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Division II
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No. 53839-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

T. JAY DELO,

Appellant.

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

BRIEF OF APPELLANT

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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 references to a prior charge in the to-convict instructions.

3. Legislative changes to the bail jumping statute have classified Mr. Delo's conduct as a gross misdemeanor, requiring remand for resentencing. RCW 9A.76.170.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The elements of bail jumping do not require the State to prove the defendant was charged with a specific felony or with a particular class of felony; the State must only prove the defendant was charged with a crime. Where the State presented evidence that Mr. Delo was previously charged with a class C felony, and where the to-convict instructions asked the jury to find Mr. Delo had been charged with a class C felony in order to find he committed bail jumping, did the court err in admitting this evidence because it was irrelevant? In light of the stigma associated with felony charges, did the admission of this evidence cause Mr. Delo undue prejudice?

2. In March 2020, Washington passed House Bill 2231, “Bail Jumping – Failure to Appear or Surrender.” LAWS of 2020, ch. 19, §§ 1-2. This law will become effective on June 11, 2020 – approximately the same date the State files its responsive briefing in this appeal. Due to the change in law, an individual’s failure to appear at a court proceeding, other than a failure to appear for trial, or in a case involving a violent felony or sex offense, is now a gross misdemeanor. H.B. 2231. Should Mr. Delo, whose direct appeal is pending at the time the new law becomes effective, benefit from this change in law, as our courts have granted similar relief prospectively, pursuant to State v. Ramirez, 191 Wn.2d 732, 749, 426 P.3d 714 (2018), and is remand required?

C. STATEMENT OF THE CASE

1. Underlying charge

In the early morning hours of December 27, 2017, T-Jay Delo was riding as a passenger, allowing a friend to test-drive his truck.

7/29/19 RP 14; 8/6/19 RP 181-82.¹ When Mr. Delo’s friend committed

¹ The verbatim report of proceedings are referred to by date; the transcript from 8/7/19 is further labeled (am) and (pm), for clarity. The 7/29/19 volume relates to testimony from the CrR 3.5 hearing.

an apparent traffic infraction, the truck was pulled over by a Thurston County Sheriff's deputy. 7/29/19 RP 14; 8/6/19 RP 183.

The deputy received information stating the registered owner of the vehicle, T-Jay Delo, had an active warrant. 7/29/19 RP 16-18. The deputy asked the passenger whether he was, in fact, T-Jay Delo. *Id.* at 18. Mr. Delo told the deputy that he was not T-Jay Delo, but was instead T-Jay's brother, Paul Delo. *Id.* at 22-24.

After consulting the Department of Licensing (DOL) database, the deputy asked T-Jay Delo to step out of the truck; the deputy handcuffed Mr. Delo and placed him on the bumper of his patrol car. *Id.* at 25. T-Jay Delo gave his brother Paul's date of birth when asked, and according to the deputy, DOL photographs revealed that the two brothers did not closely resemble each other. *Id.* T-Jay Delo was charged with criminal impersonation in the first degree. CP 5; 8/6/19 RP 183-84.

At a CrR 3.5 hearing, the trial court suppressed Mr. Delo's statements to the deputy, finding a *Miranda*² violation. After Mr. Delo's statements were suppressed, Mr. Delo entered a guilty plea to

² *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

one count of making false or misleading statements to a public servant, a gross misdemeanor. CP 85-91; 8/6/19 RP 7-10.

2. Bail jumping charges

Despite Mr. Delo's resolution of the primary charge against him, the State proceeded to trial on three counts of bail jumping, due to Mr. Delo's failure to appear on three court dates during the pendency of the case. CP 48-49; RCW 9A.76.170(1).

The first count alleged that Mr. Delo failed to appear in court for his arraignment on January 9, 2018. CP 48. After Mr. Delo's arrest in the early morning hours of December 27, 2017, he was released on personal recognizance following a preliminary hearing. 8/6/19 RP 206-08. The order that Mr. Delo was given on his release indicated the arraignment date would be January 9, 2018; however, it also stated, "this order expires if charges are not filed by December 29, 2017." Ex. 1; 8/6/19 RP 209. State witnesses acknowledged Mr. Delo received no notification that charges had actually been filed, and thus, that the scheduling order was still valid. 8/7/19(am) RP 8-9.

