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Court of Appeals
Division II
State of Washington
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No. 53034-1-II

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

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 OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court improperly admitted evidence relating to a prior charge in violation of ER 401 and ER 403.

2. The trial court erred when it included irrelevant and prejudicial language in the to-convict instruction.

B. ISSUES

The elements of bail jumping neither require the State to prove the defendant was charged with a particular class of a felony nor require the State to prove the defendant was charged with a specific felony. The offense only requires the State to prove the defendant was charged with a crime.

Mr. Kuzkin moved to prevent the State and the court from mentioning his underlying crime's particular felony classification. The court refused, and the jury heard evidence detailing that Mr. Kuzkin was previously charged with a class C felony. The to-convict instructions for both charges also required the jury to find Mr. Kuzkin was previously charged with a class C felony.

(a) Did the court err in admitting this evidence because it was irrelevant?

(b) In light of the stigma that accompanies felony charges, did the admission of this evidence cause Mr. Kuzkin undue prejudice?

(c) Did the court err in instructing the jury that it must find Mr. Kuzkin was charged with a class C felony?

C. STATEMENT OF THE CASE

Leonid Kuzkin is a primarily monolingual Russian-speaker. RP 168. In 2017, he was charged with possession of a controlled substance: methamphetamine. RP 24. At a court hearing, the court instructed Mr. Kuzkin to return to court on January 4th and January 8th. RP 122. An interpreter was present at this hearing. RP 143, 150. Mr. Kuzkin heard these dates, but they did not register in his memory. RP 169. The court handed Mr. Kuzkin a scheduling order, but it was difficult for him to read it because there were many corrections on the document. Ex. 3; RP 169-70, 176. Mr. Kuzkin did not appear on January 4th, and the State charged him with one count of bail jumping. CP 103; RP 18, 134.

Mr. Kuzkin appeared in court with the assistance of an interpreter in June of 2018. RP 129-30; Ex. 10. The court handed Mr. Kuzkin a scheduling order. RP 131. The scheduling order required Mr. Kuzkin to appear in court in September. Ex. 6.

In the interim, Mr. Kuzkin was going through a divorce and looking for a new home. RP 171. He stored all of his belongings in a

storage facility, including his court documents. RP 171. Unfortunately, someone broke into his storage unit and stole many items, including his court documents. RP 171-72, 174, 179. Mr. Kuzkin did not appear at the September court hearing, and the State charged him with another count of bail jumping. CP 103; RP 138-39

Before trial, Mr. Kuzkin moved to prevent any explicit mention of his underlying charge or the classification of his underlying charge (a class C felony), but the State insisted it needed to produce evidence of either one of these options to prove its case; ultimately, the court forced him to choose between these options. RP 24-27. Mr. Kuzkin chose the latter option. RP 27.

Mr. Kuzkin's theory of defense at trial was that because he is monolingual, he is more reliant on court documents, and since (1) his scheduling order related to the first charge was difficult to read; and (2) his scheduling order for the second charge went missing, he did not knowingly fail to appear on those two court dates. *See* Ex. 3; RP 212. The to-convict instructions for the bail jumping charges both required the jury to find that Mr. Kuzkin was charged with a class C felony. CP 115-16.

The jury convicted Mr. Kuzkin of both charges. RP 225. The underlying drug charge was dismissed after a CrR 3.6 motion to suppress. RP 235.

E. ARGUMENT

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.

- a. Irrelevant evidence is inadmissible, and even when evidence is minimally relevant, it should be excluded if it is unduly prejudicial.

Evidence is relevant only if it tends to make the existence of any fact of consequence more or less probable than it would be without the evidence. ER 401. Evidence that fails to meet this criteria is inadmissible, and courts have no discretion to admit irrelevant evidence. ER 402; *See In the Matter of the Detention of Post*, 170 Wn.2d 302, 311, 241 P.3d 1234 (2010).

Even if evidence is relevant, courts should exclude it if it is likely to cause the defendant undue prejudice. ER 403; *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010). Evidence is unduly prejudicial if it is “likely to stimulate an emotional response rather than a rational decision.” *Salas*, 168 Wn.2d at 671 (*referencing State v. Powell*, 126 Wn.2d 244, 264, 898 P.2d 615 (1995)). The State bears the burden of proving the probative value of the evidence outweighs its prejudicial effect. *See State v. Calegar*, 133 Wn.2d 718, 722, 947 P.2d 235 (1997).

