

No. 53870-9-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DAMON BLANCHARD,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the trial court erroneously deny Blanchard's request to give a modified version of WPIC 19.17, the uncontrollable circumstances affirmative defense jury instruction for Bail Jumping?
- B. Did Blanchard prove by a preponderance of the evidence the affirmative defense of uncontrollable circumstances?
- C. Do the 2020 legislative amendments to the bail jumping statute retroactively apply to Blanchard?

II. STATEMENT OF THE CASE

Trooper Ashley conducted a traffic stop on a black Acura driven by Blanchard for speeding on February 26, 2019. RP 105. The traffic stop culminated in Blanchard being arrested for Possession of a Stolen Vehicle. RP 115, 168-67. The State charged Blanchard with Possession of a Stolen Vehicle. CP 1-2.

Blanchard was released from custody on an unsecured appearance bond on March 14, 2019. RP 169; Ex. 7. Apparently, while held in the Lewis County Jail, Blanchard missed a court date for a case in Oregon and a warrant was issued for his arrest. RP 169-70. Therefore, Blanchard was transported from the Lewis County Jail down to Portland. RP 170.

While in custody in Oregon, Blanchard missed his next court date for his case in Lewis County. RP 170-71; Ex. 10. The State filed

an amended information charging Blanchard with Bail Jumping. CP 5-6.

Blanchard elected to have his case tried to a jury. See RP. The jury acquitted Blanchard of the charge Possession of a Stolen Vehicle and convicted Blanchard of Bail Jumping. CP 33-34. Blanchard was sentenced to four months in custody. CP 50. Blanchard timely appeals his conviction. CP 47-56.

The State will supplement the facts as necessary in its argument section below.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR WHEN IT DENIED BLANCHARD'S REQUEST TO GIVE A MODIFIED UNCONTROLLABLE CIRCUMSTANCES JURY INSTRUCTION.

The trial court correctly decided it was not appropriate to give Blanchard's proposed modified uncontrollable circumstances affirmative defense jury instruction. The instruction requested misstated the statutory affirmative defense. The trial court gave the proper affirmative defense instruction for uncontrollable circumstances. This Court should affirm.

1. Standard Of Review

In general, an appellate court reviews a trial court's choice of jury instructions for an abuse of discretion. *State v. Hathaway*, 161

Wn. App. 634, 647, 251 P.3d 253 (2011); *State v. Douglas*, 128 Wn, App. 555, 561, 1116 P.3d 1012 (2005). However, when the alleged error is a legal question, the reviewing court reviews the error under a de novo standard. *State v. Jensen*, 149 Wn. App. 393, 398, 203 P.3d 393 (2009).

A challenged jury instruction is reviewed in the context of the jury instructions as a whole. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Juries are presumed to follow the jury instructions provided to them by the trial court. *State v. Ervin*, 158 Wn.2d 746, 756, 147 P.3d 567 (2006).

2. The Trial Court Properly Denied Giving Blanchard's Modified Proposed Uncontrollable Circumstances Affirmative Defense Instruction.

Jury instructions are considered inadequate if they prevent a party from arguing their theory of the case, misstate the applicable law or mislead the jury. *Bell v. State*, 147 Wn.2d 166, 176, 52 P.3d 503 (2002). The State and the defendant have the right to have the trial court instruct the jury upon its theory of the case so long as there is sufficient evidence to support the theory. *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983). A proposed instruction should be given by the trial court if it is not misleading, properly states the law and allows the party to argue her or his theory of the case. *State*

v. Webb, 162 Wn. App. 195, 208, 252 P.3d 424 (2011), *citing State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). “When considering whether a proposed jury instruction is supported by the evidence, the trial court must examine the evidence and draw all reasonable inferences in the light most favorable to the requesting party.” *Webb*, 162 Wn. App. at 208, *citing State v. Hanson*, 59 Wn. App. 651, 656–57, 800 P.2d 1124 (1990).

