Supreme Court No. 99701-2
(COA No. 53034-1-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LEONID KUZKIN,

Petitioner.

PETITION FOR REVIEW

Gregory C. Link
Sara S. Taboada
Attorneys for Petitioner

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Leonid Kuzkin asks this Court to accept review of a divided opinion, which the Court of Appeals issued on March 23, 2021. Mr. Kuzkin has attached a copy of this split opinion to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. For the crime of bail jumping, this Court has held that the penalty classification of the underlying crime that required an individual to appear in court is only relevant to the sentence imposed upon conviction. The penalty classification is not an element the State needs to prove beyond a reasonable doubt.

At his trial for two counts of bail jumping, Mr. Kuzkin moved to prevent the court from admitting evidence of his underlying crime's penalty classification. The court refused, and the jury heard evidence detailing that the State charged Mr. Kuzkin with a class C felony. The to-convict instructions for both charges also required the jury to find Mr. Kuzkin was previously charged with a class C felony.

(a) The court erred in admitting the evidence because it was irrelevant.

(b) In light of the stigma that accompanies felony charges, the admission of this evidence was also unfairly prejudicial.

(c) This Court recently granted the State's petition for review in *Bergstrom*,[1] which seeks to clarify the elements courts must place in a to-convict instruction in a bail jumping case. Here, the court erred in instructing the jury it must find Mr. Kuzkin was charged with a class C felony because it is not an element of the offense of bail jumping. It is also highly prejudicial to remind the jury in a to-convict instruction that a person was previously charged with a crime. As in *Bergstrom*, this Court should accept review.

2. This Court recently declared the possession of a controlled substance statute is unconstitutional and void. Bail jumping's penalty classification is contingent on the penalty classification of the underlying charged crime that required the person to appear in court at a later date.

The State charged Mr. Kuzkin with possession of a controlled substance. Where Mr. Kuzkin was charged with a non-existent crime, no penalty attached, and Mr. Kuzkin's convictions for bail jumping are void.

C. STATEMENT OF THE CASE

Leonid Kuzkin is a primarily monolingual Russian-speaker. RP 168. In 2017, he was charged with possession of a controlled substance: methamphetamine. RP 24. At a court hearing, the court instructed Mr.

[1] *State v. Bergstrom*, 15 Wn. App. 2d 92, 474 P.3d 578 (2020), *review granted* 2021 WL 1293235 (Wash. Apr. 7, 2021) (No. 99347-5).

Kuzkin to return to court on January 4th and January 8th. RP 122. An interpreter was present at this hearing. RP 143, 150. Mr. Kuzkin heard these dates, but they did not register in his memory. RP 169. The court handed Mr. Kuzkin a scheduling order, but it was difficult for him to read it because there were many corrections on the document. Ex. 3; RP 169-70, 176. Mr. Kuzkin did not appear on January 4th, and the State charged him with one count of bail jumping. CP 103; RP 18, 134.

Mr. Kuzkin appeared in court with the assistance of an interpreter in June of 2018. RP 129-30; Ex. 10. The court handed Mr. Kuzkin a scheduling order. RP 131. The scheduling order required Mr. Kuzkin to appear in court in September. Ex. 6.

In the interim, Mr. Kuzkin was going through a divorce and looking for a new home. RP 171. He stored all of his belongings in a storage facility, including his court documents. RP 171. Unfortunately, someone broke into his storage unit and stole many items, including his court documents. RP 171-72, 174, 179. Mr. Kuzkin did not appear at the September court hearing, and the State charged him with another count of bail jumping. CP 103; RP 138-39

Before trial, Mr. Kuzkin moved to prevent any explicit mention of his underlying charge or the classification of his underlying charge (a class C felony), but the State insisted it needed to produce evidence of either

one of these options to prove its case; ultimately, the court forced him to choose between these options. RP 24-27. Mr. Kuzkin chose the latter option. RP 27.

Mr. Kuzkin's theory of defense at trial was that because he is monolingual, he is more reliant on court documents, and since (1) his scheduling order related to the first charge was difficult to read; and (2) his scheduling order for the second charge went missing, he did not knowingly fail to appear on those two court dates. *See* Ex. 3; RP 212. The to-convict instructions for the bail jumping charges both required the jury to find that Mr. Kuzkin was charged with a class C felony. CP 115-16.

