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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 D. DELO,

Appellant.

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

The Honorable Carol Murphy
Cause No. 17-1-02318-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether this Court should consider alleged error arguing that evidence was erroneously admitted contrary to ER 401 and ER 403 and that the to-convict instructions for bail jumping erroneously included the classification of the underlying offense, when Delo failed to raise either issue in the trial court.

2. Whether the trial court's to-convict instructions for the charges of bail jumping correctly required the jury to find a particular offense by including an element that the jury must find that Delo was charged with a class C felony.

3. Whether evidence describing the nature and classification of the underlying offense of criminal impersonation in the first degree, a class C felony, was properly admitted where the State was required to prove the particular crime.

4. Whether any error that may have occurred in the admission of evidence or the jury instructions was harmless because overwhelming evidence supported the convictions such that no reasonable probability exists that the outcome would have differed if the evidence had been limited or the jury instructions had been modified.

5. Whether RCW 9.94A.345 and RCW 10.01.040 require that the bail jumping statute in effect at the time of offenses be applied to Delo's convictions where the legislature has enacted amendments to RCW 9A.76.170 which become effective on June 11, 2020, in E.S.H.B. 2231.

B. STATEMENT OF THE CASE.

The appellant, T-Jay Duane Delo, was originally charged with one count of criminal impersonation in the first degree, a class C felony. CP 4, RCW 9A.60.040. Delo failed to appear for his initial arraignment hearing on January 9, 2018, and failed to appear for evidentiary hearings on August 6, 2018, and February 25, 2019. RP (8/6/19) 184-185, 186-187, 210, 214. As a result of his failures to appear, Delo was additionally charged with three counts of felony bail jumping. CP 45-46.

At a CrR 3.5 hearing, the Honorable Judge James J. Dixon, ruled that all statements made by Delo prior to being placed into handcuffs were admissible at trial and any statements made after Delo was placed into handcuffs were inadmissible. CP 50-54; RP (7/29/19) 87-88. Prior to the start of trial, the State agreed to amend the charge of criminal impersonation in the first degree to the gross misdemeanor charge of making a false or misleading statement to

a public servant. CP 48-49, 85-89, RP (8/6/19) 6-10. Following the plea on the amended count one, trial proceeded on the bail jumping charges. RP (8/6/19) 10.

Before beginning jury selection, the trial court inquired as to the parties' preference as to how it would indicate the charges to the jury. RP (8/6/19) 30. Defense counsel requested that the trial court use the exact language of the charging document, which included "having been charged or convicted of a class C or B felony." RP (8/6/19) 30-31, CP 48-50. During trial, the State presented evidence, including a copy of the original criminal information, indicating that at the time of his failures to appear, Delo was charged with criminal impersonation in the first degree, a class C felony. RP (8/6/19) 204, 212; Ex. 2. Delo did not object. RP (8/6/19) 204.

The State also admitted evidence indicated that Delo was released on his own recognizance and notified of the arraignment hearing scheduled for January 9, 2018. RP (8/6/19) 208-210. Ex. 1. A warrant was issued for Delo's arrest after his initial failure to appear. Ex. 3, Ex. 4. After his arrest on that warrant, Delo was released on bail, as authorized by the Court. RP (8/6/19) 222; Ex. 6. Delo was subsequently notified of a required appearance for a

3.5/3.6 hearing on August 6, 2018, which he failed to appear at. RP (8/6/19) 184-185, 226, 229, 232-233; Ex. 8, Ex. 9.

After another arrest pursuant to a bench warrant, Delo was authorized for release on an increased bail amount and was notified of a required appearance at a 3.5/3.6 hearing on February 25, 2019. RP (8/6/19) 234-238, Ex. 12, Ex. 13. Ex. 14. Delo again failed to appear on February 25, 2019. RP (8/6/19) 186-187; RP (8/7/19 AM) 29-31; Ex. 15. When jury instructions were discussed, the defense objected to the Court not including its proposed instructions for a lesser included offense of misdemeanor bail jumping. RP (8/7/19 AM) 53-54; CP 63-84. The trial court denied the request because Delo was not charged with or convicted of a gross misdemeanor at the time of his failures to appear. RP (8/6/19) 29; RP (8/7/19) 54. The defense did not take exception or object to any of the given instructions. RP (8/7/19) AM 51, 53-54.