Blanchard asserts he was entitled to have the trial court submit to the jury his proposed jury instruction for the affirmative defense of uncontrollable circumstances. Appellant Opening Brief (AOB) 7-13. Blanchard proposed a modified WPIC 19.17 that stated:

It is a defense to a charge of bail jumping that:

- (1) uncontrollable circumstances prevented the defendant from personally appearing in court; and
- (2) the defendant did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear; and
- (3) the defendant appeared as soon as such circumstances ceased to exist.

For the purposes of this defense, an uncontrollable circumstance is an act **that included but is not limited to any of the following, acts** of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of man such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is

no time for a complaint to the authorities and no time or opportunity to resort to the courts.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to this charge.

CP 12 (emphasis added). Blanchard argues, as he did in the trial court, that the statutory affirmative defense (and the WPIC that mirrors it) is not limited to the defined uncontrollable events listed in the statute. AOB 9-11. Blanchard asserts the list contained within RCW 9A.76.010(4) is a suggestive list of examples, because if it were an exhaustive the list would impermissibly limit the defense. *Id.* at 9. Blanchard states that due to the trial court's error, his conviction must be reversed and the matter remanded for a new trial.

Blanchard's argument is without merit. Blanchard's reading of RCW 9A.76.010(4), the definition of "uncontrolled circumstances" is contrary to the plain language of the statute. While Blanchard is correct that the items, such as flood, earthquake, and fire are simply examples, they are examples of a specific category of uncontrolled circumstances that the legislature determined would be part of the statutory defense to Bail Jumping. RCW 9A.76.010(4); RCW

9A.76.170(2).¹ The correct statement of the law is contained within WPIC 19.17. *Id.* The trial court properly instructed the jury by giving the appropriate affirmative defense instruction for uncontrollable circumstances. CP 27, *citing* WPIC 19.17.

The legislature made the policy decision to include an affirmative defense within the bail jumping statute:

(1) 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 the this state, or of the requirement to report to a correctional facility for service of a sentence, and who fails to appear or who fails to surrender for service as required is guilty of bail jumping.

(2) It is an affirmative defense to a prosecution under this section that uncontrolled circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

RCW 9A.76.170. Uncontrolled circumstances is a statutorily defined term:

"Uncontrollable circumstances" means an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or

¹ The State's citations to RCW 9A.76.170 will be in reference to the statute as it was at the time Blanchard was charged and convicted, version Laws of 2001, ch. 264 § 3, which can be found online at: <http://lawfilesexternal.wa.gov/biennium/2001-02/Pdf/Bills/Session%20Laws/House/1227.SL.pdf?cite=2001%20c%20264%20%2%A7%203> (last visited 9/8/20). Versions of the 2020 bail jumping statute will be cited as the 2020 session law or ESHB 2231.

treatment, or an act of a human being such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

RCW 9A.76.010. At the heart of Blanchard’s argument is his assertion that all of the listed circumstances contained within RCW 9A.76.010(4) are a non-exhaustive list of examples of uncontrollable circumstances. This is contrary to the basic principles of statutory construction.

When the courts conduct statutory interpretation, the purpose “is to determine and give effect to the intent of the legislature.” *State v. Dennis*, 191 Wn.2d 169, 172, 421 P.3d 944 (2018) (internal quotations and citations omitted).² When interpreting a criminal statute, the court “gives it a literal and strict interpretation.” *Dennis*, 191 Wn.2d at 172. To determine the legislative intent, the court looks to the plain language in the statute by considering four things related to the provision at question: 1) the provision’s actual text, 2) “the context of the statute where the provision is found,” 3) any related provisions, and (4) the entire statutory scheme. *Id.* at 172-73. A statute is ambiguous if, after conducting the inquiry, “there is more

² The other citations to *Dennis* in this paragraph will also have internal quotations and citations omitted.

than one reasonable interpretation of the plain language.” *Id.* at 173. More than one conceivable interpretation does not make a statute ambiguous. *Id.* If a statute is ambiguous, the court “may rely on principle of statutory construction, legislative history, and relevant case law to discern legislative intent.” *Id.*