Evidence that a defendant previously committed felonies is prejudicial. *State v. Hardy*, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997). This is because the jury may assume the defendant “has a ‘bad’ general character and deserves to be sent to prison whether or not they in fact committed the crime in question.” *State v. Newton*, 109 Wn.2d 69, 73, 743 P.3d 254 (1987). Additionally, the jury may perceive this history as proof the defendant has the propensity to commit criminal acts, which may make the jury believe it is more likely the defendant committed the crime in question. *Id.*

Moreover, to-convict instructions should also guard against unfair prejudice in order to protect the defendant’s right to Due Process. U.S. CONST. amend. XIV; *see State v. Oster*, 147 Wn.2d 141, 147-48, 52 P.3d 26 (2002).

A court abuses its discretion when its decision is based on untenable grounds or untenable reasons, if it rests on facts the record does not support, or if the court applied the wrong legal standard. *T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 423-24, 138 P.3d 1053 (2006). A court necessarily abuses its discretion when it admits irrelevant evidence. *Post*, 170 Wn.2d at 314.

- b. The fact that Mr. Kuzkin was charged with a Class C felony was irrelevant, as the State only needed to prove he was charged with a crime and knowingly failed to appear at a later court date to convict him of bail jumping.

The elements of bail jumping neither require the State to prove the defendant was charged with a particular class of a felony nor require the State to prove the defendant was charged with a specific felony. It only requires the State to prove the defendant was charged with a crime. Accordingly, the court inappropriately admitted evidence demonstrating Mr. Kuzkin was charged with committing a class C felony, as this evidence was irrelevant. In addition to being irrelevant, this evidence was highly prejudicial. The court erred in admitting this evidence.

- i. *The State neither has to prove the name nor the classification of the underlying charge.*

In order to appropriately assess the irrelevance of this evidence, it is important to first discuss how our Supreme Court and this Court have interpreted the bail jumping statute. First, in *Williams*, the defendant, Demetrius Williams, was charged with possession of a controlled substance, which is a class C felony. 162 Wn.2d 177, 181, 170 P.3d 30 (2007); RCW 69.50.4013(2). Mr. Williams failed to appear at his omnibus hearing, and the State charged him with one count of bail jumping. *Williams*, 162 Wn.2d at 181. At trial, the court instructed the jury that to-

convict Mr. Williams of bail jumping, it needed to find he was charged with possession of a controlled substance. *Id.* at 186. On appeal, Mr. Williams contended the jury instruction was deficient because it failed to mention the underlying crime's classification. *Id.*

Our Supreme Court held the penalty classification of the crime was relevant “*only* to the sentence to be imposed on conviction....it is not an element of the crime” *Id.* at 187 (emphasis added). This was because RCW 9A.76.170(1) outlined all of the elements of the crime. *Id.* The statute reads as follows:

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.

RCW 9A.76.170(1).

A separate portion of the bail jumping statute outlines the classification (e.g., class A, B, or C felony) of the bail jumping offense based on the classification of the underlying charge/conviction. RCW 9A.76.170(3). For example, RCW 9A.76.170(3)(c) notes that a bail jumping conviction must be classified as a class C felony “if the person was held for, charged with, or convicted of a class B or class C felony.”

However, because RCW 9A.76.170(1) makes no reference to the penalties outlined in RCW 9A.76.170(3), the State bears no burden in proving the classification of the underlying charge. *Williams*, 162 Wn.2d at 188. Because the State bears no burden in proving the classification of the crime, “a simple identification of the alleged crime is sufficient” in a to-convict instruction. *Id.*

The court also noted any misunderstanding of the underlying crime in the to-convict instruction could only have worked in Mr. Williams’ favor, as the to-convict instruction stated Mr. Williams was charged with possession of a controlled substance. *Id.* at 186, 189. The court opined that “if the jury thought the underlying charge was a misdemeanor drug charge (marijuana), this is a lesser charge than Williams actually jumped.” *Id.* at 189. Accordingly, the court recognized that the jury’s potential assumption that Mr. Williams committed a *misdemeanor* drug charge rather than a higher drug charge (felony) minimized the prejudice of the underlying crime in the to-convict instruction.