Each of the to-convict instructions for counts 2, 3, and 4 included the element that the “defendant was charged with a class C felony.” CP 103-105, RP (8/7/19 PM) 13-15. The jury found Delo guilty of counts 2, 3, and 4. CP 140-142, RP (8/7/19 PM) 53. With an offender score of 8, the trial court sentenced Delo to a total term of incarceration of 43 months. CP 162-164. This appeal follows.

C. ARGUMENT.

1. This Court should not consider Delo's argument that the classification of criminal impersonation was irrelevant because the issue was not raised before the trial court.

Generally, a reviewing court will not consider an evidentiary issue that is raised for the first time on appeal because failure to object deprives the trial court of the opportunity to prevent or cure any error. RAP 2.5(a)(3); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). A narrow exception, however, exists for "manifest error[s] affecting a constitutional right." RAP 2.5(a)(3); Kirkman, 159 Wn.2d at 936.

Alleged errors based on ER 403 are generally not constitutional in nature and do not constitute manifest error pursuant to RAP 2.5(a)(3). City of Seattle v. Heatley, 70 Wn. App. 573, 583, 854 P.2d 658 (1993); State v. Korum, 157 Wn.2d 614, 648, 141 P.3d 13 (2006). Likewise, jury instructions that are alleged to be erroneous do not manifest constitutional error unless it relieves the State of its burden to prove every essential element of the crime charged beyond a reasonable doubt. State v. Eastmond, 129 Wn.2d 497, 503, 919 P.2d 577 (1996); State v. Gordon, 172 Wn.2d 671, 677-678, 260 P.3d 884 (2011) (Failure to provide a

definitional instruction does not manifest error affecting a constitutional right).

Delo does not address the fact that he made no relevance objection based on the inclusion of the classification of the crime of criminal impersonation in the first degree, nor did he object to the form of the to-convict instructions. Instead, Delo argues that the defense response to one of the State's motions in limine raised the issue. Prior to jury selection, the State moved the trial court for an order prohibiting the defense from arguing to the jury that the defendant was subsequently convicted of a gross misdemeanor. RP (8/6/19) 25.

The defense responded by citing Apprendi and arguing that it is the jury who is required to find every fact that would increase sentencing. RP (8/6/19) 27-28. The trial court found "the situation at the time that it was charged was that Mr. Delo was charged with a felony. And the court is not allowing resolution of the matter to be evidence in this case." RP (8/6/19) 29. That ruling was correct. State v. Coucil, 170 Wn.2d 704, 706, 245 P.3d 222 (2010) (RCW 9A.76.170, unambiguously provides that bail jumping is classified for sentencing purposes according to the nature of the underlying charge at the time the defendant jumps bail). The defense never

argued that inclusion of the classification of the offense was irrelevant. In fact, the defense wanted to argue that Delo was convicted of a gross misdemeanor instead of a class C felony.

When the parties again argued about whether a lesser included instruction should be provided, the defense again argued that the jury must make the determination of the facts about whether the bail jumping charges would be a gross misdemeanor or a felony. RP (8/6/19) 157, 159. The prosecutor argued that the focus is on the defendant's status on the date of the failure to appear. RP (8/6/19) 161. The State noted, that the classification of the crime is a legal decision for the Court. RP (8/6/19) 162. The State noted that the jury needed to find facts which supported a conclusion that on the date that Delo failed to appear, he had been charged with a class C felony. RP (8/6/19) 163.

The trial court ruled that the "crime of bail jumping does not change when the underlying count is modified by agreement of the parties." RP (8/6/19) 170-171. The trial court was never asked to rule whether or not the classification of the underlying offense was relevant and if any evidence should not have been admitted. Delo failed to preserve the relevancy argument that he now makes and this Court should decline to consider the argument pursuant to RAP

2.5(a). Additionally, as the State argues in section 2 below, the jury instructions were constitutionally adequate. Delo has not demonstrated manifest constitutional error such that this Court should consider his argument that the jury instructions were erroneous for the first time on appeal. This Court should decline to consider that argument as well pursuant to RAP 2.5(a).

2. The jury instructions properly conveyed the required elements of bail jumping and it was not erroneous to include the classification of the offense in the jury instructions.