The actual text of RCW 9A.76.170 states “[i]t is an affirmative defense to a prosecution under this section that uncontrolled circumstances prevented the person from appearing...” An uncontrolled circumstance is a defined term. RCW 9A.76.010(4). The legislature decided to include four categories of possible events that would qualify as “uncontrollable circumstances.” RCW 9A.76.010(4). These categories are, (1) an act of nature; (2) “a medical condition that requires immediate hospitalization or treatment;” (3) “an act of a human being;” and (4) “substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.” RCW 9A.76.010(4). The definition includes, within two of the categories, a non-exhaustive list of examples of what may constitute an act of nature or an act of a human being. *Id.*

Under the basic principles of statutory construction, the plain language of the statute is unambiguous, uncontrollable

circumstances is restricted to the four categories listed in RCW 9A.76.010(4). *Dennis*, 191 Wn.2d at 172-73. Therefore, *expressio unius est exclusio alterius* requires this Court to limit the affirmative defense to the specifically designated categories contained in the statute. *State v. Swanson*, 116 Wn. App. 67, 75-77, 65 P.3d 343 (2003). *Expressio unius est exclusio alterius* “holds that ‘where a state specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature.’” *Swanson*, 116 Wn. App. at 75, *citing Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969). If the legislature intended an uncontrollable circumstance to include “act[s] that include but [are] not limited to any of the following” four categories of uncontrollable circumstance, the language Blanchard argues is the appropriate legal standard for the affirmative defense, it would have written the definition in such a manner. RCW 9A.76.010(4); *Swanson*, 116 Wn. App. at 75-76; CP 12. “*Expressio unius est exclusio alterius* demands that this court give weight and significance to this obvious legislative vacancy.” *Swanson*, 116 Wn. App. at 76. There is no basis to expand the affirmative defense

beyond the four categories listed in the statutory definition of “uncontrollable circumstances.”

Indeed, none of the cases cited by Blanchard supports his faulty statutory interpretation of the affirmative defense. See, AOB 9-11, citing *State v. Fredrick*, 123 Wn. App. 347, 97 P.3d 47 (2004); *State v. Lundy*, 162 Wn. App. 865, 256 P.3d 466 (2011) (published in part);³ *State v. White*, 137 Wn. App. 227, 152 P.3d 364 (2007); *State v. Carver*, 122 Wn. App. 300, 93 P.3d 947 (2004). Blanchard is correct, none of the cases hold RCW 9A.76.010(4) contains an exclusive list. AOB 9. That is because, as argued above, RCW 9A.76.010(4) contains an exclusive list as to the four categories of “uncontrollable circumstances” but also contains a non-exclusive list of examples for two of the categories, an act of nature and act of a human being. Blanchard asserts appellate courts have reviewed different fact patterns to consider circumstances outside the listed examples from the affirmative defense of bail jumping to determine whether the legal threshold has been met to show the defendant “was actually unable to appear in court.” AOB 10. In the cases cited

³ *Lundy* is published in part. The portion cited by Blanchard, regarding bail jumping is in the unpublished portion, as this Court determined only the Reasonable Doubt Instruction section warranted publication. *Lundy's* publication date is July 26, 2011, therefore it is outside the GR 14.1(a)'s permitted citation to unpublished opinions (on or after March 1, 2013). The State respectfully requests this Court disregard any argument citing *Lundy* by Blanchard.

by Blanchard, the appellate courts reviewed the fact patterns for varying reasons, to the extent necessary to rule upon the legal challenges brought in the appeals. Blanchard's overarching statement is an attempt to equate "inability to attend on the date scheduled" with uncontrollable circumstances. They are not the same.

Further, Blanchard mischaracterizes this Court's ruling regarding the affirmative defense in *Fredrick*, 123 Wn. App. 347. AOB 9-10. Blanchard states, "this Court has ruled uncontrollable circumstances apply when they cause an 'inability to attend on the date' scheduled." *Id.*, citing *Fredrick*, 123 Wn. App. at 353. The holding in *Fredrick* does not state this. *Fredrick*, 123 Wn. App. at 353. In *Fredrick*, this Court stated, "[t]he defense provided in the statute relates to the defendant's inability to attend on the date of which she has been previously given notice." *Id.* The Court was explaining how the affirmative defense did "not negate the knowledge element of" bail jumping. *Id.* Additionally, this Court found *Fredrick's* evidence, that she was ill, did "not meet the statutory definition of 'uncontrollable circumstances,'" therefore her affirmative defense claim failed. *Id.* at 352-53.

