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Supreme Court No. 100491-5
(COA No. 53870-9-II)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAMON BRADLEY BLANCHARD,

Petitioner.

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

PETITION FOR REVIEW

KATE L. BENWARD
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711 x125
katebenward@washapp.org

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER AND DECISION BELOW 1

B. ISSUES PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE 3

D. ARGUMENT 6

1. The Court of Appeals misapplied this Court's precedent in refusing to retroactively apply the remedial changes to the bail jumping statute. 6

a. Mr. Blanchard was convicted of a felony for missing a court date—conduct the legislature deemed no longer criminal while his case was pending. 6

b. The legislature's change in the law that makes missing a court date no crime at all is an expression of intent that the laws should apply retroactively. 10

c. This Court should grant review because the Court of Appeals' misapplication of this Court's caselaw results in Mr. Blanchard remaining convicted of a felony for non-criminal conduct. 15

2. The court wrongly denied Mr. Blanchard's proposed instruction in support of his defense that being detained in jail qualified as an uncontrollable circumstances preventing his court appearance. 16

a. The accused is entitled to an instruction that encompasses the defense theory of the case when it accurately states the law. 16

b. Mr. Blanchard was denied his proposed instruction on the affirmative defense of "uncontrollable circumstances." 17

c. This Court should accept review because the Court of Appeals' erroneous interpretation of the statute denied Mr. Blanchard the right to a full defense. 21

3. The Court of Appeals erred in finding Mr. Blanchard did not prove his absence was due to uncontrollable circumstances. 24

a. "Uncontrollable circumstances" is a defense to bail jumping. 24

b. This Court should accept review because the Court of Appeals erroneously found Mr. Blanchard failed to prove the uncontrollable circumstances defense. 25

E. CONCLUSION 29

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 260 P.3d 857 (2011) 24
State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000) 17
State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999) 23
State v. Grant, 89 Wn.2d 678, 575 P.2d 210 (1978) 11, 14
State v. Griffin, 100 Wn.2d 417, 670 P.2d 265 (1983) 22
State v. Heath, 85 Wn.2d 196, 532 P.2d 621 (1975) 11, 13
State v. Henderson, 192 Wn.2d 508, 430 P.3d 637 (2018) 16
State v. Jefferson, 192 Wn.2d 225, 429 P.3d 467 (2018) 7, 9
State v. Jenks, 197 Wn.2d 708, 720, 487 P.3d 482 (2021) 12
State v. Lively, 130 Wn.2d 1, 921 P.2d 1035 (1996) 25
State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018) 8, 9
State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003) 17
State v. Staley, 123 Wn.2d 794, 872 P.2d 502 (1994) 16
State v. Wiley, 124 Wn.2d 679, 880 P.2d 983 (1994) 11, 13, 15
State v. Williams, 132 Wn.2d 248, 937 P.2d 1052 (1997) 22
State v. Zornes, 78 Wn.2d 9, 475 P.2d 109 (1970) 11

Statutes

Laws of 1901 ex. s. ch. 6 § 1.3 10
Laws of 2020, ch. 19, § 1 .... 5, 6, 7, 13
RCW 10.01.040 10
RCW 9A.76.010 19
RCW 9.94A.030 12
RCW 9A.76.170 .... passim
RCW 9A.76.190 .... 6, 7

Other Authorities

Senate Bill Report, ESHB 2231 (Feb. 27, 2020) 15
11 Wash. Prac., Pattern Jury Instr. Crim. 19.17 (4th Ed) 19

Rules

RAP 13.4(b)..2, 3, 15, 16, 23, 29

Court of Appeals Decisions

City of Spokane v. Beck, 130 Wn. App. 481, 123 P.3d 854 (2005)..... 24, 25, 28
State v. Carver, 122 Wn. App. 300, 93 P.3d 947 (2004)..................... 21
State v. Fredrick, 123 Wn. App. 347, 97 P.3d 47 (2004) 20, 21, 26
State v. Huxel, 36191-8-III, 2020 WL 1656464 (Mar. 19, 2020) 8, 9
State v. Lundy, 162 Wn. App. 865, 256 P.3d 466 (2011) 20
State v. White, 137 Wn. App. 227, 152 P.3d 364 (2007)..................... 20

Constitutional Provisions

U.S. Const. amend. VI 16
U.S. Const. amend. XIV 16, 24

United States Supreme Court Decisions

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 114 S. Ct. 1164, 1170, 127 L. Ed. 2d 500 (1994)... 20
Crane v. Kentucky, 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)... 16
In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 16

A. IDENTITY OF PETITIONER AND DECISION BELOW

Damon Blanchard, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review dated November 16, 2021, attached as Appendix A, pursuant to RAP 13.3 and RAP 13.4.

B. ISSUES PRESENTED FOR REVIEW

1. The State charged Mr. Blanchard with felony bail jumping when his incarceration in another jurisdiction made him unable to attend a court date. Mr. Blanchard was ultimately acquitted of the charged property crime, but convicted of felony bail jumping. While Mr. Blanchard's case was pending, the Legislature passed a new law decriminalizing the conduct of failing to attend a court hearing under the circumstances in Mr. Blanchard's case.

Courts generally apply a new, remedial statute in cases pending on direct review. Additionally, an amendment that downgrades an entire offense conclusively demonstrates the Legislature's intent that the amendment apply retroactively.