The elements of bail jumping under RCW 9A.76.170 require that the State prove that the defendant was held for, charged with, or convicted of a particular crime; was released by court order or admitted to bail with the requirement of a subsequent personal appearance; and, knowingly failed to appear as required. State v. Williams, 162 Wn.2d 177, 183, 170 P.3d 30 (2007); State v. Pope, 100 Wn. App. 624, 627, 999 P.2d 51 (2000); RCW 9A.76.170(1). In Williams, our State Supreme Court rejected a claim that the to-convict instructions were insufficient because the State merely alleged that Williams had been charged with “possession of a controlled substance, a felony,” and did not allege or prove the classification of the offense. Williams, 162 Wn.2d at 181-182, 188.

The Supreme Court stated, “we hold that 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.

Importantly, the to-convict instruction in Williams identified the underlying crime of possession of a controlled substance and the evidence presented at trial demonstrated that the charge was cocaine possession, which is a class C felony. Id. at 188. The Supreme Court found that the identification of the crime as possession of a controlled substance in the information and to-convict instruction was sufficient for a conviction of felony bail jumping.

The Williams Court further noted that RCW 9A.76.170(3) defines the penalty classification of bail jumping and stated, “Williams correctly argues that any fact that imposes more serious punishment is an essential element of the offense and must be alleged in a proper to-convict instruction.” Williams, 162 Wn.2d at 190, *citing*, Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The Supreme Court, however, rejected Williams argument that the to-convict instruction was insufficient because “possession of any controlled substance (except

marijuana) in Washington is a class B or C felony” and the charging document alleged felony possession of a controlled substance. Williams, 162 Wn.2d at 190-191.

While Williams makes it clear that the exact classification of the predicate offense for bail jumping did not need to be included in the to-convict instruction, the State is still required to allege and prove sufficient facts to demonstrate that the predicate was in fact a class B or C felony in order to convict a defendant with the crime of felony bail jumping. The State is aware of no case that stands for the proposition that the State is not required to prove either the nature or classification of the underlying crime as Delo argues. Certainly, no case indicates that it is prejudicial error to include the classification and nature of the underlying offense in the charging document and to-convict instructions.

In State v. Anderson, this Court stated, “RCW 9A.76.170(1) does not list the defendant’s particular crime as an element of bail jumping. Instead, an accused bail jumper’s underlying charge is relevant only as to the classification of the bail jump charge.” 3 Wn. App.2d 67, 71, 413 P.3d 1065 (2018). In that case, as in this case, the to-convict instruction alleged that the defendant had been

charged with a class B or C felony. Id. at 68-69. In finding that the to-convict instruction was adequate, this Court stated:

Williams stated that simple identification of the alleged crime is sufficient. It did not state that identification by name is required. Because the instruction in *Williams* named the underlying crime, the only pertinent issue related to its classification. The *Williams* holding is therefore restricted to the question of penalty classification. *Williams* held that penalty classification was not required. It did not hold that naming the underlying conviction was required.

Anderson, 3 Wn. App.2d at 72, (internal quotations omitted); *citing Williams*, 162 Wn.2d at 188.

In Anderson, the uncontested facts demonstrated that Anderson was charged with possession of stolen property in the first degree, a class B felony. Anderson, 3 Wn. App.2d at 73. This Court found no error in the to-convict instruction identifying the underlying charge by penalty classification. Id.

In this case, the State alleged that Delo had been charged with or convicted of a class C or B felony. CP 48-49. The to-convict instructions required the jury to find that Delo had been charged with a class C. CP 103-105, RP (8/7/19 PM) 13-15. As was the case in Anderson, the to-convict instruction was constitutionally adequate and required that the jury identify the underlying crime in a manner sufficient for the trial court to sentence Delo for felony bail

jumping. The only evidence placed before the trial court was that Delo had been charged with criminal impersonation in the first degree, a class C felony. RP (8/6/19) 204, 212; Ex. 2. The jury instructions were not erroneous. There was no possibility that the jury could not have found all the essential elements of the offense of bail jumping and it is clear that the jury found all of the facts necessary to define the penalty classification of the offense as required by Apprendi.

3. The nature and classification of the underlying offense were relevant to the required elements of bail jumping and to the facts that needed to be found by the jury to support the penalty classification of the offense.