The jury convicted Mr. Kuzkin of both charges. RP 225. The underlying drug charge was dismissed after a CrR 3.6 motion to suppress. RP 235.

Mr. Kuzkin appealed, arguing the Court of Appeals should reverse his convictions because the evidence relating to his previous charges, which were classified as class C felonies, were irrelevant and unduly prejudicial. Op. at 1. Additionally, Mr. Kuzkin argued the to-convict instructions were prejudicial and undermined his right to due process because they required the jury to find he was previously charged with class C felonies. Op. at 1. The majority disagreed, opining the evidence was relevant and not prejudicial. Op. at 2-5. Judge Maxa disagreed,

arguing the trial court "clearly erred" under this Court's jurisprudence. Op. at 6-7. Nevertheless, Judge Maxa concurred in the result, believing "overwhelming evidence" supported the actual elements of bail jumping. Op. at 8.

D. ARGUMENT

1. In the context of bail jumping, the classification of the underlying criminal charge requiring the person to appear in court at a later date is irrelevant and prejudicial.

a. *Williams* and *Andersen* hold the penalty classification of the underlying charge is irrelevant.

Evidence is relevant only if it tends to make the existence of any fact of consequence more or less probable than it would be without the evidence. ER 401. Evidence that fails to meet this criteria is inadmissible, and courts have no discretion to admit irrelevant evidence. ER 402; *See In the Matter of the Detention of Post*, 170 Wn.2d 302, 311, 241 P.3d 1234 (2010).

In order to appropriately assess the irrelevance of the evidence relating to the penalty classification of Mr. Kuzkin's criminal charge, it is important to first discuss how this Court and the Court of Appeals have interpreted the bail jumping statute. First, in *Williams*, the defendant, Demetrius Williams, was charged with possession of a controlled substance, which used to be a class C felony. 162 Wn.2d 177, 181, 170

P.3d 30 (2007); RCW 69.50.4013(2); *see State v. Blake*, __Wn.2d__, 481 P.3d 521, 527 (2021). Mr. Williams failed to appear at his omnibus hearing, and the State charged him with one count of bail jumping. *Williams*, 162 Wn.2d at 181. At trial, the court instructed the jury that to-convict Mr. Williams of bail jumping, it needed to find he was charged with possession of a controlled substance. *Id*. at 186. On appeal, Mr. Williams contended the jury instruction was deficient because it failed to mention the underlying crime's classification. *Id*.

This Court held the penalty classification of the crime was relevant "*only* to the sentence to be imposed on conviction….it is not an element of the crime" *Id*. at 187 (emphasis added). This was because Former RCW 9A.76.170(1) outlined all of the elements of the crime. *Id*. The statute reads as follows:

> Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

Former RCW 9A.76.170(1).

A separate portion of the bail jumping statute outlines the classification (e.g., class A, B, or C felony) of the bail jumping offense based on the classification of the underlying charge/conviction. RCW

9A.76.170(3). For example, Former RCW 9A.76.170(3)(c) notes that a bail jumping conviction must be classified as a class C felony "if the person was held for, charged with, or convicted of a class B or class C felony."

However, because RCW 9A.76.170(1) makes no reference to the penalties outlined in RCW 9A.76.170(3), the State bears no burden in proving the classification of the underlying charge. *Williams*, 162 Wn.2d at 188. Because the State bears no burden in proving the classification of the crime, "a simple identification of the alleged crime is sufficient" in a to-convict instruction. *Id*.

This Court also noted any misunderstanding of the underlying crime in the to-convict instruction could only have worked in Mr. Williams' favor, as the to-convict instruction stated Mr. Williams was charged with possession of a controlled substance. *Id*. at 186, 189. This Court opined that "if the jury thought the underlying charge was a misdemeanor drug charge (marijuana), this is a lesser charge than Williams actually jumped." *Id*. at 189. Accordingly, this Court recognized that the jury's potential assumption that Mr. Williams committed a *misdemeanor* drug charge rather than a higher drug charge (felony) minimized the prejudice of the underlying crime in the to-convict instruction.

The Court of Appeals' holding in *Anderson* also demonstrates the underlying nature of the crime is irrelevant. In *Anderson*, Britt Anderson was charged with one count of possession of stolen property. 3 Wn. App. 2d 67, 68, 413 P.3d 1065 (2018). Mr. Anderson posted bail and failed to appear to a pretrial hearing, and the State charged him with one count of bail jumping. *Id*. at 68. At trial, the court instructed the jury that to-convict Mr. Anderson of the crime of bail jumping, it must find he was charged with a class B or class C felony. *Id*. at 69. On appeal, the defendant argued the to-convict instruction relieved the State of its burden to prove every element of the crime because it did not specify the particular crime he was charged with committing. *Id*.