Contravening both principles, the Court of Appeals held the amendments to the bail jumping statute do not apply to Mr. Blanchard's case that was pending on appeal. This Court should grant review. RAP 13.4(b)(1), (4).

2. The accused is entitled to instructions that allow them to argue their theory of the case, as long as the instructions accurately state the law, are not misleading, and are supported by sufficient evidence. U.S. Const. amend. XIV, VI. The Court of Appeals found Mr. Blanchard was not entitled to his proposed instruction that correctly instructed the jury that the statutory defense of "uncontrollable circumstances" was a non-exclusive list of circumstances. The Court of Appeals erroneously concluded that the "uncontrollable circumstances" listed in the statute was an exclusive list. This Court should grant review because the Court of Appeals misconstrued the statute and denied Mr. Blanchard the right to present a full defense. RAP 13.4(b)(3).

3. Mr. Blanchard proved the three elements of "uncontrollable circumstances," the affirmative defense for bail jumping. He was physically incapable of appearing in court due to the "uncontrollable circumstance" of being detained in jail, did not recklessly contribute to the circumstance of being detained in a separate jurisdiction, and he appeared as soon as the circumstances allowed it. Still the Court of Appeals affirmed. This Court should accept review to determine whether his conviction is supported by sufficient evidence. RAP 13.4(b)(3).

C. STATEMENT OF THE CASE

Damon Blanchard was charged with possession of a stolen vehicle. CP 1-2. The court released him on an unsecured appearance bond for this offense on March 14, 2019. RP 169; Ex. 7. However, while he was held in Lewis County, Mr. Blanchard missed a court date in Oregon and a warrant was issued for his arrest. RP 169-70. Mr. Blanchard was transported

to Oregon on this warrant instead of being released in Lewis County. RP 169-70.

Because the jail had transported him to Oregon, Mr. Blanchard missed his next court date in Lewis County on April 18, 2019. RP 170-71; Ex. 10. Mr. Blanchard was released in Oregon and transported to Lewis County where he quashed his warrant for failure to appear five days after the April 18 hearing. RP 177, 183; CP 5, 60-61. Due to this missed date, the prosecutor charged him with bail jumping. CP 5-6.

At trial, Mr. Blanchard requested an instruction setting out the elements of "uncontrollable circumstances," the statutory defense to bail jumping. CP 12. The proposed language stated "uncontrollable circumstances" were not limited to the examples listed in the statute. *Id.* The trial court denied Mr. Blanchard's proposed instruction but told him he could argue his defense to the jury. RP 192. However, the court also instructed the jury that the law was contained in the

instructions, not the arguments made by counsel. CP 27 (instruction 11).

Mr. Blanchard testified about his purchase of the vehicle, which he had not known was stolen until being so informed by the arresting officer. RP 162-68; 172-76. He also testified regarding the circumstances of missing court in both jurisdictions, resulting in successive incarcerations, successive warrants, and eventual transport back to Lewis County. RP 169-72; RP 177; RP 183.

The prosecutor argued in closing that Mr. Blanchard's incarceration was not an uncontrollable circumstance. *See* RP 208. The jury acquitted Mr. Blanchard of the original charge, but convicted him of bail jumping. CP 47-48

After Mr. Blanchard was sentenced, the Legislature determined such failures to appear should be no crime at all. Op. at 8 (citing Laws of 2020, ch. 19, § 2; RCW 9A.76.170(1)(b)). The Court of Appeals affirmed Mr. Blanchard's bail jumping conviction, finding he did not benefit

from the legislature's decriminalization of bail jumping while his case was still pending.

D. ARGUMENT

1. The Court of Appeals misapplied this Court's precedent in refusing to retroactively apply the remedial changes to the bail jumping statute.

a. Mr. Blanchard was convicted of a felony for missing a court date—conduct the legislature deemed no longer criminal while his case was pending.

Under the law as it existed during Mr. Blanchard's trial, a criminal defendant's failure to appear at any hearing "before any court of this state" was punishable as felony bail jumping. Former RCW 9A.76.170(1), (3); see Laws of 2020, ch. 19, § 1. Effective June 2020, the Legislature amended the statute to make failure to appear a felony only if (1) the missed hearing is part of a trial, or (2) the defendant is charged with a violent or sex offense. RCW 9A.76.170(1); Laws of 2020, ch. 19, § 1.

Otherwise, failure to appear is no crime at all as long as the defendant appears within 30 days to move to quash any warrant that may have issued. RCW 9A.76.190(1); Laws of

2020, ch. 19, § 2. If the defendant does not move to quash within 30 days or previously had a warrant issue for failure to appear in the same case, failure to appear is a misdemeanor. RCW 9A.76.190(1), (3); Laws of 2020, ch. 19, § 2.

Because Mr. Blanchard's case is on direct appeal and is not final, he is entitled to the benefit of the change in the law. "[S]tatutes generally apply prospectively from their effective date unless a contrary intent is indicated." *State v. Jefferson*, 192 Wn.2d 225, 245, 429 P.3d 467 (2018). A new statute even affects actions in a pending case that occurred before it was enacted "if the 'triggering event' to which the new enactment might apply has not yet occurred." *Id.* For example, "when the new statute concerns a postjudgment matter like the sentence," it "will apply to the sentence . . . while the case is pending on direct appeal, even though the charged acts have already occurred." *Id*. at 247.