ER 401 states “Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The rule requires only a minimal logical relevance. State v. Bebb, 44 Wn. App. 803, 723 P.2d 512 (1986), *affirmed*, 103 Wn.2d 515, 740 P.2d 829 (1987). Generally, all relevant evidence is admissible. ER 402. However, ER 403 allows for relevant evidence to be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Delo's argument that evidence including the name of the crime of criminal impersonation in the first degree and the penalty classification of that offense should have been excluded pursuant to ER 401 and ER 403 is without merit. As noted above, Delo did not object to the admission of such evidence at trial. Even if an objection had been made, the State was required to prove that at the time of the failures to appear, Delo was charged with a class C felony. Williams and Anderson make clear that the State can prove that fact with a simple identification of the offense by reference to its name, classification, or both.

While Williams states that the classification of the offense is not an element of the crime that needs to be included in a to-convict instruction and Anderson states that the name of the offense does not need to be included in a to-convict instruction, both cases clearly indicate that there must be some facts found by the jury sufficient for the trial court to conclude that Delo was guilty of felony bail jumping, which requires that the evidence demonstrate that he was charged with a class B or C felony.

The facts regarding the nature and classification of the crime of criminal impersonation in the first degree were relevant and

highly probative to the charged offenses of bail jumping. There was no evidentiary error in their unopposed admission.

4. If this Court finds error in the admission of evidence of the nature and classification of the underlying offense or finds that the jury instructions were somehow erroneous, any error was harmless given the overwhelming evidence that Delo had been charged with criminal impersonation in the first degree when he failed to appear on three separate occasions.

“Strong policy reasons support the use of harmless error analysis. ‘A judicial system which treats every error as a basis for reversal simply could not function because, although the courts can assure a fair trial, they cannot guarantee a perfect one.’ State v. White, 72 Wn.2d 524, 531, 433 P.2d 692 (1967). A reversal should occur only when the reliability of the verdict is called into question.” State v. Neidigh, 78 Wn. App. 71, 78-79, 895 P.2d 423 (1995).

An error is harmless “unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)). The evidence presented in this case clearly demonstrated that Delo was charged with criminal impersonation in the first degree, which is in fact a class C felony, and then failed to appear at three different hearings after having been provided

notice. The fact that he had been charged with criminal impersonation at the time of the failures to appear was uncontested. During closing argument, defense counsel focused on whether Delo knew he had been charged prior to failing to appear. RP (8/7/19) 38-42.

The evidence was overwhelming that Delo committed each of the bail jumping offenses. Delo's reliance on State v. Hardy, 133 Wn.2d 701, 946 P.2d 1175 (1997) to demonstrate prejudice is misplaced. In Hardy, the defendant was charged with robbery and the trial court admitted evidence that he had been previously convicted of a drug crime, which the trial court called an unnamed felony." Id. at 706. Our State Supreme Court found that the prior conviction should not have been admitted pursuant to ER 609. Id. at 712. The Supreme Court found that the error was not harmless because there was not overwhelming evidence and the prior conviction was the only impeachment of Hardy's testimony. Id. at 713.

Unlike Hardy, Delo elected not to testify during trial. RP (8/7/19 AM) 44-45. Additionally, the State was required to demonstrate that Delo had been charged with a particular crime. State v. Williams, 162 Wn.2d at 183. Given the evidence presented

at trial, it made no difference whether the State proved the particular crime by name, classification or both. There was no probability that the jury's verdict would have been different if the trial court had limited the evidence admitted or changed the jury instructions.

The only thing that would have made a difference would be if the trial court had directed that the jury must find that Delo had been charged with "a crime," as suggested by Delo. Brief of Appellant at 16. It would have been in error for the trial court to adopt what Delo now suggest because such an instruction would not have been sufficient to meet the "particular crime" requirement through "simple identification". Williams, 162 Wn.2d 177, 183; Anderson, 3 Wn. App.2d at 72.

As noted in the previous section above, Delo has neither argued nor demonstrated that there was constitutional error. However, even if this Court were to find that any of the alleged error affects a constitutional right, that error would still be harmless based on the facts of this case. The test for whether a constitutional error is harmless is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. State v. Romero-Ochoa, 193 Wn.2d 341, 347, 440 P.3d

994 (2019). Here, Delo was charged with three counts of felony bail jumping. The fact that he had been charged with a particular offense was a necessary element of the crimes. Given the overwhelming evidence that he had been charged with criminal impersonation in the first degree and failed to appear three times, any error that stems from the nature or classification of that offense was harmless beyond a reasonable doubt.