Mr. Delo's failure to appear at arraignment resulted in the first count of bail jumping. RCW 9A.76.170(1). After Mr. Delo vacated the bench warrant, was released on bail, and was issued a subsequent

scheduling order, he did not appear on August 6, 2018, the initial date set for the CrR 3.5 hearing. 8/6/19 RP 184-85. A bench warrant was issued and the State charged Mr. Delo with a second count of bail jumping. CP 43-44.

After this warrant was vacated and a new schedule set, Mr. Delo was again released on bail and he missed an additional court date on which the CrR 3.5 hearing had been re-set, February 25, 2019. 8/7/19(am) RP 29-32. The State charged Mr. Delo with a third count of bail-jumping. CP 45-46.

Before trial, the State moved to preclude the defense from any explicit argument that Mr. Delo had resolved his underlying charge with a misdemeanor, rather than a class C felony. 8/6/19 RP 25-28. The defense argued the jury should be informed about the misdemeanor conviction, and similarly requested a lesser included instruction for misdemeanor bail jumping. 9A.76.170(3)(d). The court precluded any reference to Mr. Delo's misdemeanor guilty plea and denied his request for a lesser included instruction. 8/6/19 RP 29-31, 153-61; 8/7/19(am) RP 50-51; CP 59-62.

At trial, the to-convict instructions for the bail jumping charges required the jury to find that Mr. Delo had been charged with a class C

felony. CP 103-05. The prosecuting attorney emphasized repeatedly, both in closing argument and in PowerPoint slides during argument that Mr. Delo had been charged with a C felony. 8/7/19(pm) RP 21, 27, 33, 34, 38, 45; CP 108-39.

The jury convicted Mr. Delo of all three counts of bail jumping. CP 140-42.

Meanwhile, the legislature determined that a failure to appear under these circumstances is a gross misdemeanor, even if the individual had initially been charged with a felony. This change in law occurred while Mr. Delo's appeal is pending. Mr. Delo timely appeals.

D. ARGUMENT

1. The court erred when it admitted irrelevant and prejudicial evidence relating to Mr. Delo's arrest charge; similarly, it erred when it included this irrelevant and prejudicial evidence in the to-convict instructions.

- 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 these 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 unsupported by the record, 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. Delo 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 a defendant was charged with a specific felony, nor with a particular class of felony. It only requires the State to prove a defendant was charged with a crime. Accordingly, the court inappropriately admitted evidence that Mr. Delo was charged with committing a class C felony, as this evidence was irrelevant. In addition to being irrelevant, this

evidence was highly prejudicial. The trial 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. In *State v. Williams*, the defendant was charged with possession of a controlled substance, 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 argued the jury instruction was deficient because it failed to mention the underlying crime's classification. *Id.*

The Supreme Court held the penalty classification of the crime is relevant “*only* to the sentence to be imposed on conviction...it is not an element of the crime” *Id.* at 187 (emphasis added). This is because

RCW 9A.76.170(1) outlines 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, C felony, or misdemeanor) 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 to prove the classification of the underlying charge. *Williams*, 162 Wn.2d at 188. Where the State has no burden to prove 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's 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 acknowledged 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 that the nature of the underlying crime is irrelevant. In *State v. Anderson*, the defendant 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 at a pretrial hearing; 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 the argument, holding that RCW 9A.76.170(1) 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, and to the extent it was relevant, it was unduly prejudicial.

ii. *The court improperly permitted the State to introduce evidence that Mr. Delo was charged with the class C felony of criminal impersonation.*

Based on an apparent misapprehension of both *Anderson* and *Williams*, the trial court erroneously believed that (1) evidence of Mr. Delo's underlying charge; and/or (2) evidence of the classification of Mr. Delo's underlying charge was relevant. This misapprehension also caused the court to fail to perceive the prejudice of the evidence. 8/6/19

RP 170-72. Most critically, the court specifically determined that the underlying charge was an element of bail jumping – in contradiction to this Court’s holding in *Anderson*. 3 Wn. App. 2d at 72.