This Court recently held that the Legislature's 2018 amendments to the statute governing legal financial obligations

applied to cases then pending on direct appeal. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). This Court observed that the "precipitating event" for the newly amended statute's application—the imposition of costs on a convicted person—is "the termination of the defendant's case." *Id.* at 749 (quoting *State v. Blank*, 131 Wn.2d 230, 249, 930 P.2d 1213 (1997)). The 2018 amendments therefore applied to the imposition of LFOs in Mr. Ramirez's judgment and sentence because his case was pending on direct appeal and not final. *Id*.

Even more recently, the Court of Appeals applied these common law principles in finding amendments to the statute allowing for the vacation of misdemeanor offenses applied to cases pending on appeal. *State v. Huxel*, 36191-8-III, 2020 WL 1656464, at 1-2 (Mar. 19, 2020) (unpublished, see GR 14.1). In *Huxel*, the trial court had concluded the prior offense was statutorily ineligible for vacation, and the appellant challenged this denial of his motion to vacate. *Id.* at 1. While the appeal was pending, the Legislature expanded a trial court's ability to

vacate offenses. *Id.* Based on *Ramirez*, and because his appeal was pending when the statutory amendment was enacted, the Court accepted the State's concession that this change in the law applied to the appellant's case. *Id.* at 2. *Huxel* demonstrates that *Ramirez* applies beyond the context of legal financial obligations. *Id.*

Applying the analysis in *Ramirez* and *Jefferson,* the "precipitating event" of the bail jumping amendments is the postjudgment imposition of sentence. Their effect is to provide that a person who misses a non-trial court hearing will either be sentenced for a misdemeanor or not be sentenced at all, rather than be sentenced for a felony under the Sentencing Reform Act of 1981 ("SRA"). Laws of 2020, ch. 19, §§ 1, 2. Because the triggering event is the imposition of sentence at the end of the case, the amendments apply to all cases pending on direct appeal and not yet final. *Ramirez,* 191 Wn.2d at 749.

The Court of Appeals acknowledged that Mr. Blanchard's failure to appear at a court hearing for a property

crime is not a crime under the 2020 bail jumping statute. Op. at 8. Rather than apply the common law rules, the Court of Appeals applied the savings statute in RCW 10.01.040. Op. at 8. This was error, because the bail jumping statute's removal of a criminal penalty for the conduct Mr. Blanchard is convicted of is an expression of legislative intent that no person should be convicted of and sentenced for a felony offense based on missing a mere court hearing, which makes it retroactive.

b. The legislature's change in the law that makes missing a court date no crime at all is an expression of intent that the laws should apply retroactively.

The legislature in 1901 purported to modify the common-law rule by enacting what is referred to as the savings statute, RCW 10.01.040. Laws of 1901 ex. s. ch. 6 § 1.3. This statute provides that absent an express statement by the legislature that the amendments were intended to apply retroactively, "all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced." RCW 10.01.040.

Because this statute is in derogation of the common law, this Court has interpreted it narrowly and reasoned that the legislature may enact a retroactive criminal law to the benefit of the defendant if the statute "fairly convey[s] that intention." *State v. Grant,* 89 Wn.2d 678, 683, 575 P.2d 210 (1978); *State v. Zornes*, 78 Wn.2d 9, 13, 475 P.2d 109 (1970).

When the Legislature reduces the maximum punishment for a crime, that reduction is presumed to apply to all cases. *State v. Wiley,* 124 Wn.2d 679, 687, 880 P.2d 983 (1994). In such cases, 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. *State v. Heath*, 85 Wn.2d 196, 198, 532 P.2d 621 (1975). *Wiley* recognized this is so because "the reclassification of a crime is no mere refinement of elements, but rather a fundamental reappraisal of the value of punishment." 124 Wn.2d at 687.

This Court's recent decision considering application of the savings clause in *State v. Jenks* illustrates this point. In *Jenks,* this Court considered the application of the savings clause to ESSB 5228, which removed second degree robbery from the list of most serious offenses in 2019. *State v. Jenks*, 197 Wn.2d 708, 720, 487 P.3d 482 (2021). This Court noted that the legislature described the statute only as an "AN ACT Relating to removing robbery in the second degree from the list of offenses that qualify an individual as a persistent offender; and amending RCW 9.94A.030." *Id.* (citing LAWS OF 2019, ch. 187 pmbl.).

Unlike in *Jenks,* where the statute "did nothing more than remove second degree robbery from the list of most serious offenses," *id.,* the new bail jumping decriminalizes a felony offense, which is a recognition that it is fundamentally unfair to impose criminal liability for missing a court appearance. While here, as in *Jenks,* the language of the amended bail jumping statute does not expressly state whether the law was intended to

have retroactive effect, the difference is that the bail jumping statute created a new, lesser offense of failure to appear or surrender or made it no crime at all. Laws of 2020, ch. 19, § 1 (1), § 2(1)(b). Given the legislature's determination that imposing criminal liability in circumstances like Mr. Blanchard's is unjust, no purpose is served by applying the old law to his case. *See Heath,* 85 Wn.2d at 198 (when legislature has effectively created a new reduced penalty for a crime, "no purpose would be served by imp liability for missing non-trial hearings.). The fair implication or import of the law is that the legislature intended to not criminalize Mr. Blanchard's conduct and that this change in the law should apply retroactively to his case which is not final.