Building on the court's holding in *Williams*, the Court of Appeals rejected this argument, holding that Former RCW 9A.76.170(1) (the bail jumping statute) did not "list the defendant's 'particular crime' as an element of bail jumping." *Id*. at 71. Instead, a "'simple identification of the alleged crime is sufficient.'…[*Williams*] did not state that identification [of the charged crime] by name is required" *Id*. at 72 (*quoting Williams*, 162 Wn.2d at 188).

Reading *Williams* and *Andersen* together demonstrates that neither the name nor the penalty classification of the underlying crime is an

element of bail jumping. *Anderson*, 3 Wn. App. 2d at 72; *Williams*, 162 Wn.2d at 188. Accordingly, this information is irrelevant.

However, based on an apparent misapprehension of this Court's ruling in *Anderson* and our Supreme Court's ruling in *Williams*, the trial court believed (1) evidence of Mr. Kuzkin's underlying charge; and/or (2) evidence of the classification of Mr. Kuzkin's underlying charge was relevant.

Before trial, Mr. Kuzkin moved in limine to prevent the State and the court from either mentioning his underlying criminal charge by name or mentioning the classification of his underlying offense. RP 22; CP 92-94. Relying on *Anderson* and *Williams*, Mr. Kuzkin argued this evidence was irrelevant. CP 92-93. He also pointed out that the pattern instruction for bail jumping has a bracket that provides for the court to simply instruct the jury that the defendant committed "a crime under RCW (fill in statute)," and so it was unnecessary to mention the underlying crime or its classification in the to-convict instruction. CP 93 (internal brackets omitted); RP 22.

Additionally, Mr. Kuzkin argued any mention of his underlying criminal charge or its classification was unduly prejudicial. RP 23; CP 93. Accordingly, Mr. Kuzkin asked the court to prohibit the State from

mentioning the underlying crime by its specific name or classification and instead refer to it only under its designated RCW number. CP 94; RP 23.

The State opposed this motion, arguing "it's the State's position that referring to it simply as the RCW would not be appropriate." RP 23. The State arrived at this conclusion because (1) in *Williams*, this Court believed the to-convict instruction at issue (which explicitly mentioned the underlying crime) was appropriate; and (2) in *Anderson*, the Court of Appeals concluded the to-convict instruction at issue (which explicitly mentioned the classification of the underlying crime) was appropriate. RP 23-24. The State then claimed the classification of the crime was "an element the State [had] to prove," and argued the way to solve Mr. Kuzkin's prejudice concerns was for him to stipulate to having been charged with a class C felony; it also claimed it could cure any prejudice by having the witnesses refer to it as a class C felony. RP 24-25, 27.

Mr. Kuzkin countered that while neither case specifically holds that naming the statute is sufficient, both cases hold a simple identifier of the crime is sufficient. RP 26. He also reemphasized that simply identifying the crime by its statute had the least risk of being prejudicial, misleading, or confusing under ER 403. RP 26.

Nevertheless, the court agreed with the State, stating,

> I don't believe naming either possession of a controlled substance or value is misleading or felony is misleading or confusing. So which one would you like to choose?

RP 26.

Mr. Kuzkin asked the court if it was forcing him to choose between those two options, and the court confirmed those were his only options. RP 26. Consequently, Mr. Kuzkin told the court it would prefer it if the witnesses stated he was charged with a class C felony. RP 27.

The State elicited evidence demonstrating Mr. Kuzkin was charged with a class C felony, and the court instructed the jury it must find Mr. Kuzkin was charged with a class C felony to find him guilty of bail jumping. RP 130, 133, 186; CP 115-16.

The court's ruling was in error. The court overlooked the fact that both cases hold it suffices for the State or the court to give a simple identification of the alleged crime. *Williams*, 162 Wn.2d at 199; *Anderson*, 3 Wn. App. 2d at 72. The State has no obligation to prove the underlying classification of the crime or to produce evidence of the name of the underlying charge; consequently, this information is non-essential and irrelevant.

b. Informing the jury the State previously charged someone with a felony is prejudicial**.**

Additionally, because the court assumed this information was essential, it neglected to examine the prejudicial effect of the evidence. Instead, it merely asked Mr. Kuzkin to choose between (what it believed) were his only two options. RP 26.

