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Division II
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No. 53034-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LEONID PETROVICH KUZKIN,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

The court erred when it admitted irrelevant and prejudicial evidence relating to Mr. Kuzkin's prior charges; similarly, it erred when it included this irrelevant and prejudicial evidence in the to-convict instruction.

The elements of bail jumping neither require the State to prove the defendant was charged with a particular class of felony nor require the State to prove the defendant was charged with a specific felony. RCW 9A.76.170(1); *State v. Williams*, 162 Wn.2d 177, 180, 170 P.3d 30 (2007); *State v. Anderson*, 3 Wn. App. 2d 67, 71, 413 P.3d 1065 (2018). The offense only requires the State to prove the defendant was charged with a crime. Nevertheless, at Leonid Kuzkin's trial for bail jumping, the court forced Mr. Kuzkin into choosing between the State identifying the class of his underlying charge to the jury or having the State identify his specific charged crime to the jury. RP 24-27. After the court gave Mr. Kuzkin this Hobson's choice, he told the court he would prefer the former option. RP 27. Because evidence and identification relating to Mr. Kuzkin's underlying charge was irrelevant and prejudicial, this Court should reverse.

In response, the State claims reversal is unwarranted, arguing (1) the penalty classification of the underlying charge is the "simple identifier" our Supreme Court declared was proper in *Williams*; and (2) it

would violate *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) for the evidence and the to-convict instruction to omit the underlying classification of the charged crime. Resp. Br. at 4-9. Alternatively, the State argues any error was harmless because “the evidence of [Mr.] Kuzkin’s guilt was overwhelming.” Resp. Br. at 10. For the reasons stated below, these arguments are unavailing, and this Court should reject them.

The State ignores that our Supreme Court expressly found that the penalty classification of the underlying charge is not an essential element of bail jumping. *Williams*, 162 Wn.2d at 180, 188. Instead, our Supreme Court held that a “simple identification” of the underlying charge was all that was necessary in the to-convict instruction. *Id.* at 188. The fact that in *Williams*, the underlying classification was missing in the to-convict instruction (yet the court affirmed) illustrates that it distinguished between the underlying classification and a “simple identification.” The court never said the classification of the underlying crime would constitute a “simple identification;” rather, it held that something *less* than the underlying classification sufficed. *Id.*

The State also ignores that in *Williams*, the court considered the *Apprendi*¹ argument but rejected it. *Id.* at 189-91; *see also* Brief for Petitioner at 1-9, *State v. Williams*, 162 Wn.2d 177, 170 P.3d 30 (2007) (No. 78984-4), 2007 WL 6546220. Moreover, the State could cure any potential *Apprendi* issue by actually implementing Mr. Kuzkin's suggestion at his trial, which was for the State to identify the statute Mr. Kuzkin was charged with violating. That way, the State could introduce evidence the defendant was charged with violating a particular statute, and the State have the jury find the defendant was charged with the crime. This would comply with *Apprendi*. It is irrelevant for the jury to learn the penalty classification of the underlying crime (i.e., the statute the State proves the defendant was charged with violating), as that is only relevant for purposes of sentencing. *Williams*, 162 Wn.2d at 182.

To clarify Mr. Kuzkin's position, Mr. Kuzkin acknowledges that both *Williams* and *Anderson* implicitly appear to suggest that referring to the classification of the crime is permissible. However, this is only because of the facts and the arguments raised in both cases. Neither *Williams* nor *Anderson* directly addressed the question of whether it was

¹ *Apprendi* holds that any "fact" that increases the maximum penalty of a crime must be charge in the information, submitted to a jury, and proved beyond a reasonable doubt. 530 U.S. at 476.

relevant for the jury to learn the classification of the underlying charge.

And neither *Williams* nor *Anderson* address the prejudice that results from the jury learning a defendant was charged with a felony. Indeed,

Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court. An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered.

In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) (internal citations and quotations omitted).

Both *Williams* and *Anderson* strongly support Mr. Kuzkin's position that this evidence was irrelevant, but neither case is directly on-point. Thus, as far as counsel is aware, this case presents an issue of first impression for this Court.

Additionally, the court's error in admitting this evidence materially affected the outcome of Mr. Kuzkin's trial, as evidence that a defendant committed a felony is highly prejudicial. *State v. Hardy*, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997). Nevertheless, the State maintains any error was harmless because it believes evidence of Mr. Kuzkin's guilt was "overwhelming." Resp. Br. at 10. To support this contention, the State claims the defendant himself undermined his defense that he lacked the

mens rea to commit the crime because he (1) testified that he had “several cases going on;” and (2) acknowledged that he received notice of upcoming court appearances. Resp. Br. at 10-11.

The State is forgetting that Mr. Kuzkin was going through a divorce at the time of his alleged bail jumping, and so his assertion that he had several cases going on around the time of the alleged bail jumping does not necessarily mean he had several *criminal cases*. RP 171. The jury could have rightly assumed Mr. Kuzkin had several *civil cases* pending at the time. Moreover, what was at issue in this case was whether Mr. Kuzkin knowingly failed to appear on the dates listed on the court documents. Receiving notice that he had to appear at a later date is not the same as Mr. Kuzkin having knowledge that he was supposed to appear on a specific date.

Finally, this Court’s analysis as to whether evidentiary errors warrant reversal does not turn on whether there is sufficient evidence to convict. Rather, the question is “whether there is a reasonable probability that the outcome of the trial would have been different without the inadmissible evidence.” *State v. Gower*, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014). The State’s contention that the alleged strength of its evidence alone demonstrates any error was harmless is misplaced.

B. CONCLUSION

For the reasons stated in this brief and in his opening brief, Mr. Kuzkin respectfully requests that this Court reverse his conviction.

DATED this 11th day of March, 2020.

Respectfully submitted,

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