By downgrading bail jumping to a misdemeanor or no crime at all, the Legislature "has judged the specific criminal conduct less culpable." *Wiley,* 124 Wn.2d at 687. Because the Legislature necessarily intended retroactive application, the

saving statute does not apply. *Id*. at 687–88; *Grant,* 89 Wn.2d at 683.

Remarks during debate on the bill further show the Legislature intended the amendments to apply retroactively. Legislators in both houses noted the existing statute was unjustly harsh and often abused. Hearing on HB 2231 Before H. Pub. Safety Comm., 66th Leg. 2020 (Jan. 14, 2020) (Rep. Pellicciotti, 41:50–46:55, 47:43–48:21; Rep. Klippert, 46:55–47:34);[1] Hearing on ESHB 2231 Before S. Law & Just. Comm., 66th Leg. 2020 (Feb. 25, 2020) (Rep. Pellicciotti, 31:20–35:08, 39:16–40:25, 41:42–42:15; Sen. Holy, 40:25– 41:42).[2] Bail jumping charges often serve as a plea bargaining tool for prosecutors and saddle defendants with a felony conviction that

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[1] Available at https://www.tvw.org/watch/?eventID=2020011091.

[2] Available at https://www.tvw.org/watch/?eventID=2020021343. .

will have devastating effects on their lives. Senate Bill Report, ESHB 2231 at 3–4 (Feb. 27, 2020).[3]

The bail jumping amendments are "a fundamental reappraisal of the value of punishment" for missing a court hearing. *Wiley*, 124 Wn.2d at 687. Because "the Legislature has reassessed the culpability" of missing court dates, the amendments must be given "retroactive effect." *Id*. at 688.

c. This Court should grant review because the Court of Appeals' misapplication of this Court's caselaw results in Mr. Blanchard remaining convicted of a felony for non-criminal conduct.

The Court of Appeals' erroneous decision contravenes longstanding case law stated in numerous opinions of this Court, including *Ramirez*, *Jefferson*, *Wiley*, and *Heath*. RAP 13.4(b)(1). Whether people convicted of felony bail jumping should be held to a penalty the Legislature has concluded is unjust, as the Court of Appeals reasoned they must, is an issue

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[3] Available at http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bill%20Reports/Senate/2231-S.E%20SBR%20LAW%2020.pdf.

of substantial public concern. RAP 13.4(b)(4). This Court should grant review**.**

2. The court wrongly denied Mr. Blanchard's request for a proposed instruction in support of his defense that being detained in jail qualified as an uncontrollable circumstances preventing his court appearance.

a. The accused is entitled to an instruction that encompasses the defense theory of the case when it accurately states the law.

The federal constitution "guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (internal quotation marks omitted); U.S. Const. amend. VI, XIV. This includes the right "to have the jury fully instructed on the defense theory of the case." *State v. Henderson*, 192 Wn.2d 508, 512, 430 P.3d 637 (2018) (quoting *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994)); *see In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). "Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are

not misleading, and allow each party the opportunity to argue their theory of the case." *State v. Redmond,* 150 Wn.2d 489, 493, 78 P.3d 1001 (2003).

In assessing whether the evidence is sufficient to support a proposed instruction, this Court must "view the evidence in the light most favorable to the party that requested the instruction." *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

b. Mr. Blanchard was denied his proposed instruction on the affirmative defense of "uncontrollable circumstances."

The affirmative defense to a charge of bail jumping is met, in part, when "uncontrollable circumstances prevented the person from appearing" RCW 9A.76.170(2).[4]

Mr. Blanchard had no ability to appear in court on the date that led to the bail jumping charge because he was

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[4] The statute also requires "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(2).

incarcerated in a different state. RP 170-71; Ex. 10. He was incarcerated in Oregon because the court held him in jail for the State's charge of possessing a stolen vehicle, which caused the Oregon court to issue a warrant when he failed to appear. RP 170-71; Ex. 10.

Mr. Blanchard proposed an instruction that provided:

> 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 <u>is an act that included but is not limited to any of the following</u>, 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.

CP 12 (emphasis added).

This instruction added the above-emphasized text to RCW 9A.76.010 (4). The proffered instruction would have allowed Mr. Blanchard to argue that being detained in jail was an occurrence that fits within the statute's list of legal excuses for missing a court hearing. The trial court denied the proposed instruction. RP 192; *see* CP 12. Instead the court instructed the jury to use the pattern instruction that mirrors the statute. RP 192-93; CP 27 (instruction 11); 11 Wash. Prac., Pattern Jury Instr. Crim. 19.17 (4th Ed).

The Court of Appeals looked to the plain language of RCW 9A.76.010(4) to conclude that the statutes' examples of a "(1) an act of nature, (2) a medical condition that requires immediate hospitalization or treatment, or (3) an act of man" were "non-exclusive" circumstances because there was not language in the statute specifically stating they were. Op. at 5.

This was error because each of these broad categories included specific examples introduced with the phrase "such

as." This indicates the "illustrative and not limitative" function of the examples given. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577, 114 S. Ct. 1164, 1170, 127 L. Ed. 2d 500 (1994).

