

FILED
Court of Appeals
Division II
State of Washington
12/20/2019 2:22 PM
NO. 53034-1-II

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

STATE OF WASHINGTON, Respondent

v.

LEONID PETROVICH KUZKIN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-01730-2

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The trial court properly admitted evidence regarding defendant's prior charge because it was relevant to prove that the defendant committed two counts of bail jumping.**
- II. **The trial court did not abuse its discretion when it included the "class C felony" designation in the to-convict instruction because that language was neither irrelevant nor more prejudicial than the other possible options for properly instructing the jury.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Leonid Petrovich Kuzkin was originally charged by information with Possession of a Controlled Substance – Methamphetamine and Ignition Interlock Violation for an incident on August 3, 2017. CP 3. During the pendency of the case, the information was amended on multiple occasions to account for Kuzkin's successful CrR 3.6 suppression motion (suppressing the discovery of the methamphetamine), his multiple missed court dates, and his successful severance motion (severing the bail jumping counts from the Ignition Interlock Violation). CP 83-87; RP 9-10, 16-17. Ultimately, relevant to this appeal, Kuzkin was charged by fourth amended information with two counts of Bail Jumping on Class B or C

Felony for missing required court dates on January 4, 2018 and September 13, 2018. CP 103-04.

The case proceeded to a jury trial before the Honorable Gregory Gonzales, which commenced on December 17, 2018 and concluded on the same day with the jury's verdicts finding Kuzkin guilty as charged. CP 115-16; RP 109-225. The trial court sentenced Kuzkin to 91 days of total confinement, which reflected the amount of time that Kuzkin had already served. CP 255; RP 235-37. Kuzkin filed a timely notice of appeal. CP 133.

B. STATEMENT OF FACTS

As mentioned above, in 2017 the State originally charged Kuzkin with Possession of a Controlled Substance – Methamphetamine, a class C felony. CP 3. During the time in which Kuzkin was charged with the felony drug offense, he was released by court order on two occasions, and was informed of multiple court dates at which he was required to attend, to include January 4, 2018 and September 13, 2018. CP 103-04, RP 118-19, Ex. 12. Kuzkin did not appear in court on January 4, 2018 or September 13, 2018.

In order to prove that Kuzkin had knowledge of the relevant court dates, the State presented (1) testimony from the relevant deputy prosecuting attorneys who were working on the court docket at the times

that Kuzkin's future court dates were scheduled; (2) videos from the court dockets showing the judge advising Kuzkin of his future court dates; (3) scheduling orders that contained Kuzkin's future court dates, contained his signature, and of which he received a copy; and (4) testimony from the Russian interpreter present on the docket who assisted Kuzkin and also told him about his future court dates. RP 119-122, 130-32, 143-151; Ex. 3, Ex. 6, Ex. 8, Ex. 10. Kuzkin testified and acknowledged receiving the scheduling orders, being told by the judge of future court dates, knowing he had to come back to court, and that he had no difficulty understanding the interpreter. RP 168-69, 172-73. That said, Kuzkin did complain about the legibility of the scheduling order that directed him appear on January 4, 2018 and claimed that a break in at his storage unit in the summer of 2018 resulted in the theft of his court documents, which presumably included the scheduling order that apprised him of the September 13, 2018 appearance. RP 170-74.

In order to prove that Kuzkin did not appear in court as required on January 4, 2018 and September 13, 2018, which was not contested, the State presented (1) testimony from the relevant deputy prosecuting attorneys who were in court on those dates and who noted that Kuzkin did not appear; (2) videos from the court docket on each date showing that Kuzkin's case was called and that he did not appear; and (3) clerk's

minutes from each date memorializing Kuzkin's failure to appear. RP 127-28, 134-35, 138-140; Ex. 4, Ex. 7, Ex. 9, Ex. 11.

ARGUMENT

- I. **The trial court properly admitted evidence regarding defendant's prior charge because it was relevant to prove that the defendant committed two counts of bail jumping and did not abuse its discretion when it included the "class C felony" designation in the to-convict instruction because that language was neither irrelevant nor more prejudicial than the other possible options for properly instructing the jury.**

Prior to trial, despite not stipulating to any evidence related to the Possession of a Controlled Substance – Methamphetamine charge in which his legal duty to attend court originated, Kuzkin sought to exclude any mention of the name of the crime and its penalty classification. CP 92-94; RP 21-23. Instead, Kuzkin proposed that the crime should be referenced "by its RCW" and proposed, as an example, that the State refer to the crime as "a crime committed under RCW 69.50.4013(1)." CP 93-94; RP 23, 26. Kuzkin argued that referring to the crime by using the RCW was less prejudicial than saying "'possession of [a] controlled substance' or a 'class C felony.'" CP 93.