Before trial, the State moved in limine to preclude Mr. Delo from arguing at trial that he had resolved his underlying charge with a plea to the gross misdemeanor of making a false statement to a public servant. 8/6/19 RP 25-26. Mr. Delo argued the jury should be permitted to consider the lesser included offense of misdemeanor bail jumping, in light of his resolution of the matter with a misdemeanor plea. 8/6/19 RP 151.

The State argued the classification of the crime is “an element the State has to prove.” 8/6/19 RP 165-66. The court erroneously agreed with the State’s argument, finding:

The Court finds that resolution of a count that provides a basis for a bail-jump charge does not modify the bail-jump charge such that the jury must determine various alternatives. The Court agrees that the jury must decide all elements of each charge, including each bail-jump charge, and these are elements. What we have in this case is not a sentencing enhancement. It is not proving a prior conviction. These are elements of bail jump or the crime of bail jumping.

8/6/19 RP 170.

At trial, the State elicited evidence demonstrating Mr. Delo was charged with the class C felony of criminal impersonation, and the court instructed the jury that it must find Mr. Delo was charged with a class C felony to find him guilty of each count of bail jumping. 8/6/19 RP 202-06, 211; CP 103-05.

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 erroneously found this information was an essential element, it neglected to examine the prejudicial effect of the evidence. The State did not even meet its burden to prove the probative value of this evidence (assuming any exists, which Mr. Delo

disputes) outweighed the significant danger of prejudice. *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. Delo'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. Delo was charged with a class C felony.

As suggested 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. Delo was merely charged with “a crime” would have made his underlying offense 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, which would be fair, since this is, in fact, how he resolved his arrest.³

However, the State introduced evidence that Mr. Delo had been 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 certain stigma, felonies necessarily represent more serious offenses, and as such, they carry an even greater prejudice.

It is reasonably probable that the court's erroneous ruling and instructions materially affected the outcome of Mr. Delo's trial. At trial, the central dispute was whether Mr. Delo knowingly failed to appear at the court dates in question. For the first count of bail jumping, Mr. Delo's defense was that he did not appear because he had not been informed as to whether charges had, in fact, been filed by the prosecutor's office. 8/7/19(am) RP 8-9; 8/7/19(pm) RP 40-42. As to the additional counts, Mr. Delo's cross-examination discredited and

³ The outstanding arrest warrant for Mr. Delo was also for a misdemeanor offense. 7/29/19 RP 28-29. The driver who actually committed the traffic offense – for an improperly positioned after-market headlight apparatus – was not even given a citation. *Id.*

impeached the accounts of the State's witnesses, whom – aside from the deputy who made the initial traffic stop – were deputy prosecuting attorneys who had varying degrees of recollection about the days in question. 8/6/19 RP 193-233; 8/7/19(am) RP 4-41.

For example, one deputy prosecutor testified that she had appeared for the State on February 25, 2019 – the day Mr. Delo's case was scheduled for a CrR 3.5 hearing. 8/7/19(am) RP 29-32. The judge had ordered a bench warrant at 9:08 a.m. when Mr. Delo was eight minutes late for court. *Id.* The prosecutor acknowledged that she had not noted whether defense counsel had been present when the warrant was ordered, and she had left the space for counsel's name blank on the order. *Id.* at 38-39.

Undoubtedly, the evidence relating to Mr. Delo's previous felony charge discredited his defense. The evidence of his criminal impersonation arrest, particularly since it is a crime of dishonesty, made Mr. Delo seem like the kind of person who would flaunt the law, fail to appear in court, and create excuses for failing to appear in court.

Adding to the prejudice of the court's error, the prosecuting attorney emphasized the felony charge for which Mr. Delo had originally been arrested, despite the fact that he had resolved this

accusation with a misdemeanor plea. In closing argument, the deputy prosecutor used the word “felony” at least eight times. 8/7/19(pm) RP 21, 27, 33, 34 (twice), 38 (twice), 45. The prosecutor repeatedly used the term “C felony” on PowerPoint slides during his argument, suggesting to the jury the potential dangerousness of Mr. Delo. CP 112, 113, 114, 119.⁴

“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 Mr. Delo’s bail jumping convictions.

2. The legislature has determined that failing to appear for court is a misdemeanor offense and has thus amended the statute. This Court should vacate Mr. Delo’s felony convictions and sentence and remand for further proceedings to reflect current law.