Indeed, no opinions in Washington hold RCW 9A.76.010(4) provides an exclusive list of circumstances which constitute "uncontrollable circumstances." Instead, courts have ruled uncontrollable circumstances apply when they cause an "inability to attend on the date" scheduled. *State v. Fredrick*, 123 Wn. App. 347, 353, 97 P.3d 47 (2004). Appellate courts have considered unlisted circumstances in different fact patterns to determine whether those specific circumstances met the legal threshold of showing the person was actually unable to appear in court. *See, e.g.*, *State v. Lundy*, 162 Wn. App. 865, 873, 256 P.3d 466 (2011) (scheduling conflict and confusion over multiple court dates); *State v. White*, 137 Wn. App. 227, 231, 232, 152 P.3d 364 (2007) (fear of back pain from jail bed); *Fredrick*, 123 Wn. App. at 353 (sick but not hospitalized or incapable of appearing); *State v. Carver*, 122 Wn. App. 300,

306, 93 P.3d 947 (2004) (forgot court date). While the facts in these cases did not constitute uncontrolled circumstances, these opinions show the court must consider the underlying circumstances, beyond the statutory list defining uncontrollable circumstances, to determine if the person had an "inability to attend on the date" scheduled. *Fredrick*, 123 Wn. App. at 353.

c. This Court should accept review because the Court of Appeals' erroneous interpretation of the statute denied Mr. Blanchard the right to a full defense.

Mr. Blanchard was "entitled to have the jury fully instructed on [his] theory of the case." *Henderson*, 192 Wn.2d at 512. He and the prosecutor both offered evidence showing he had no ability to appear in court for reasons beyond his control. RP 170-71; Ex. 10.

Mr. Blanchard's proposed instruction represented "the applicable law, [was] not misleading," and would have permitted Mr. Blanchard "the opportunity to argue [his] theory of the case." *Redmond,* 150 Wn.2d at 493. The trial court's

refusal to provide the requested instruction in accordance with the law was error. *Id.*; *Henderson*, 192 Wn.2d at 512.

"Each party is entitled to have the jury provided with instructions necessary to its theory of the case if there is evidence to support it; [f]ailure to provide such instructions to [do so] constitutes prejudicial error." *Redmond*, 150 Wn.2d at 495 (reversing with no explicit analysis of harm); *State v. Williams*, 132 Wn.2d 248, 260, 937 P.2d 1052 (1997) (when defense theory of the case is supported by evidence, "[f]ailure to so instruct is reversible error"); *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983) (same).

In *Redmond*, the Court held a "trial court cannot allow the defendant to put forth a theory of self-defense, yet refuse to provide corresponding jury instructions that are supported by the evidence in the case." *Redmond*, 150 Wn.2d at 495. Here, the trial court permitted Mr. Blanchard to testify to and argue his theory, yet denied him his right to have the jury instructed in his lawful, supported theory. *See* RP 192-93.

Constitutional errors are "presumed to be prejudicial." *State v. Finch*, 137 Wn.2d 792, 859, 975 P.2d 967 (1999). The prosecution bears the burden of proving this error is harmless beyond a reasonable doubt. *Id.* at 859.

The trial court's denial of the proposed instruction permitted the prosecutor to make an argument that is unsupported in the law: "He missed his court date apparently because he was in jail elsewhere. That is not an excuse for bail jumping. He knew he was supposed to be here." RP 208.

No evidence contradicted Mr. Blanchard's defense and the jurors found to be a credible witness regarding the stolen vehicle charge, acquitting him. CP 33. Had it been clear to them incarceration could be an "uncontrollable circumstance," they likely would have reached a different verdict.

This Court should grant review. RAP 13.4(b)(3).

3. The Court of Appeals erred in finding Mr. Blanchard did not prove his absence was due to uncontrollable circumstances.

When a person proves they missed a court hearing due to uncontrollable circumstances, they may not be convicted of bail jumping. Mr. Blanchard proved just that. As a matter of due process and fundamental fairness, this Court should accept review because Mr. Blanchard is convicted based on insufficient evidence. *See* U.S. Const. amend. XIV; Const. art. I, § 3, RAP 13.4(b)(3).

a. "Uncontrollable circumstances" is a defense to bail jumping.

An accused person must prove an affirmative defense by a preponderance of the evidence. *E.g.*, *City of Spokane v. Beck*, 130 Wn. App. 481, 483, 123 P.3d 854 (2005). "Proof of a defense by a preponderance of the evidence merely means the greater weight of the evidence." *Id.* at 486; *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 608, 260 P.3d 857 (2011) ("more likely than not" or "more than 50 percent"). A

conviction may not stand where the defense adequately proves an affirmative defense. *See Beck*, 130 Wn. App. at 486.

This Court must reverse if no "rational trier of fact could have found that the accused failed to prove the defense by a preponderance of the evidence." *Id.* at 486 (citing *State v. Lively*, 130 Wn.2d 1, 17, 921 P.2d 1035 (1996)).

The uncontrollable circumstances defense is met when:

(1) "uncontrollable circumstances prevented the person from appearing,"

(2) "the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear," and

(3) "the person appeared … as soon as such circumstances ceased to exist."

RCW 9A.76.170(2).

b. This Court should accept review because the Court of Appeals erroneously found Mr. Blanchard failed to prove the uncontrollable circumstances defense.