Even if evidence is relevant, courts should exclude it if it is likely to cause the defendant undue prejudice. ER 403; *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010). Evidence is unduly prejudicial if it is "likely to stimulate an emotional response rather than a rational decision." *Salas*, 168 Wn.2d at 671 (*referencing State v. Powell*, 126 Wn.2d 244, 264, 898 P.2d 615 (1995)). The State bears the burden of proving the probative value of the evidence outweighs its prejudicial effect. *See State v. Calegar*, 133 Wn.2d 718, 722, 947 P.2d 235 (1997).

The majority concluded no prejudice resulted from the court's admission of evidence concerning Mr. Kuzkin's felony charge, but this is contrary to this Court's rulings. Op. at 5. Evidence that a person previously committed felonies is prejudicial. *State v. Hardy*, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997). This is because the jury may assume the person "has a 'bad' general character and deserves to be sent to prison whether or not they in fact committed the crime in question." *State v.*

Newton, 109 Wn.2d 69, 73, 743 P.3d 254 (1987). The jury may also perceive this history as proof the defendant has the propensity to commit criminal acts, which may make the jury believe it is more likely the defendant committed the crime in question. *Id*.

As intimated in *Williams* and discussed in *Hardy*, the jury's knowledge that the State has charged a defendant with a *felony* rather than a misdemeanor carries a danger of prejudicing the defendant. *Williams*, 162 Wn.2d at 189; *Hardy*, 133 Wn.2d at 706. Introducing evidence and instructing the jury that Mr. Kuzkin was merely charged with violating a certain statute would have made his crime ambiguous to the jury and inoculated the inflammatory effect of his prior charge. This is because the jury could have merely believed he was charged with a misdemeanor.

The Court of Appeals has also concluded that evidence of a person's prior felony charges are prejudicial. *See State v. Roche*, 75 Wn. App. 500, 878 P.2d 497 (1997) (recognizing trial court's failure to give any consideration to the prejudice associated with a criminal record was "troublesome"); *State v. Saunders*, 91 Wn. App. 575, 958 P.2d 364 (1998) (concluding counsel was deficient for eliciting evidence that client was previously convicted of a felony and finding this deficient performance prejudicial).

Additionally, the concurrence's conclusion that the error was "harmless because of the overwhelming evidence that supported the actual elements of bail jumping" is in error for two reasons. Op. at 8. First, a court's analysis as to whether evidentiary errors warrant reversal does not turn on whether there is sufficient evidence to convict. Rather, the questions is "whether there is a reasonable probability that the outcome of the trial would have been different without the inadmissible evidence." *State v. Gower*, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014). This requires the court to assess whether a reasonable probability exists that the trier of fact would have reached a different outcome. *Gunderson*, 181 Wn.2d at 927. It does not turn on whether sufficient evidence exists to uphold the conviction. *Id*.

Second, the evidence was *not* overwhelming. Both the majority and concurring opinions ignore the fact that Mr. Kuzkin is a monolingual Russian speaker who relies heavily on court documents to determine his next court dates. Because (1) his scheduling order related to the first charge was difficult to read; and (2) his scheduling order for the second charge went missing, he maintained he did not knowingly fail to appear at these court dates. Yet evidence of the prior felony charges made him seem like the kind of person who would flaunt the law, not appear in court, and "make up" excuses for failing to appear in court.

This Court should accept review. RAP 13.4(b)(1), (2), (3), (4).

c. Reminding the jury in a to-convict instruction that a person was previously charged with a felony violates due process.

To-convict instructions should guard against unfair prejudice in order to protect a person's right to due process. U.S. Const. amend. XIV; Const. art. I, § 3; *see State v. Oster*, 147 Wn.2d 141, 147-48, 52 P.3d 26 (2002). Here, the court included the penalty classification in the to-convict instruction over Mr. Kuzkin's objection. The concurrence agreed with Mr. Kuzkin that this was in error: "stating either the penalty classification or the name of the underlying offense in the to-convict instruction potentially is prejudicial to a defendant because it allows the jury to assume that he or she has a bad character of has to propensity to commit criminal acts." Op. at 7.