This Court’s holding in *Anderson* also demonstrates the underlying nature of the crime is irrelevant. In *Anderson*, the defendant, Britt Anderson, was charged with one count of possession of stolen property. 3 Wn. App. 2d 67, 68, 413 P.3d 1065 (2018). Mr. Anderson posted bail and failed to appear to a pretrial hearing, and so the State charged him with

one count of bail jumping. *Id.* at 68. At trial, the court instructed the jury that to convict Mr. Anderson of the crime of bail jumping, it must find he was charged with a class B or class C felony. *Id.* at 69. On appeal, the defendant argued the to-convict instruction relieved the State of its burden to prove every element of the crime because it did not specify the particular crime he was charged with committing. *Id.*

Building on the court's holding in *Williams*, this Court rejected this argument, holding that RCW 9A.76.170(1) (the bail jumping statute) did not "list the defendant's 'particular crime' as an element of bail jumping." *Id.* at 71. Instead, a "simple identification of the alleged crime is sufficient.'...[*Williams*] did not state that identification [of the charged crime] by name is required" *Id.* at 72 (*quoting Williams*, 162 Wn.2d at 188).

Reading *Williams* and *Andersen* together demonstrates that neither the name nor the penalty classification of the underlying crime is an element of bail jumping. *Anderson*, 3 Wn. App. 2d at 72; *Williams*, 162 Wn.2d at 188. Accordingly, this information is irrelevant.

- ii. *The court inappropriately gave Mr. Kuzkin the Hobson's choice of either agreeing to have the State introduce evidence that he was charged with a class C felony or have the State introduce evidence that he was charged with possession of a controlled substance.*

Based on an apparent misapprehension of this Court's ruling in *Anderson* and our Supreme Court's ruling in *Williams*, the trial court believed (1) evidence of Mr. Kuzkin's underlying charge; and/or (2) evidence of the classification of Mr. Kuzkin's underlying charge was relevant. This misapprehension also caused the court to fail to perceive the prejudice of the evidence.

Before trial, Mr. Kuzkin moved in limine to prevent the State and the court from either mentioning his underlying criminal charge by name or mentioning the classification of his underlying offense. RP 22; CP 92-94. Relying on *Anderson* and *Williams*, Mr. Kuzkin argued this evidence was irrelevant. CP 92-93. He also pointed out that the pattern instruction for bail jumping has a bracket that provides for the court to simply instruct the jury that the defendant committed "a crime under RCW (fill in statute)," and so it was unnecessary to mention the underlying crime or its classification in the to-convict instruction. CP 93 (internal brackets omitted); RP 22.

Additionally, Mr. Kuzkin argued any mention of his underlying criminal charge or its classification was unduly prejudicial. RP 23; CP 93. Accordingly, Mr. Kuzkin asked the court to prohibit the State from mentioning the underlying crime by its specific name or classification and instead refer to it only under its designated RCW number. CP 94; RP 23.

The State opposed this motion, arguing “it’s the State’s position that referring to it simply as the RCW would not be appropriate.” RP 23. The State arrived at this conclusion because (1) in *Williams*, the court believed the to-convict instruction at issue (which explicitly mentioned the underlying crime) was appropriate; and (2) in *Anderson*, this Court concluded the to-convict instruction at issue (which explicitly mentioned the classification of the underlying crime) was appropriate. RP 23-24. The State then claimed the classification of the crime was “an element the State [had] to prove,” and argued the way to solve Mr. Kuzkin’s prejudice concerns was for him to stipulate to having been charged with a class C felony; it also claimed it could cure any prejudice by having the witnesses refer to it as a class C felony. RP 24-25, 27.

Mr. Kuzkin countered that while neither case specifically holds that naming the statute is sufficient, both cases hold a simple identifier of the crime is sufficient. RP 26. He also reemphasized that simply identifying the crime by its statute had the least risk of being prejudicial,

misleading, or confusing under ER 403. RP 26; *see also Newton*, 109 Wn.2d at 70 (noting that reference to prior crimes has the “extraordinary potential for misleading and confusing the jury into believing it is being told that defendant is a ‘bad’ person and therefore guilty of the crime charged”).

Nevertheless, the Court agreed with the State, stating,

I don’t believe naming either possession of a controlled substance or value is misleading or felony is misleading or confusing. So which one would you like to choose?

RP 26.

Mr. Kuzkin asked the court if it was forcing him to choose between those two options, and the court confirmed those were his only options. RP 26. Consequently, Mr. Kuzkin told the court it would prefer it if the witnesses stated he was charged with a class C felony. RP 27.

The State elicited evidence demonstrating Mr. Kuzkin was charged with a class C felony, and the court instructed the jury that it must find Mr. Kuzkin was charged with a class C felony to find him guilty of bail jumping. RP 130, 133, 186; CP 115-16.