Uncontrollable circumstances refer to those causing a person's "inability to attend on the date" scheduled. *State v.*

Fredrick, 123 Wn. App. at 353. People in custody are physically unable to lawfully attend court in a different jurisdiction unless they are transported by the jail. Mr. Blanchard was in jail and incapable of appearing in court while in custody elsewhere. The clerk confirmed the reason for his absence and Mr. Blanchard reaffirmed it through his testimony. RP 170-71; Ex. 10. The prosecution conceded he was in jail in another jurisdiction in its closing argument. RP 208. The Court of Appeals appeared to agree that Mr. Blanchard met the first element of the statute, but ruled that a reasonable juror could find Mr. Blanchard failed to establish the second and third elements of the defense. Op. at 7.

Mr. Blanchard proved that he did not recklessly contribute to the circumstances that made him miss court. Before missing court in Lewis County, Mr. Blanchard was held in jail on the underlying stolen vehicle charge. RP 169-70; Ex. 7. While in custody, he missed court in Oregon. RP 170. His Oregon case predated the Washington charge. RP 182. Missing

court in Oregon triggered a warrant for his arrest. RP 170. He was subsequently held in custody there, missing his Lewis County court date. *Id.*

The prosecutor attempted to convince the jury Mr. Blanchard's explanation about being in possession of a car the State claimed was stolen was not reasonable and that he must have known the vehicle was stolen. RP 210-14. However, the jury heard his testimony and acquitted him of this charge, crediting his testimony. *See* CP 33 (verdict).

But for being held on the stolen vehicle charge, Mr. Blanchard would not have missed court in Oregon and consequently been unable to attend his Washington hearing. RP 169-71. Given that he was acquitted of the stolen vehicle charge, he did not act with "reckless disregard of the requirement to appear." RCW 9A.76.170(2); CP 33.

Mr. Blanchard established the third element because he appeared in court at the first opportunity. Mr. Blanchard was transported to Lewis County when he was released in Oregon.

RP 177, 183; CP 61. Though the Court of Appeals noted Mr. Blanchard's testimony that he stayed in Oregon "for a while," there was no evidence he had the ability to get himself to Washington. Op. at 7. He was served with the warrant by a Lewis County sheriff's deputy five days after the missed court date. CP 5, 61. He was brought to court, in custody, the next day. CP 60, 61. Mr. Blanchard was not in control of the release and transport decisions of the courts and the jails. He appeared as soon as the two counties' procedures permitted it.

No "rational trier of fact could have found [Mr. Blanchard] failed to prove the defense by a preponderance of the evidence." *Beck*, 130 Wn. App. at 486. All the evidence presented at trial by both Mr. Blanchard and the prosecutor supported his affirmative defense. The undisputed evidence that Mr. Blanchard was in jail, unable to appear in court, and therefore did not recklessly contribute to the circumstances that kept him from appearing. He appeared in court as soon as the two courts and the jail transport system permitted it.

The Court of Appeals found “a reasonable trier of fact” could have found Mr. Blanchard failed to prove the last two elements, without specifying the relevant standard—by a preponderance of the evidence. Op. at 7. The Court of Appeals erred in concluding he failed to establish this defense to the conviction of bail jumping by a preponderance of the evidence. This Court should accept review. RAP 13.4(b)(3).

E. CONCLUSION

Based on the foregoing, petitioner Damon Blanchard respectfully requests this that review be granted pursuant to RAP 13.4 (b)(1),(3), (4).

DATED this 15th day of December, 2021.

This document contains 4,780 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted,

KATE BENWARD (WSBA 43651)
Washington Appellate Project
(91052)
Attorneys for Appellant

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

November 16, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAMON BRADLEY BLANCHARD, Appellant.	No. 53870-9-II UNPUBLISHED OPINION

PRICE, J. — Damon B. Blanchard appeals his conviction for bail jumping. Blanchard argues that the trial court erred by refusing to give his proposed jury instruction on the affirmative defense of uncontrollable circumstances. Blanchard also argues that the legislature's recent change in law regarding bail jumping should apply to his conviction. We affirm Blanchard's conviction for bail jumping.

FACTS

On February 27, 2019, the State charged Blanchard with possession of a stolen vehicle. On April 25, 2019, the State amended the complaint to add one count of bail jumping. Blanchard's jury trial began on June 17, 2019.

Trooper Brian Ashley of the Washington State Patrol testified that on February 26, 2019, he stopped a 2008 black Acura driven by Blanchard. The vehicle Blanchard was driving was reported stolen in Oregon.

The State presented evidence that Blanchard failed to appear for a hearing on April 18, 2019. The certified clerk's minutes admitted at trial noted that Blanchard was "in custody

elsewhere." Suppl. Clerk's Papers (CP) at 59. The trial court issued a bench warrant for Blanchard's failure to appear.

After Blanchard was initially arrested for the stolen vehicle, he was released on an unsecured bond. Blanchard signed a conditions of release order that required his appearance in court on April 18, 2019. While he was waiting to be released, he was transported to Portland as a result of an Oregon warrant. Blanchard had earlier missed a Portland court date because of his arrest for possession of a stolen vehicle. Due to being in custody in Portland, Blanchard missed his April 18 court date in Washington. When Blanchard was released on the Portland case, he stayed in Portland "for a while" before being arrested and brought back to Washington on the Washington bench warrant. 2 Verbatim Report of Proceedings (VRP) at 177.