On March 7, 2020, Washington passed House Bill 2231, changing the definition and classification of bail jumping. The Governor signed the bill on March 18, 2020. The new legislation is entitled, “Bail Jumping –

⁴ The trial court scolded the deputy prosecutor for failing to disclose his PowerPoint presentation before his closing argument, so the defense could have made timely objections. 8/7/19(pm) RP 46-49.

Failure to Appear or Surrender.” The law will become effective on June 11, 2020.⁵

Due to the change in law, a failure to appear for any court date other than a date set for trial is a gross misdemeanor, even if the underlying charge was a felony. E.S.H.B. 2231, § 2, 1.⁶ Mr. Delo, whose appeal has not yet been litigated, should benefit from this change in law.

- a. Under *State v. Ramirez*, this change in law applies to cases on direct appeal.

In *Ramirez*, the Supreme Court explained that changes in the law apply prospectively to cases on appeal. *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018). In other words, the fact that E.S.H.B. 2231 was not in effect at time of Mr. Delo’s trial and sentencing is not important. *See id.* In applying the change in the law as to legal financial obligations, the *Ramirez* Court found the critical issue was that Ramirez’s case “was on appeal as a matter of right and thus was not yet final under RAP 12.7” at the time the legislation was passed. *See id.* at 749.

⁵ Engrossed Substitute House Bill (E.S.H.B.) 2231: <http://lawfilesexternal.wa.gov/biennium/2019-20/Pdf/Bills/Session%20Laws/House/2231-S.SL.pdf>.

⁶ There are also exceptions where the charge of arrest was a violent felony or sex offense; under the amended law, a failure to appear can still be charged as a felony bail jumping. E.S.H.B. 2231, § 1(b)(i). This is not the situation here.

Here, Mr. Delo's case was on appeal as a matter of right when the March 2020 legislation was passed, altering the definition of the crime of bail jumping and the available punishment. This is Mr. Delo's opening brief; his appeal is clearly not yet final. Pursuant to the Rules of Appellate Procedure, the State's responsive briefing will be filed a week or two after E.S.H.B. 2231 becomes effective. RAP 10.2(c) (brief of respondent in criminal case to be filed within 60 days following brief of appellant). When E.S.H.B. 2231 goes into effect on June 11th, Mr. Delo's appeal will not even be fully briefed. RAP 10.2(d)(reply brief due within 30 days of respondent's brief).

Mr. Delo was charged, convicted, and sentenced based upon the now outdated statute, RCW 9A.76.170, which determined that his failures to appear for routine court appearances constituted C felonies. Under the current statute, Mr. Delo's three failures to attend court no longer constitute felony bail jumping; rather, each of them is a gross misdemeanor. LAWS of 2020, ch. 19, §§ 1-2. As in *Ramirez*, the change the law applies to Mr. Delo's case because it is on direct appeal and is not final. Mr. Delo, like Mr. Ramirez and others, "is entitled to benefit from this statutory change." *Ramirez*, 191 Wn.2d at 749.

- b. Because the legislature has determined that a gross misdemeanor is adequate to punish the failure to appear in these circumstances, retroactive application of the new law is presumed, and it would be unjust not to apply the law equally to all similar offenders.

A legislative reduction in the penalty for a crime creates a presumption that there is no purpose in executing the harsher penalty of the old law in pending cases. *See State v. Heath*, 85 Wn.2d 196, 198, 532 P.2d 621 (1975). In announcing this principle, the *Heath* Court unanimously affirmed that a newly enacted statute granting a judge authority to stay a license revocation penalty, imposed post-conviction, applied retroactively. *Id.* at 196.

The *Heath* Court articulated two reasons for the ruling. First, the statute was remedial, creating a presumption of retroactivity in the statute. *Id.* Second, and more pertinently, the statute reduced the penalty for the crime. *Id.* at 197-98. The Court noted that when the legislature reduces the penalty for a crime,

... 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.

Heath, 85 Wn.2d at 96.