Blanchard appears to assert that an appellate court, by disposing of the issue raised by an appellant – that their factual basis met the criteria for uncontrollable circumstances – is a signal that the reviewing courts considered circumstances outside the statutory listed categories of uncontrollable circumstances to qualify for the affirmative defense. AOB 10-11. A defendant has the right to appeal their conviction and raise issues they see fit. Appellate courts are required to review fact patterns to determine if they sufficiently meet legal thresholds. This consideration does not mean the court endorses the proposition that the facts are relevant to the legal standard, as appellate courts are not the gatekeepers to the evidence they review.

Blanchard cites three cases regarding their discussion of other “unlisted” circumstances. AOB 10.⁴ Yet, these cases are all distinguishable from Blanchard’s and the issue at hand. In *White*, the court was asked to determine if the general common law defense of necessity was available in a prosecution for bail jumping rather than affirmative defense of “uncontrollable circumstances. *White*, 137 Wn. App. 227. *Fredrick*, as discussed above, was predominately about

⁴ The State is disregarding Blanchard’s citation to *Lundy*, 162 Wn. App. 865 as explained above.

whether the affirmative defense of uncontrollable circumstances effect on the knowledge element. *Fredrick*, 123 Wn. App. 351-53. In *Carver*, the affirmative defense was not even considered, only whether “I forgot” the specific court date was a defense, negating the knowledge requirement. *Carver*, 122 Wn. App. at 305-06. None of these cases support those proposition that the courts have considered the statutory defense to include circumstances beyond the four categories listed within RCW 9A.76.010(4).

The “uncontrollable circumstances” affirmative defense instruction given by the trial court was a correct statement of the law and the appropriate instruction to give. CP 27, *citing* WPIC 19.17; RCW 9A.76.010(4); RCW 9A.76.170. Broadening the definition of “uncontrollable circumstances” to include acts outside the four categories listed within the statute, as Blanchard’s proposed jury instruction did, is a misstatement of the law. Blanchard is not entitled to an instruction that is misleading, as a jury instruction is inadequate when it is a misstatement of the applicable law. *Redmond*, 150 Wn.2d at 493; *Bell*, 147 Wn.2d at 174. Blanchard could have requested the trial court not give the unmodified WPIC 19.17, uncontrollable circumstances instruction or, as he chose, he could

go forward and argue to the jury that his circumstances somehow fit into the statutory defense.

A defendant does not simply get to change a statutory affirmative defense because the facts of his case do not fit the statutory definition required to assert the defense. Blanchard argues the trial court cannot refuse to provide a jury instruction that corresponds with the evidence and defense the trial court allowed him to present. AOB 12, *citing Redmond*, 150 Wn.2d at 495. *Redmond* is distinguishable from Blanchard's circumstances. Redmond presented an argument for self-defense, including that he did not have a duty to retreat, yet the trial court refused to give the no duty to retreat instruction. *Redmond*, 150 Wn.2d at 493-95. The established case law requires a trial court to give a no duty to retreat instruction when there is sufficient evidence to support that a person is assaulted in a place they had the right to be. *Id.* at 493. Failing to give this instruction is reversible error. *Id.* at 495.

There is no well-established law that supports Blanchard's definition of uncontrollable circumstances, as Blanchard's definition expands upon the statutory definition used for the statutory affirmative defense. Blanchard was still able to assert a defense to bail jumping. The trial court gave the appropriate jury instruction with

the correct legal standard. There was no error and this Court should affirm.