Blanchard testified that he tried contacting his attorney but he could not get through. Blanchard also testified that he told the Portland jail about his pending Washington court date, but Blanchard could not testify about the jail's response because it was hearsay.

Blanchard proposed a modified version of the pattern jury instruction for the affirmative defense of uncontrollable circumstances:

> 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 <u>that included (sic) but is not limited to any of the following, acts</u> 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 at 12 (modified language underlined). Blanchard also proposed a pattern uncontrollable circumstances instruction that did not contain modified language.

The trial court gave the unmodified pattern uncontrollable circumstances instruction. The trial court explained that Blanchard could make his arguments based on the language in the pattern jury instruction.

The jury found Blanchard not guilty of possession of a stolen vehicle, but guilty of bail jumping. The trial court sentenced Blanchard to a standard range sentence of four months confinement.

Blanchard appeals.

ANALYSIS

I. JURY INSTRUCTIONS

Blanchard argues that the trial court erred by declining to give his proposed modified jury instruction on the affirmative defense of uncontrollable circumstances. Because Blanchard's proposed jury instruction is not a correct statement of the law, we disagree.

A. LEGAL PRINCIPLES

Jury instructions are appropriate if they are supported by substantial evidence, allow the parties to argue their theories of the case, are not misleading, and when read as a whole properly state that applicable law. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

We review whether jury instructions adequately state the applicable law de novo. *State v. Stevens*, 158 Wn.2d 304, 308, 143 P.3d 817 (2006).

We review issues of statutory interpretation de novo. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015). Our main goal in interpreting statutes is to determine the legislature's intent. *Conover*, 183 Wn.2d at 711. Legislative intent is determined from the text of the statutory provision in question, as well as the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. *Conover*, 183 Wn.2d at 711.

"Where the meaning of statutory language is plain on its face, we must give effect to that plain meaning as an expression of legislative intent." *State v. Alvarado*, 164 Wn.2d 556, 562, 192 P.3d 345 (2008). When the plain language of the statute is unambiguous, no further construction or interpretation is necessary. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). However, the statute is ambiguous if the statute "'is subject to more than one reasonable interpretation.'" *Jametsky*, 179 Wn.2d at 762 (quoting *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 456, 219 P.3d 686 (2009)). If a statute is ambiguous, then we "'may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.'" *Jametsky*, 179 Wn.2d at 762 (quoting *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007)). Under the expression unius est exclusion alterius rule of statutory interpretation, omissions by the legislature are considered intentional. *See State v. Bacon*, 190 Wn.2d 458, 466-67, 415 P.3d 207 (2018).

B. ADEQUACY OF JURY INSTRUCTION DEFINING UNCONTROLLABLE CIRCUMSTANCES

Blanchard's proposed jury instructions were based on the statutory affirmative defense to bail jumping in former RCW 9A.76.170(2) (2001). Former RCW 9A.76.170(2) states,

> It is an affirmative defense to a prosecution under this section that uncontrollable 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.

The term "uncontrollable circumstances" is specifically defined by statute as:

> [A]n act 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 or 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.

Former RCW 9A.76.010(4) (2001).

Blanchard argues that his proposed jury instruction was a proper statement of the law because the legislature created a non-exclusive list of examples of uncontrollable circumstances. Blanchard argues that an uncontrollable circumstance is any circumstance that results in a person's inability to attend court. This is an incorrect reading of the statutory definition of uncontrollable circumstances.

Here, a plain reading of former RCW 9A.76.010(4) shows that the legislature created three specific categories of uncontrollable circumstances: (1) an act of nature, (2) a medical condition that requires immediate hospitalization or treatment, or (3) an act of man. Because the statute does not contain any language indicating that these three circumstances are non-exclusive, then we must presume that the legislature intentionally omitted such language. Therefore, an uncontrollable circumstances must be limited to these three specific categories. Blanchard's proposed instruction added language making these three categories non-exclusive which is not consistent with the legislature's intent. Accordingly, the trial court properly denied Blanchard's proposed instruction.

Further, Blanchard argues that the trial court's refusal to give his proposed instruction prevented him from being able to argue his defense. We disagree. Although an uncontrollable circumstance must fit into one of the three enumerated categories in the statute, those three categories are not specifically defined. An act of man is not defined but is instead illustrated by two examples: (1) an automobile accident or (2) 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. An argument was still available to Blanchard that being in jail in another jurisdiction was an act of man that could qualify as an uncontrollable circumstance. Therefore, failure to give Blanchard's proposed instruction did not prevent him from being able to argue his defense or his theory of the case.

II. Sufficiency of the Evidence on Affirmative Defense

Blanchard argues that he proved the elements of the affirmative defense of uncontrollable circumstances by a preponderance of the evidence. Because a rational trier of fact could have found Blanchard failed to prove the affirmative defense, his sufficiency of the evidence challenge fails.

When reviewing a challenge to the sufficiency of the evidence establishing an affirmative defense, our inquiry is whether, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the accused failed to prove the defense by a preponderance of the evidence. *City of Spokane v. Beck*, 130 Wn. App. 481, 486, 123 P.3d 854 (2005).