Second, as this Court has acknowledged, “a clearly remedial statutory amendment will be retroactively applied, regardless of whether it contains language demonstrating legislative intent for retroactive application.” *State v. Walsh*, No. 50972-5-II, 2019 WL 2189473, at *5 (2019) (citing *Kane*, 101 Wn. App. at 613).⁷ The new House Bill reclassifying the failure to appear at regular non-trial court hearings as a misdemeanor is “clearly remedial.”

Even a remedial statute must be squared with RCW 10.01.040, however, also known as the saving statute.⁸ Washington’s general saving statute, RCW 10.01.040, was enacted over a century ago to prevent modifications to the penal code from causing the frustration of prosecutions. It has many exceptions and interpretations, and is to be narrowly construed; it is not applicable to declarations of legislative will that reclassify and downgrade the culpability of criminal offenses. *See State v. Ross*, 152 Wn.2d 220, 239-40, 95 P.3d (2004); *State v. Wiley*,

⁷ GR 14.1. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court.

⁸ The saving statute, sometimes referred to as “savings,” states in part that when a criminal statute is 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... unless a contrary intention is expressly declared ...” RCW 10.01.040.

124 Wn.2d 679, 687, 880 P.2d 983 (1994); *Heath*, 85 Wn.2d at 198.

The Supreme Court has never overruled *Heath* or this principle.

On the contrary, the Court has continued to reference this rule in analyzing the boundaries and exceptions of the general saving clause.

See *Ross*, 152 Wn.2d at 239-40; *Wiley*, 124 Wn.2d at 687.

This Court recently discussed the difference between a statute that simply changes the elements of crime (not retroactive), and one that seeks to reclassify “an entire crime to a lower level of punishment” (retroactive). *State v. Jenks*, __ Wn. App. __, 459 P.3d 389, 394 (2020) (quoting *Wiley*, 124 Wn.2d at 682).⁹ In *Jenks*, this Court cited *Wiley* to determine the new persistent offenders legislation should not be applied retroactively. *Id.* The Court suggested that the change in the persistent offender statute “does not make defendants convicted of the earlier crime any less culpable; instead, it clarifies the evidence required to prove the crime.” *Id.* (citing *Wiley*, 124 Wn.2d at 687-88). However, this Court continued in *Jenks*, explaining:

On the other hand, when the Legislature downgrades an entire crime, it has judged the specific criminal conduct less culpable. By reclassifying a crime without substantially altering its elements, the Legislature concludes the criminal conduct at issue deserves more lenient treatment. The

⁹ Mr. Jenks is filing a petition for review in the Washington Supreme Court later this month.

reclassification of a crime is no mere refinement of elements, but rather a fundamental reappraisal of the value of punishment. It is therefore highly relevant to a sentencing judge's estimation of a defendant's overall culpability and dangerousness.

394 P.3d at 394 (*quoting Wiley*, 124 Wn.2d at 687-88) (emphasis added).

Mr. Delo's case falls into the second category discussed by this Court, where the legislature has downgraded an entire crime, judging the specific criminal conduct less culpable. As discussed in *Jenks* and *Wiley*, the legislature has concluded that a failure to appear for a court appearance, other than for a case scheduled for trial, is less culpable conduct than previously believed, and consequently, such individuals are less culpable and less dangerous in the community. *See Wiley*, 124 Wn.2d 687-88.

c. The bail jumping statute now defines Mr. Delo's failures to appear in court as gross misdemeanors; therefore, this Court should vacate his convictions and remand so that he can be resentenced.

This Court should vacate Mr. Delo's convictions and sentence and remand so that he can be resentenced to a misdemeanor sentence, unless this Court reverses as to the first ground raised in this brief. The court imposed a standard range sentence following trial, because at the time, the court was bound to do so, short of imposing an exceptional

sentence downward, which the court declined to do. 9/18/19 RP 23-24.
Now the law has changed, and accordingly, Mr. Delo's convictions
should be vacated and the matter remanded for further proceedings on
the gross misdemeanor allegations.

E. CONCLUSION

Based on the foregoing, Mr. Delo respectfully requests that this
Court reverse his convictions and remand for further proceedings.

DATED this 23rd day of April, 2020.

Respectfully submitted,

/s Jan Trasen

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Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 53839-3-II
v.)	
)	
T-JAY DELO,)	
)	
Appellant.)	

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