This Court recently accepted review in *Bergstrom* to determine which elements should appear in jury instructions for bail jumping. *Bergstrom*, 15 Wn. App. 2d 92, *review granted* 2021 WL 1293235 (Wash. Apr. 7, 2021) (No. 99347-5). The issue in *Bergstrom* relates to the knowledge element of bail jumping. The issue here is whether the penalty classification of the underlying crime must appear in the to-convict instruction. As these issues are interrelated, this Court should accept review. RAP 13.4(b)(3), (4).

2. Because Mr. Kuzkin was charged with committing the non-existent crime of possession of a controlled substance, his convictions for bail jumping are void.[2]

On February 25, 2021, this Court issued its opinion in *Blake*, which invalidated the crime of possession of a controlled substance. 481 P.3d at 534. This Court held the statute "violates the due process clauses of the state and federal constitutions and is void." *Id*.

As discussed, the penalty classification of the underlying charge requiring an individual to later appear in court determines the penalty classification for bail jumping. *See* Former RCW 9A.76.170(3). The statute states bail jumping is a class C felony if the person was charged with a class C felony. Former RCW 9A.76.170(3)(c).

Mr. Kuzkin's bail jumping convictions are predicated on his charge for possession of a controlled substance, which the legislature classified as a class C felony. But given this Court's ruling in *Blake*, possession of a controlled substance is not, and has never been, a felony. The statute does not attach a penalty where the State charges someone

[2] Mr. Kuzkin and the State submitted their briefing in this case well before this Court's decision in *Blake*. This Court issued its decision in *Blake* just a few weeks before the Court of Appeals issued its opinion in Mr. Kuzkin's case. Consequently, Mr. Kuzkin did not raise this issue before the Court of Appeals. However, Mr. Kuzkin asks this Court to exercise its discretion and accept review of this important issue. RAP 1.2; RAP 13.4(b)(3), (4).

with a non-existent crime. Former RCW 9A.76.170(3)(c). Consequently, no penalty classification attaches to his conviction for bail jumping, rendering his convictions for bail jumping void.

This Court should accept review. RAP 13.4(b)(3), RAP 13.4(b)(4).

E. CONCLUSION

Based on the foregoing, Mr. Kuzkin respectfully requests that this Court accept review.

DATED this 22nd day of April, 2021.

Respectfully submitted,

/s Gregory C. Link
Gregory C. Link – WSBA #25228

/s Sara S. Taboada
Sara S. Taboada – WSBA #51225
Washington Appellate Project
Attorneys for Petitioner

Filed
Washington State
Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LEONID PETROVICH KUZKIN, Appellant.	No. 53034-1-II UNPUBLISHED OPINION

WORSWICK, J. — Leonid Kuzkin appeals his convictions for two counts of bail jumping arguing that the trial court abused its discretion by admitting evidence that he had previously been charged with a class C felony and including that information in the to-convict instructions. We disagree and affirm Kuzkin's convictions.

FACTS

The State charged Kuzkin with possession of a controlled substance (methamphetamine), which is a class C felony.[1] After Kuzkin failed to appear at two required court dates, the State charged Kuzkin with two counts of bail jumping.

Before trial, Kuzkin moved to prohibit the State from referencing that Kuzkin had been charged with possession of a controlled substance or that he had been charged with a class C felony, arguing that hearing the name of the crime or its classification was irrelevant and prejudicial. Kuzkin proposed that the underlying crime be identified only by reference to RCW

[1] Kuzkin was also charged with a gross misdemeanor involving an ignition interlock violation. That charge is not germane to his convictions or his arguments on appeal.

69.50.4013(2). The trial court denied Kuzkin's motion stating, "I don't believe naming either possession of a controlled substance . . . or a felony is misleading or confusing." Report of Proceedings (RP) at 26. The trial court gave Kuzkin the choice of referring to the charge by name—"possession of a controlled substance"—or by classification—"Class C felony." RP at 26-27. Kuzkin opted to refer to the charge by classification as a class C felony.

At trial, a Clark County prosecutor testified that Kuzkin was charged with a class C felony when he missed court dates in September 2017 and January 2018. The trial court instructed the jury that to convict Kuzkin of bail jumping as charged in each count, the State had to prove beyond a reasonable doubt, in relevant part, that Kuzkin was charged with a "class C felony." Clerk's Papers (CP) at 115-16. The jury found Kuzkin guilty of both bail jumping charges.