As discussed above, the affirmative defense of uncontrollable circumstances has three elements: (1) uncontrollable circumstances prevent the defendant from appearing, (2) the defendant did not contribute to circumstances with reckless disregard of the requirement to appear,

and (3) the defendant appeared as soon as such circumstances ceased to exist. Former RCW 9A.76.170(2). An uncontrollable circumstance must be an act of nature, a medical condition, or an act of man. Former RCW 9A.76.010(4). An act of man includes an automobile accident or serious threats of harm "in the immediate future for which there is no time for a complaint to the authorities and not time or opportunity to resort to the courts." Former RCW 9A.76.010(4).

Here, a reasonable trier of fact could have found that Blanchard failed to prove at least two of the three required elements of uncontrollable circumstances. First, a reasonable trier of fact could have found that Blanchard failed to prove that he did not contribute to the circumstance of being in custody when he was supposed to appear in Washington. Blanchard knew he had pending charges in Portland, knew that he missed a Portland court date, and knew about the requirement that he appear in Washington on April 18; however, there is no evidence in the record that Blanchard did anything to try to address his missed court date in Portland prior to a warrant issuing. Because there is no evidence that Blanchard tried to address or prevent his transfer to Portland on the warrant, a rational trier of fact could have found that he contributed to the circumstances with reckless disregard for his Washington court appearance.

Second, Blanchard failed to prove that he failed to appear as soon as the uncontrollable circumstance ceased to exist. Blanchard testified that he was released from jail in Portland and stayed in Portland "for a while" before he was arrested on the Washington warrant and transferred back to Washington. 2 VRP at 177. Because Blanchard did not return to Washington as soon as he was released from custody, a rational trier of fact could have found that he failed to prove that he appeared as soon as the uncontrollable circumstance ceased to exist.

III. RETROACTIVITY OF CHANGE TO BAIL JUMPING STATUTE

Blanchard argues that the 2020 legislative amendments to the bail jumping statute should apply retroactively to his case. We disagree.

With an effective date in June 2020, the legislature amended the definition of bail jumping to make it an offense only if a defendant fails to appear for trial, or, alternatively, if the person is held on, charged with, or convicted of a violent offense or sex offense and certain other conditions exist. LAWS OF 2020, ch. 19 § 1; RCW 9A.76.170(1)(b). Blanchard's actions, being charged with possession of a stolen vehicle and failed to appear for a pretrial hearing, do not meet this amended definition of bail jumping.[1] Therefore, the 2020 amendments must be applied retroactively to have any effect on Blanchard's April 2019 conviction. LAWS OF 2020, chapter 19.

The savings statute provides,

> 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. Here, there is no express statement by the legislature that the amendments to RCW 9A.76.170 are meant to apply retroactively and Blanchard does not contend otherwise. *See*

[1] The legislature also created a new misdemeanor or gross misdemeanor offense of failure to appear or surrender. A person is guilty of failure to appear if they fail to appear under a court order and either fail to make a motion to quash the bench warrant within 30 days or has had a prior warrant issued for failure to appear. RCW 9A.76.190. Because the legislative amendments do not apply retroactively, we do not address the application of the lesser offense of failure to appear to Blanchard.

LAWS OF 2020 ch. 19; Suppl. Br. of Appellant at 9-16. However, Blanchard argues that legislative amendments that downgrade offenses are remedial and, therefore, are not governed by the savings statute. We disagree.

None of the cases that Blanchard relies on to argue that the savings statute does not apply to downgrading of crimes support his argument. *State v. Wiley* addressed the application of amendments to prior convictions when determining their classification in offender score calculation. 124 Wn.2d 679, 687-88, 880 P.2d 983 (1994). *State v. Heath* is a civil case addressing administrative revocation of driver's licenses for habitual traffic offenders. 85 Wn.2d 196, 198, 532 P.2d 621 (1975). These cases do not implicate the savings statute, let alone stand for the proposition that downgrading a crime is necessarily remedial and retroactive. *See* Suppl. Br. of Appellant at 15 ("*Heath* and *Wiley* clearly contemplate[d] circumstances like Mr. Blanchard's, and distinguished them from those where the savings clause applies . . . ."). Here, there is no clear expression of legislative intent that would cause the amendments to operate retroactively when the savings statute requires otherwise.

To the extent Blanchard argues that changes in the law can apply on appeal because a conviction is not final, this argument is misguided. Our Supreme Court recently relied on such a principle in applying the legislative amendments on legal financial obligations to cases pending on appeal. *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). But that rule applies in situations where the precipitating event for the amended statute is the *conviction*. *Ramirez*, 191 Wn.2d at 749. Here, the precipitating event for a penal statute is the date the crime is committed. Therefore, this rule does not apply here.

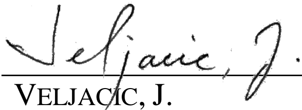
Although the legislature has reduced felony bail jumping to a misdemeanor in some circumstances, there is no express statement of legislative intent that would justify our refusal to apply the savings statute. Accordingly, the legislative amendments to the bail jumping statute do not apply retroactively and have no effect on Blanchard's conviction. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

ERIK D. PRICE, J.

We concur:

WORSWICK, P.J.



VELJACIC, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 53870-9-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Sara Beigh
[sara.beigh@lewiscountywa.gov]
[appeals@lewiscountywa.gov]
Lewis County Prosecuting Attorney

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: December 15, 2021

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