The trial court denied Kuzkin's motion, but agreed that sanitization of the offense was proper, both during testimony and in the to-convict instructions, and allowed Kuzkin to choose whether the drug crime would

only be referred to by name or by classification (“Class C felony”). RP 26-29. Kuzkin, while maintaining his objection, chose classification. RP 26-27. Kuzkin renews this argument on appeal. But the trial court did not abuse its discretion in allowing the crime to be referenced by its classification—a decision that appears to have the imprimatur of this Court. *State v. Anderson*, 3 Wn.App.2d 67, 413 P.3d 1065 (2018). Moreover, even assuming error, overwhelming evidence supported the verdict and the error was harmless.

a. Standard of Review

“Questions of relevancy and the admissibility of testimonial evidence are within the discretion of the trial court, and we review them only for manifest abuse of discretion.” *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010); *State v. Martin*, 169 Wn.App. 620, 628, 281 P.3d 315 (2012) (“The admissibility of evidence is within the sound discretion of the trial court and an appellate court will not disturb that decision unless no reasonable person would adopt the trial court’s view.”) (citations omitted). When a trial court’s ruling on such matters of evidence is in error, reversal will only be required “if there is a reasonable possibility that the testimony would have changed the outcome of trial.” *Aguirre*, 168 Wn.2d at 361 (citing *State v. Fankhouser*, 133 Wn.App. 689, 695, 138 P.3d 140 (2006)).

b. The Essential Elements of Bail Jumping

To prove that a defendant is guilty of bail jumping, the State must prove that the defendant: (1) was released by court order or admitted to bail with the knowledge of the requirement of a subsequent personal appearance and (2) failed to appear as required. RCW 9A.76.170; *Anderson*, 3 Wn.App.2d at 70-71; *State v. Williams*, 162 Wn.2d 177, 183-84, 170 P.3d 30 (2007); *State v. Gonzalez-Lopez*, 132 Wn.App. 622, 629, 132 P.3d 1128 (2006). The knowledge¹ requirement “is met when the State proves that the defendant has been *given notice* of the required court dates.” *State v. Fredrick*, 123 Wn.App. 347, 353, 97 P.3d 47 (2004) (emphasis added) (citing *State v. Carver*, 122 Wn.App. 300, 93 P.3d 947 (2004)); *State v. Aguilar*, 153 Wn.App. 265, 276, 223 P.3d 1158 (2009) (citations omitted). In other words, the State is not required to prove “knowledge on the specific date of the hearing.” *Carver*, 122 Wn.App. at 305 (citation omitted). Together this means that the State “must prove only that [a defendant] was given notice of his court date—not that he had

¹ Additionally, a person “knows or acts knowingly or with knowledge when he or she (1) is aware of a fact, circumstance, or result described by statute as being a crime, or (2) has information that would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute as being a crime.” *Aguilar*, 153 Wn.App. at 273 (citing RCW 9A.08.010(1)(b)); CP 92. Thus, for example, if based on the evidence a reasonable person would have known of a required, subsequent court date then the “evidence is sufficient for a jury to conclude that [the defendant] knew . . .” of it. *State v. Bryant*, 89 Wn.App. 857, 871, 950 P.2d 1004 (1998).

knowledge of this date every day thereafter—and that ‘I forgot’ is not a defense to the crime of bail jumping.” *Id.* at 306.

Because a straightforward reading of the bail jumping statute that criminalizes the failure to appear does not mention the name of the crime giving rise to the legal requirement of appearing at subsequent court date or the penalty classification of said crime, neither (the name of the crime or its penalty classification) are essential elements that the State must prove in order to secure a bail jumping conviction. *Anderson*, 3 Wn.App.2d at 71-73; *Williams*, 162 Wn.2d at 186-88. *State v. Anderson* and *State v. Williams* are instructive. In *Williams*, the defendant convicted of bail jumping complained that his to-convict instruction was insufficient because it stated the particular name of the crime that he had been charged with and failed to also include the “penalty classification.” 162 Wn.2d at 181. Our Supreme Court rejected that argument, and affirmed the bail jumping conviction, holding that “a simple identification of the alleged crime is sufficient” and that the “the classification of the underlying crime is not an essential element of bail jumping and, therefore, does not have to be included in the to-convict instruction.” *Id.* at 188.