5. Amendments to the bail jumping statute which take effect in June of 2020 do not apply retroactively or prospectively to cases on appeal such as Delo's conviction and sentence.

The general rule is that a defendant's sentence is determined based on the law in effect at the time the defendant committed the crime for which he is being sentenced. State v. Jenks, 12 Wn. App.2d 588, 592, 459 P.3d 389 (2020); State v. Ross, 152 Wn.2d 220, 236-237, 95 P.3d 1225 (2004). The general rule stems from the application of RCW 9.94A.345 and RCW 10.01.040, also known as the saving statute. Jenks, 12 Wn. App.2d at 592.

RCW 9.94A.345 states, "any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." RCW 10.01.040 states:

No offense committed and no penalty of forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal is express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act.

Pursuant to the rule, a defendant whose crime is repealed or amended after the date of commission of the offense, is subject to the version of the offense in effect at the time the charges were committed.

Delo argues that this Court should remand his convictions for felony bail jumping with direction that they be amended to gross misdemeanors because of the legislative changes to the bail jumping statute which take effect June 11, 2020. E.S.H.B. 2231, Laws of 2020, Ch. 19; Brief of Appellant, at 18-19. Delo cites to State v. Heath, 85 Wn.2d 196, 198, 532 P.2d 621 (1975), for the proposition that a legislative change that affects the penalty for a crime creates a presumption that there is no purpose in executing the harsher penalty of the old law. However, Delo ignores that Heath did not directly implicate the savings clause of RCW

10.01.040 because it pertained to amendments governing civil driver license revocations under the Washington Habitual Traffic Offenders Act. State v. Ross, 152 Wn.2d at 220, 239.

E.S.H.B. 2231 effectively amends RCW 9A.76.170 to create a new offense of failure to appear. However, nothing in the bill indicates a desire that the amendments be applied retroactively or prospectively. The lack of language demonstrating an intent that the amendment applies to cases committed prior to the effective date compels the conclusion that the amendments do not apply retroactively. Absent language from the legislature indicating a contrary intent, amendments to a penal statute subject to RCW 10.01.040 are not retroactive. State v. McCarthy, 112 Wn. App. 231, 237-238, 48 P.3d 1014 (2002).

In State v. Kane, 101 Wn. App.607, 613, 5 P.3d 741 (2000), Division I of this Court acknowledged that if a statutory amendment is penal and subject to RCW 10.01.040, there is no presumption that it applies retroactively, even if the statute is patently remedial. Therefore, a statutory amendment to a penal statute, absent language indicating a contrary intent, applies prospectively to cases committed on or after the effective date of the act. Id., See *also*, State v. Humphrey, 139 Wn.2d 53, 63, 983 P.2d 1118 (1999).

Delo's argument that State v. Ross and State v. Wiley, 124 Wn.2d 679, 687, 880 P.2d 983 (1994), create an exception to RCW 10.01.040 applicable to E.S.H.B. 2231 is without merit. In Wiley, our Supreme Court held that when a statutory amendment merely changes the elements of a crime the original classification of the crime must be used when calculating an offender score, however, the reclassification of an entire crime to lower a punishment level applies retroactively to the calculation of an offender score. 124 Wn.2d at 682, 685-686. In Ross, the Supreme Court acknowledged that Wiley did not address the savings clause of RCW 10.01.040. State v. Ross, 152 Wn.2d at 239. The legislature is entitled to the presumption that the savings clause applies to every repealing statute, unless it expresses a contrary intention in "words that fairly convey that intention." Id. at 238; *citing* State v. Kane, 101 Wn. App. at 612.

E.S.H.B. 2231 does not contain words that fairly convey the intention that it apply retroactively. It modifies the existing crime of felony bail jumping to change the elements and added a gross misdemeanor crime with different elements for situations that are not covered by the amended felony bail jumping statute. This is not a situation where the legislature reclassified the entire crime. There

is no indication that the legislature intended that the statute apply prior to its effective date.