B. BLANCHARD DID NOT PROVE THE STATUTORY AFFIRMATIVE DEFENSE OF UNCONTROLLABLE CIRCUMSTANCES.

Blanchard did not prove, by a preponderance of the evidence, the statutory affirmative defense of uncontrollable circumstance for his charge of Bail Jumping. Therefore, contrary to his assertion, his conviction should be affirmed.

1. Standard Of Review.

The appropriate standard of review for cases where a defendant is required to prove an affirmative defense by a preponderance of the evidence “is whether, considering the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove the defense by a preponderance of the evidence.” *State v. Lively*, 130 Wn.2d 1, 17, 921 P.2d 1035 (1996).

2. A Rational Trier Of Fact Could Have Found Blanchard Failed To Prove By A Preponderance Of The Evidence The Statutory Affirmative Defense For Bail Jumping.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397

U.S. 358, 362-65, 90 S. Ct 1068, 25 L. Ed. 2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury’s by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). “The fact finder [...] is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence.” *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

Blanchard argues his proved by a preponderance of the evidence the affirmative defense to support an acquittal for his April 18, 2019 Bail Jumping charge. AOB 13-20. A person charged with Bail Jumping may avail himself or herself to the affirmative defense provided in the bail jumping statute:

It is an affirmative defense to a prosecution under this section that uncontrolled circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

RCW 9A.76.170(4). Blanchard asserts his absence due to being incarcerated in Oregon satisfies the uncontrollable circumstances prong of the defense because it made him incapable of appearing. AOB 14-17. Blanchard argues he did not recklessly contribute to the circumstances because it was being incarcerated in Lewis County that caused Blanchard to miss his court date in Oregon that triggered the events. AOB 17-19. Blanchard asserts he appeared in court the first day after he could after the missed court date. AOB 19.

Blanchard's arguments are contrary to the law and the facts presented at trial. A reasonable trier of fact could have found Blanchard failed to prove his defense by a preponderance of the evidence, therefore his conviction must be affirmed.

a. Blanchard's incarceration in Oregon does not satisfy the uncontrollable circumstances prong of the affirmative defense to Bail Jumping.

Blanchard continually asserts that simply being incapable of appearing in court is sufficient to meet the definition of uncontrollable circumstances. Blanchard points to the uncontroverted evidence he was incarcerated in a different jurisdiction as evidence he was incapable of appearing in court on April 18, 2019. Incarceration in jail in a different jurisdiction is not an uncontrollable circumstance for purposes of the statutory affirmative defense for Bail Jumping. RCW 9A.76.010(4); RCW 9A.76.170(2). Uncontrollable circumstances is a statutorily defined term confined to four categories of circumstances: act of nature, "medical condition that requires immediate hospitalization or treatment," "act of a human being," "or substantial bodily injury in the immediate future for which there is not time for a complaint to the authorities and no time or opportunity to resort to the courts." RCW 9A.76.010(4). The statute gives a non-exhaustive list of examples for acts of nature (flood, earthquake, and fire) and acts of human being (automobile accident, threats of death, and forcible sexual attack). *Id.* Incapable of appearing of court would only be sufficient if Blanchard was incapable of appearing due to one of the listed categories.

Incarceration in jail does not meet any of the four categorical definitions. In *State v. Livingston*, this Court affirmed the trial court's finding that being incarcerated in another jurisdiction did not meet the definition of uncontrollable circumstances because it "was not an act of God." *State v. Livingston*, 197 Wn. App. 590, 389 P.3d 753, LEXIS 75, slip. op. at 14-16. (2017) (published in part, unpublished portion is not precedential and cited for persuasive purposes only, GR 14.1). An act of God is synonymous with act of nature. Black's Law Dictionary, 43 (11th ed. 2019). Incarcerated in another jurisdiction does not meet the other three categories either. Therefore, Blanchard's incarceration was not an uncontrollable circumstance, a reasonable trier of fact could have found Blanchard failed to prove his affirmative defense by a preponderance of the evidence, and his conviction should be affirmed. *Lively*, 130 Wn.2d at 17.

b. Blanchard did contribute to the creation of his circumstances in reckless disregard of his requirement to appear.