In *Anderson*, the defendant convicted of bail jumping complained that his to-convict instruction was insufficient because it stated that he was charged with “a class B or C felony” and failed to also include the

“particular crime” with which he was charged. 3 Wn.App.2d at 69-71. This Court affirmed his conviction holding that the “name of the underlying charge is not an essential element” and noted with seeming approval that “[t]he to-convict instruction identified Anderson’s underlying charge of possession of stolen property in the first degree by penalty classification.” *Id.* at 73. That is, the “penalty classification” in the to-convict served as the “simple identification of the alleged crime” as required by *Williams, supra. Id.* at 72-73. Together these cases, at a minimum, as even Kuzkin acknowledges, “implicitly hold that it is *permissible* to include either the penalty classification or the [name of] the underlying crime in the to-convict instruction. . . .” Brief of Appellant at 12.

Nonetheless, Kuzkin argues that because neither the penalty classification nor the particular name of the crime is an essential element of bail jumping that “this information is irrelevant.” Br. of App. at 9, 13. But this claim is a non-sequitur undermined by Kuzkin’s own acknowledgment that *Williams* and *Anderson* “implicitly hold that it is *permissible* to include either” in the to-convict instruction since such a holding necessitates that either *is* relevant to proving, or being, the “simple identification,” of the underlying crime which “is necessary.” *Anderson*, 3 Wn.App.2d at 72-73; *Williams*, 162 Wn.2d at 187-88; Br. of App. at 12.

Moreover, “the penalty classification of the crime is relevant . . . to the sentence to be imposed on conviction.” *Williams* 162 Wn.2d at 187 (quoting *State v. Williams*, 133 Wn.App. 714, 716, 136 P.3d 792 (2006)). This is because “any fact that imposes more serious punishment . . . must be alleged in a proper to-convict instruction. . . .” *Id.* at 190. Had the trial court restricted the State from utilizing the name of the underlying crime or its penalty classification in the to-convict instruction in favor of the generic RCW proposed by Kuzkin this appeal undoubtedly would have been about a sentence unauthorized by law since the jury would not have found the fact(s) necessary to sentence Kuzkin for a felony bail jump. So while the “error” would not have affected the validity of Kuzkin’s bail jumping convictions it very well could have invalidated the sentence imposed. *See State v. Gonzalez*, 2 Wn.App.2d 96, 109-110, 113-14, 408 P.3d 743 (2018) (noting that “RCW 69.50.4013 does not impose the same maximum sentence for the possession of *all* controlled substances” and reversing defendant sentence where the to-convict allowed the jury to only find that the defendant “possessed a controlled substance”); *State v. Rivera-Zamora*, 7 Wn.App.2d 824, 829-830, 435 P.3d 844 (2019); *State v. Clark-El*, 196 Wn.App. 614, 624, 384 P.3d 627 (2016); *State v. Barbarosh*, --- Wn.App.2d ----, 448 P.3d 74, 80 (2019). Accordingly, the trial court did not abuse its discretion in admitting into evidence that

Kuzkin had been charged with a “Class C felony” and utilized that term as the simple identification of the crime in the to-convict instruction.

Even assuming error, however, the error was harmless. The evidence of Kuzkin’s guilt was overwhelming. The claim that there existed a “central dispute” as to “whether Mr. Kuzkin knowingly failed to appear at the court dates in question” is not even supported by Kuzkin’s own testimony. Br. of App. at 15. Kuzkin acknowledged getting notice, in writing and orally by the judge, of the court dates he missed, and he admitted that he knew that he was required to return for court dates. RP 172-73. These admissions of notice constitute the “knowledge” that the State was required to prove. *Fredrick*, 123 Wn.App. at 353 (citation omitted). Kuzkin’s real “defense” was that because his first scheduling order was not perfectly legible and his second scheduling order was stolen from his storage unit that he forgot when he had to return to court. RP 168-176. The problem is “that ‘I forgot’ is not a defense to the crime of bail jumping.” *Carver*, 122 Wn.App. at 306.

Furthermore, Kuzkin himself introduced the idea of his criminal proclivity by, without prompting, testifying that “I have several cases going on and I have a specific folder where I keep all of the court documents.” RP 171. This comment by Kuzkin neuters his argument that the jury’s knowledge that he was charged with a felony would be so much

more prejudicial than if the to-convict instead listed a generic RCW. Plus, weighing the possible prejudice between the two options is speculative; we have no way of knowing how what significance, if any, the jury attached to “Class C felony” classification as compared to what they would have believed when confronted with the idea that Kuzkin was charged with a crime under RCW 69.50.4013(1). All in all, Kuzkin cannot show that there is a reasonable possibility that a different ruling would have changed the outcome of trial. Thus, this Court should affirm Kuzkin’s convictions.

CONCLUSION

For the reasons argued above, Kuzkin’s convictions should be affirmed.

DATED this 20th day of December, 2019.

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December 20, 2019 - 2:22 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Appellate Court Case Title: State of Washington, Respondent v. Leonid Petrovich Kuzkin, Appellant
Superior Court Case Number: 17-1-01730-2

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