This Court also noted that Wiley was decided before the enactment of RCW 9.94A.345. State v. Walsh, 2019 Wash.App. LEXIS 1304 at 11, 2019 WL 2189473 (holding that the trial court properly applied the seriousness level of the offense of felony DUI that was in effect at the time of the offense rather than an amended seriousness level that became effective after the offense).¹ In Jenks, this Court again noted that “*Wiley* was decided long before the enactment of RCW 9.94A.345, which now unequivocally states that a sentence must be imposed under the law in effect when the offense was committed.” 12 Wn.App.2d at 597. The decision in Wiley does not support Delo’s claim that the amendments effective June 11, 2020, should apply to his case.

Delo further argues that the holding of State v. Ramirez, 191 Wn.2d 732, 749, 426 P.3d 714 (2018), requires that statutory amendments that apply prospectively be applied to cases that are on appeal as a matter of right at the time of their effective date. In Ramirez, our State Supreme Court held that amendments to the

¹ Unpublished opinion, not offered as precedential authority, but for whatever this Court deems appropriate. GR 14.1.

statutes which govern legal financial obligations applied prospectively to Ramirez's case because the LFO statutes "pertain to costs imposed on criminal defendants following conviction, and Ramirez's case was pending on direct review and thus not final when the amendments were enacted." Id. The Court noted that because the LFO statutes applied to cost imposed upon conviction and a conviction is not final until the direct appeal is decided, Ramirez was entitled to the benefit of the statutory change. Id. at 746.

Unlike the situation in Ramirez, E.S.H.B. 2231 applies prospectively to acts committed on or after June 11, 2020. The provisions are not triggered by the date of conviction, rather they apply prospectively to acts committed after the effective date. This Court recognized the distinction in State v. Jenks, finding that amendments to the persistent offender statute regarding the use robbery in the second degree as a predicate offense could not be applied to the direct appeal of a conviction where the act occurred prior to the effective date of the amendment. 12 Wn. App.2d at 589-590, 592. This Court specifically found that RCW 9.94A.345 and RCW 10.01.040 both required Jenks to be sentenced under the law at the time he committed the offense. Id. at 592. This Court noted

that Ramirez was clearly limited to costs imposed on criminal defendants following conviction and did not state a rule of general application to all sentences. Jenks, 12 Wn. App.2d at 595. Division I of this Court agreed that Ramirez did not support the argument that the amendment to RCW 9.94A.030(33) must be applied prospectively to cases pending on direct appeal in State v. Molia, ___ Wn.App.2d ___; 460 P.3d 1086, 1989 (April 6, 2020).

As with the application of amendments to the persistent offender act in Jenks and Molia, there is nothing in E.S.H.B. 2231 which indicates an intent that amendments to RCW 9A.76.170, which become effective June 11, 2020, apply retroactively. Additionally, the application of RCW 10.01.040 and RCW 9.94A.345 require that the provisions apply only to acts which occur on or after the effective date of June 11, 2020. Delo's offenses occurred on January 9, 2018, August 6, 2018, and February 25, 2019. He was properly sentenced pursuant to the law in effect at the time of his offenses.

D. CONCLUSION.

Delo failed to raise his relevancy and jury instruction arguments at the trial court. He has not demonstrated any manifest error affecting a constitutional right and this Court should not

consider these issues for the first time on appeal. If this Court considers the issues, the trial court correctly instructed the jury of all of the required elements of the offense of felony bail jumping. Additionally, the State is required to make a simple identification of the particular crime that a bail jumping offense is predicated upon and a to-convict instruction can include either the name of the offense or the classification of the offense. While neither are per se required, they are relevant and highly probative in a trial for the crime of bail jumping. There was no error in the trial court.

If this Court finds error, it was clearly harmless in light of the overwhelming evidence presented to the jury. Finally, RCW 9.94A.345 and RCW 10.01.040 require that the law in effect at the time of the offense be utilized. Amendments to the bail jumping statute effective June 11, 2020, do not apply to Delo's convictions or sentence. The State respectfully request that this Court affirm Delo's convictions and sentence in their entirety.

Respectfully submitted this 12th day of June, 2020.



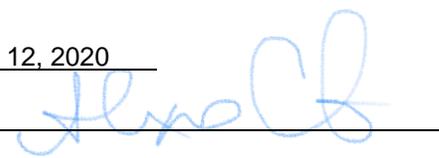
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DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: June 12, 2020

Signature: 

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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