The trial court established probable cause to believe Blanchard committed the crime of Possession of a Stolen Vehicle. CP 1-4; EX 7; CrR 3.2.1. According to Blanchard's testimony, he was incarcerated in Oregon because he had missed his court date for a preexisting case in Portland while being held in custody for his Lewis

County Possession of a Stolen Vehicle case. 170. Yet, it appeared that while the case existed prior to his Lewis County case, his Portland court dates were set after he was taken into custody in Lewis County. RP 182.

Blanchard suggests that because the only reason he was in custody in Portland was because of his missed court date there, and the only reason he supposedly missed his court date in Portland was because of the Lewis County charge, that he was later acquitted on, he did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear. AOB 17-19. A rational trier of fact could have found that while there was not sufficient evidence to convict Blanchard beyond a reasonable doubt of the Possession of a Stolen Vehicle charge, the trial court had adequate reason to establish probable cause and hold Blanchard on the charge. A rational trier of fact could have determined Blanchard's conduct in regards to being in custody in Portland were of his own creation and were in reckless disregard to his requirement to appear back in Lewis County Superior Court. Blanchard did not prove this element by a preponderance of the evidence and his conviction should be affirmed.

c. Blanchard did fail to appear as soon after his incarceration ceased exist.

A person must appear in court as soon as the circumstance that caused their inability to attend court ceased to exist. RCW 9A.76.170(4). Blanchard argues he met this element because he was transported back to the Lewis County jail when he was released from Portland. AOB 19. This is not accurate. Blanchard was released from custody in Portland, then arrested on Lewis County's warrant and reincarcerated. RP 171-72, 177. It was only after Blanchard was incarcerated again that he was transported up to Lewis County. RP 172, 177.

Blanchard was required to immediately return to Lewis County to appear in court to address his missed court date, or as soon as the court would put Blanchard on the calendar. Blanchard failed to do this. Instead, Blanchard was released in Portland and had to be arrested on Lewis County's warrant, forcing Blanchard to come back to Lewis County to handle this matter. Blanchard has not met the third element of the affirmative defense by a preponderance of the evidence and this Court should affirm Blanchard's conviction.

C. THE 2020 LEGISLATIVE AMENDMENTS TO THE BAIL JUMPING STATUTE, LAWS OF 2020, ch. 19, ARE NOT RETROACTIVE, AND THEREFORE, DO NOT APPLY TO BLANCHARD.

Blanchard was charged with Bail Jumping, former RCW 9A.76.170 for failing to appear for his court date as required on April 18, 2019. CP 5-6; RCW 9A.76.170 (Laws of 2001, ch. 264, § 3). On March 18, 2020, Governor Inslee approved Engrossed Substitute House Bill 2231, an act that changed the bail jumping statute. Laws of 2020, ch. 19. Blanchard's conduct would no likely longer constitute bail jumping under the new law. *Id.*

Absent contradictory legislative indication, statutes are generally presumed to apply prospectively. *State v. Humphrey*, 139 Wn.2d 53, 57, 983 P.2d 1118 (1999). Amendments to statutes are also presumed to be prospective in application. *In re Pers. Restraint of Martin*, 129 Wn. App. 135, 144, 118 P.3d 387 (2005). The savings statute is clear:

Whenever any criminal or penal statute shall be 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, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time

of its enactment, unless a contrary intention is expressly declared therein.

RCW 10.01.040. “The presumption of prospective application can be overcome only by showing (1) the legislature intended the amendment to apply retroactively, (2) the amendment is curative, or (3) the amendment is remedial.” *In re Martin*, 129 Wn. App. at 144 (internal citations omitted).