The Court’s ruling was in error for two material reasons. First, while *Williams* and *Anderson* implicitly hold that it is *permissible* to include either the penalty classification or the underlying crime in the to-convict instruction, neither case holds that courts *must* include either of

these things in the to-convict instruction. Instead, both cases hold it suffices for the State or the court to give a simple identification of the alleged crime. *Williams*, 162 Wn.2d at 199; *Anderson*, 3 Wn. App. 2d at 72. The State has no obligation to prove the underlying classification of the crime or the specific crime charged; consequently, this information is non-essential and irrelevant.

Second, because the court assumed this information was essential, it neglected to examine the prejudicial effect of the evidence. Instead, it merely asked Mr. Kuzkin to choose between (what it believed) were his only two options. RP 26. The State did not even meet its burden in proving the probative value of this evidence (assuming any exists, which Mr. Kuzkin maintains does not exist) outweighed the significant danger of prejudice to Mr. Kuzkin. *Calegar*, 133 Wn.2d at 722.

- c. This Court should reverse because a reasonable probability exists that the admission of this evidence and the court's inclusion of language concerning Mr. Kuzkin's underlying charge in the to-convict instruction materially affected the outcome of the trial.

Evidentiary errors require reversal if “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Post*, 170 Wn.2d at 314 (internal citations omitted).

In addition to this evidence being irrelevant, the prejudice it carried was far too high, and so the court erred in both (1) admitting this evidence; and (2) instructing the jury it needed to find Mr. Kuzkin was charged with a class C felony.

As intimated in *Williams* and discussed in *Hardy*, the jury's knowledge that the State has charged a defendant with a *felony* rather than a misdemeanor carries a danger of prejudicing the defendant. *Williams*, 162 Wn.2d at 189; *Hardy*, 133 Wn.2d at 706. Introducing evidence and instructing the jury that Mr. Kuzkin was merely charged with violating a certain statute would have made his crime ambiguous to the jury and inoculated the inflammatory effect of his prior charge. This is because the jury could have merely believed he was charged with a misdemeanor.

However, the State introduced evidence that Mr. Kuzkin was previously charged with a felony, and the court instructed the jury it must find that he was previously charged with a felony. While misdemeanors certainly carry a stigma, felonies are necessarily comprised of greater crimes, and so they carry an even greater stigma. *Compare* RCW 9A.84.020 (failure to disperse: misdemeanor); RCW 9A.76.040 (resisting arrest: misdemeanor); *with* RCW 9A.36.120 (assault of a child in the first degree: felony); RCW 9A.44.050 (rape in the first degree: felony). The court never instructed the jury as to what exactly constitutes a class C

felony, and so the jury was left to speculate as to what exact felony Mr. Kuzkin was charged with committing. The jury could have speculated he was charged with a serious drug felony. And it could have also speculated that Mr. Kuzkin was previously charged with committing a crime that was far more serious than the crime he was actually charged with committing.

It is reasonably probable that the court's erroneous ruling and instructions materially affected the outcome of Mr. Kuzkin's trial. At trial, the central dispute was whether Mr. Kuzkin knowingly failed to appear at the court dates in question. RP 18, 203, 220-21. For the first count of bail jumping, Mr. Kuzkin's defense was that he did not appear because the interpreter did not clearly convey his next court date; he also explained it was difficult to read the dates and times in the scheduling order the court gave him. Ex. 3; RP 121-22, 169-70, 176. And for the second count of bail jumping, Mr. Kuzkin's defense was that someone broke into his storage unit and stole his scheduling order that contained the court date. RP 172, 179. Because he is monolingual, he is more reliant on court documents, and since (1) his scheduling order related to the first charge was difficult to read; and (2) his scheduling order for the second charge went missing, he maintained he did not knowingly fail to appear at these court dates. RP 212.

Undoubtedly, the evidence relating to Mr. Kuzkin's previous felony charge discredited his theory of defense. This evidence (and the accompanying jury instruction) made him seem like the kind of person who would flaunt the law, not appear in court, and "make up" excuses for failing to appear in court.

"Where there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." *Salas*, 168 Wn.2d at 673 (internal quotations omitted).

This Court should reverse.

F. CONCLUSION

Based on the foregoing, Mr. Kuzkin respectfully requests that this Court reverse his convictions.

DATED this 16th day of September, 2019.

Respectfully submitted,

/s Sara S. Taboada

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
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v.)	NO. 53034-1-II
)	
LEONID KUZKIN,)	
)	
Appellant.)	

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