not her father's death that prevented her appearance but, rather, Lyons's desire to address her father's estate matters on her own schedule. She did not explain in her testimony why she had to find her brother on the morning of October 1 (rather than the day before, the day after, or the afternoon of October 1, for example). Nor did she explain what prevented her from travelling from Port Townsend to the court that morning.

Lyons's testimony is even less persuasive with regard to count II, which involved her failure to appear at the October 29 hearing. She testified that she drove to Arizona sometime in late October to deal with estate matters, to hire an estate attorney, and to address other "concerns" about her father's death. RP (Feb. 4, 2010) at 57. Again, she does not explain why

[3] Neither party cites *Lively*'s standard of review. Instead, each cites and discusses the general sufficiency standard of review. But this standard of review applies only when an appellant challenges the fact finder's rejection of a defense for which the State has the burden of proving the absence of the defense beyond a reasonable doubt (e.g., self-defense). *See Lively*, 130 Wn.2d at 17. "Uncontrollable circumstances" is not such a defense. *See Fredrick*, 123 Wn. App. at 353.

these tasks had to be performed a full month after her father's death, thereby preventing her appearance at her October 29 court hearing. The trial court could have reasonably concluded from her testimony that she simply decided to prioritize estate matters over her duty to appear in court.[4]

II. Findings 1.3 and 1.5

Lyons filed her appellant's brief in this case on July 29, 2010. In that brief, she argued that the trial court violated CrR 6.1(d) by failing to enter written findings and conclusions. The trial court entered written findings and conclusions on November 4, 2010. We ordered the parties to supplement the record with these written findings and conclusions. Additionally, we ordered the parties to file supplemental briefing addressing the findings and conclusions. In her supplemental brief, Lyons argues that substantial evidence does not support findings 1.3 and 1.5, which state that she "knowingly failed to appear" at the October 1 and 29 hearings. CP at 42. We disagree.

A. Standard of Review

We review a trial court's factual findings for substantial evidence. *See State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Substantial evidence exists "where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *Hill*, 123 Wn.2d at 644.

[4] Because the trial court could have found that Lyons failed to prove the first element of the defense on both counts—i.e. "uncontrollable circumstances" prevented her from appearing—her defense fails. *See* RCW 9A.76.170(2). Accordingly, we need not address her argument that she met the third element of the defense—namely, that she appeared in court as soon as the "uncontrollable circumstances" ceased to exist. *See* RCW 9A.76.170(2).

B. Substantial Evidence Supports Findings 1.3 and 1.5

Substantial evidence supports the trial court's findings that Lyons "knowingly failed to appear" at the October 1 and 29 hearings. CP at 42. Lyons signed documents in open court instructing her to return to court for those hearings. She did not appear at either hearing. Indeed, Lyons testified openly that she did not appear at either hearing even though she knew that she was obliged to appear. As we note above, although she offered explanations for her nonappearance, such explanations do not negate the element of knowledge. *See Fredrick*, 123 Wn. App. at 353.

Lyons also asserts in her supplemental briefing that the trial court's findings are "inadequate and incomplete" because they do not "mention" or "address" her defense of uncontrollable circumstances. Appellant's Supp. Br. at 1, 2. Here, the trial court explicitly rejected her defense in an oral ruling. Lyons cites no authority to support her premise that a trial court in a criminal bench trial must enter written findings that explicitly reject an affirmative defense that a defendant asserts at trial. Because CrR 6.1(d) imposes no such requirement, we reject Lyons's argument.

III. Legal and Financial Obligations

Lyons argues that substantial evidence does not support the trial court's finding that she had "the ability or likely future ability" to pay the imposed LFOs. CP at 21. Additionally, she argues that the trial court erred by imposing court-appointed attorney fees, subpoena fees, and incarceration fees without evidence in the record to support the amount of the fees.

We need not determine whether substantial evidence supports the trial court's finding that Lyons had "the ability or likely future ability" to pay the imposed LFOs because there is no evidence that the State has attempted to collect the LFOs. The proper time for inquiring into the

defendant's ability to pay comes at "the point of collection and when sanctions are sought for nonpayment."[5] *State v. Nason*, 168 Wn.2d 936, 945, 233 P.3d 848 (2010) (quoting *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997)). Additionally, because Lyons did not object to the amount that the trial court imposed for court-appointed attorney fees, subpoena fees, and incarceration fees, we decline to review her challenge to these fees for the first time on appeal. *See* RAP 2.5(a).

III. Statement of Additional Grounds

In her SAG, Lyons argues that her two court-appointed attorneys provided ineffective assistance of counsel. She asserts that her first appointed counsel never reviewed her case and that he withdrew for a conflict of interest three months after being appointed. She contends that her second appointed counsel had no office staff; did not return phone calls; did not schedule sufficient time to meet with her; did not prepare for hearings; advised her to leave the state without advising the court; verbally abused her; and told her not to assert her jury trial rights.

Before trial, Lyons informed the trial court about many of these concerns with regard to her second appointed counsel. Counsel disputed her claims, noting that he had met with her on two occasions, during which time he had taken several pages of notes and discussed available options, including a plea deal. In any event, because Lyons's assertions rely entirely on matters outside of the trial record, we cannot review them. *See State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995). The appropriate means of raising these claims is through a personal

[5] Additionally, we note that RCW 10.01.160, which allows a trial court to order a defendant to reimburse the State for its prosecution expenses if "the defendant is or will be able to pay" them, does not require a trial court to enter formal, specific findings regarding a defendant's ability to pay before it orders the defendant to pay costs. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992).

restraint petition. *McFarland*, 127 Wn.2d at 338.

Lyons also argues that the trial court ignored her repeated complaints about her second appointed counsel. This argument fails. The record reveals that the trial court listened to Lyons's concerns and, during a lengthy pre-trial colloquy, offered to appoint new counsel. When the trial court told her that the appointment of new counsel would re-set the 90-day speedy trial clock, Lyons elected to go to trial, stating that she "prefer[red] to get this resolved now." RP (Jan. 29, 2010) at 18. The trial court honored her request.

Lyons suggests that the State acted inappropriately by dropping the original charge and filing new charges. This is a matter within the State's discretion. As our opinion illustrates, the State had sufficient evidence to convict her on the new charges.

Finally, Lyons argues that the two judges involved in her case had conflicts of interest and that their failure to recuse themselves violated her rights to a fair and impartial judicial system. First, she asserts that the judge who presided over pre-trial matters (Judge Brosey) represented her ex-husband in the couple's divorce proceedings and represented her stepson's mother in a divorce proceeding. These are matters outside of the record that we cannot review. *See McFarland*, 127 Wn.2d at 338. Second, she contends that the trial judge (Judge Lawler) should have recused himself because, while in private practice, he was involved in a custody case related to her stepson. Lyons has waived this argument because she explicitly agreed to have the trial judge preside over her case.[6]

[6] The trial judge told the parties that he "was involved a number of years ago in perhaps a domestic case with Ms. Lyons." RP (Feb. 3, 2010) at 2. In response, Lyons's attorney stated, "I talked to my client and she says she doesn't have a problem with it." RP (Feb. 3, 2010) at 3.

We affirm Lyons's convictions and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.