There is an exception to the general presumption of prospective application, “if the statute is remedial and applies to practice, procedure, or remedies and does not affect a substantive or vested right.” *State v. Blank*, 131 Wn.2d 230, 248, 930 2d 1213 (1997) (internal citations omitted). It is the precipitating event for a statute’s application that generally defines if that statute is prospective or retrospective. *Blank*, 131 Wn.2d at 248. When the precipitating event for the amendment to the statute occurs after the effective date of the amendment, the statute operates prospectively. *Id.*

Blanchard argues this Court should vacate and remand his conviction for felony bail jumping to determine whether his actions constituted a gross misdemeanor or no crime at all because of the legislative changes to the bail jumping statute, which took effect June 11, 2020. Appellant’s Supplemental Brief (ASB) 17; see *also*, Laws

of 2020, ch. 19 (ESHB 2321). Blanchard 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, Blanchard 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 220, 239, 95 P.3d 1225 (2004), *citing Heath*, 85 Wn.2d 197-98.

ESHB 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 apply 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).

It has been established that if a statutory amendment is penal and subject to RCW 10.01.040, there is no presumption it applies retroactively, even if the statute is patently remedial. *State v. Kane*, 101 Wn. App. 607, 613, 5 P.3d 741 (2000). 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. *Kane*, 101 Wn. App. at 613; see also, *Humphrey*, 139 Wn.2d at 63.

Blanchard'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 ESHB 2231 is without merit. In *Wiley*, our Supreme Court held 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. *Wiley*, 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. *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 Kane*, 101 Wn. App. at 612.

ESHB 2231 does not contain words that fairly convey the intention that it apply retroactively. ESHB 2231 modifies the existing crime of felony bail jumping to change the elements and add 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*, No. 50972-5-II, slip op. at 11, LEXIS 1304 (Wash. Ct. App. May 21, 2019) (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).⁵ 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

⁵ Unpublished opinion, not offered as precedential authority, but for whatever this Court deems appropriate. GR 14.1.

offense was committed.” *State v. Jenks*, 12 Wn. App. 2d 588, 597, 459 P.3d 389 (2020). The decision in *Wiley* does not support Blanchard’s claim that the amendments effective June 11, 2020, should apply to his case.

Blanchard 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 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.” *Ramirez*, 191 Wn.2d at 749. 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*, ESHB 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 *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. *Jenks*, 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, *citing Ramirez*, 191 Wn.2d at 747. 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*, 12 Wn. App. 2d 895, 900-03, 460 P.3d 1086 (2020).

As with the application of amendments to the persistent offender act in *Jenks* and *Molia*, there is nothing in ESHB. 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. Blanchard's offense occurred on April 18, 2019. Blanchard was properly prosecuted and sentenced pursuant to the law in effect at the time of his offense.

IV. CONCLUSION

Blanchard was not entitled to a jury instruction modifying the statutory affirmative defense for bail jumping of uncontrollable circumstances. The trial court properly gave the appropriate legal standard, a non-modified WPIC 19.17. Blanchard did not prove the affirmative defense by a preponderance of the evidence. Finally, ESHB 2231 does not apply retroactively to Blanchard's Bail Jumping conviction. Therefore, this Court should affirm Blanchard's conviction.

RESPECTFULLY submitted this 16th day of September,
2020.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

Appendix A

Engrossed Substitute House Bill 2231

Bail Jumping – Failure to Appear or Surrender

Laws of 2020, Ch. 19

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE HOUSE BILL 2231

Chapter 19, Laws of 2020

66th Legislature
2020 Regular Session

BAIL JUMPING--FAILURE TO APPEAR OR SURRENDER

EFFECTIVE DATE: June 11, 2020

Passed by the House March 7, 2020
Yeas 53 Nays 44

LAURIE JINKINS

Speaker of the House of Representatives

Passed by the Senate March 4, 2020
Yeas 26 Nays 20

CYRUS HABIB

President of the Senate

Approved March 18, 2020 10:22 AM

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Bernard Dean, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE HOUSE BILL 2231** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BERNARD DEAN

Chief Clerk

FILED

March 18, 2020

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE HOUSE BILL 2231

AS AMENDED BY THE SENATE

Passed Legislature - 2020 Regular Session

State of Washington **66th Legislature** **2020 Regular Session**

By House Public Safety (originally sponsored by Representatives Pellicciotti, Hudgins, Appleton, Davis, Gregerson, Santos, Frame, Pollet, Fitzgibbon, Thai, Bergquist, Ormsby, Wylie, Pettigrew, Peterson, and Riccelli)

READ FIRST TIME 02/05/20.

1 AN ACT Relating to bail jumping; amending RCW 9A.76.170; adding a
2 new section to chapter 9A.76 RCW; and prescribing penalties.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 9A.76.170 and 2001 c 264 s 3 are each amended to
5 read as follows:

6 (1) ~~((Any person having been))~~ A person is guilty of bail jumping
7 if he or she:

8 (a) Is released by court order or admitted to bail ((with
9 knowledge)), has received written notice of the requirement of a
10 subsequent personal appearance for trial before any court of this
11 state, and fails to appear for trial as required; or

12 (b)(i) Is held for, charged with, or convicted of a violent
13 offense or sex offense, as those terms are defined in RCW 9.94A.030,
14 is released by court order or admitted to bail, has received written
15 notice of the requirement of a subsequent personal appearance before
16 any court of this state or of the requirement to report to a
17 correctional facility for service of sentence, and ((who)) fails to
18 appear or ((who)) fails to surrender for service of sentence as
19 required ((is guilty of bail jumping)); and

20 (ii)(A) Within thirty days of the issuance of a warrant for
21 failure to appear or surrender, does not make a motion with the court

1 to quash the warrant, and if a motion is made under this subsection,
2 he or she does not appear before the court with respect to the
3 motion; or

4 (B) Has had a prior warrant issued based on a prior incident of
5 failure to appear or surrender for the present cause for which he or
6 she is being held or charged or has been convicted.

7 (2) It is an affirmative defense to a prosecution under this
8 section that uncontrollable circumstances prevented the person from
9 appearing or surrendering, and that the person did not contribute to
10 the creation of such circumstances (~~(in reckless disregard of)~~) by
11 negligently disregarding the requirement to appear or surrender, and
12 that the person appeared or surrendered as soon as such circumstances
13 ceased to exist.

14 (3) Bail jumping is:

15 (a) A class A felony if the person was held for, charged with, or
16 convicted of murder in the first degree;

17 (b) A class B felony if the person was held for, charged with, or
18 convicted of a class A felony other than murder in the first degree;

19 (c) A class C felony if the person was held for, charged with, or
20 convicted of a class B or class C felony; or

21 (d) A misdemeanor if the person was held for, charged with, or
22 convicted of a gross misdemeanor or misdemeanor.

23 NEW SECTION. Sec. 2. A new section is added to chapter 9A.76
24 RCW to read as follows:

25 (1)(a) A person is guilty of failure to appear or surrender if he
26 or she is released by court order or admitted to bail, has received
27 written notice of the requirement of a subsequent personal appearance
28 before any court of this state or of the requirement to report to a
29 correctional facility for service of sentence, and fails to appear or
30 fails to surrender for service of sentence as required; and

31 (b)(i) Within thirty days of the issuance of a warrant for
32 failure to appear or surrender, does not make a motion with the court
33 to quash the warrant, and if a motion is made under this subsection,
34 he or she does not appear before the court with respect to the
35 motion; or

36 (ii) Has had a prior warrant issued based on a prior incident of
37 failure to appear or surrender for the present cause for which he or
38 she is being held or charged or has been convicted.

1 (2) It is an affirmative defense to a prosecution under this
2 section that uncontrollable circumstances prevented the person from
3 appearing or surrendering, that the person did not contribute to the
4 creation of such circumstances by negligently disregarding the
5 requirement to appear or surrender, and that the person appeared or
6 surrendered as soon as such circumstances ceased to exist.

7 (3) Failure to appear or surrender is:

8 (a) A gross misdemeanor if the person was held for, charged with,
9 or convicted of a felony; or

10 (b) A misdemeanor if the person was held for, charged with, or
11 convicted of a gross misdemeanor or misdemeanor.

Passed by the House March 7, 2020.

Passed by the Senate March 4, 2020.

Approved by the Governor March 18, 2020.

Filed in Office of Secretary of State March 18, 2020.

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