Kuzkin appeals his convictions for bail jumping.

ANALYSIS

Kuzkin argues that the trial court abused its discretion by admitting evidence that he had previously been charged with a class C felony and by including that information in the to-convict instructions. Specifically, Kuzkin argues that testimony that Kuzkin had been charged with a class C felony was irrelevant and unduly prejudicial. We disagree.

At the time of Kuzkin's offenses, a defendant was guilty of bail jumping if the State proved beyond a reasonable doubt that the defendant was released by court order or admitted to bail with the knowledge of the requirement of a subsequent personal appearance and failed to appear as required. Former RCW 9A.76.170(1)(a) (2001). The classification of bail jumping depends on the classification of the underlying charge. Former RCW 9A.76.170(3).

We review evidentiary rulings for an abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Darden*, 145 Wn.2d at 619. We also review 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). Jury instructions are appropriate if they are supported by substantial evidence, allow a defendant to argue his theories of the case, are not misleading, and when read as a whole properly state the applicable law. *State v. Anderson*, 3 Wn. App. 2d 67, 69-70, 413 P.3d 1065 (2018).

ER 401 provides that evidence is relevant if it makes a fact "of consequence to the determination of the action" more probable or less probable. "The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible." *State v. Gregory*, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). Even if evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. Evidence is unfairly prejudicial if it is "'more likely to arouse an emotional response than a rational decision by the jury.'" *City of Auburn v. Hedlund*, 165 Wn.2d 645, 654, 201 P.3d 315 (2009) (internal quotation marks omitted) (quoting *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000)).

The parties here focus on *State v. Williams*, 162 Wn.2d 177, 186-87, 170 P.3d 30 (2007) and *Anderson*, 3 Wn. App. 2d at 67. Both cases involved challenges to to-convict instructions for bail jumping. In *Williams*, our Supreme Court rejected the argument that a to-convict instruction for bail jumping was fatally flawed because it named the underlying crime but did not identify its classification as a felony or misdemeanor. 162 Wn.2d at 186. The *Williams* court

held that the classification of the underlying crime is not an essential element of bail jumping and therefore does not have to be included in the to-convict instruction. 162 Wn.2d at 188. The Court explained that "simple identification of the alleged crime is sufficient." 162 Wn.2d at 188.

In *Anderson*, this court addressed the inverse argument—that the to-convict instruction was fatally flawed because it did not specify the underlying crime for the bail jumping charge by name and instead only listed the classification of the underlying crime. 3 Wn. App. 2d at 70. We rejected Anderson's argument, holding that the "particular crime" was not an element of bail jumping. 3 Wn. App. 2d at 71. We explained that neither the exact name nor the penalty classification of the underlying crime is an essential element of bail jumping, and held that only a simple identification of the underlying charge is necessary. *Anderson*, 3 Wn. App. 2d at 72. In *Anderson*, the classification of the underlying crime constituted an acceptable simple identification of the underlying charge. 3 Wn. App. 2d at 72-73.

Kuzkin argues, based on *Williams* and *Anderson*, that because the penalty classification of the underlying charge is not an essential element of bail jumping, the penalty classification was not relevant. His logic fails. That a fact is not an essential element of a crime does not make evidence of that fact irrelevant. Indeed, in *Anderson*, we held that the underlying charge is relevant as to the classification of the bail jumping charge. 3 Wn. App. 2d at 71. Additionally, the fact that Kuzkin was charged with a class C felony is minimally relevant to whether Kuzkin was required to appear in court, which is an essential element of bail jumping.[2] RCW 9A.76.170(1)(a).

[2] That is not to say that a different means of identifying the underlying charge would be irrelevant. Nor are we opining on which means of identifying the underlying charge would be *best*. Such determinations are best left to the discretion of the trial court.

Unlike in *Williams* and *Anderson*, Kuzkin also argues that evidence of the classification of his underlying charge and referencing the classification in the to-convict instruction was unduly prejudicial. But the testimony that Kuzkin had been charged with a class C felony was a minor moment in the trial not likely to arouse an emotional response from the jury, and the to-convict instruction properly stated the applicable law.

Especially given the *Anderson* court's approval of a to-convict instruction listing the penalty classification, we cannot hold that the trial court's decision here to admit evidence of the penalty classification and to include it in the to-convict instruction was manifestly unreasonable or based on untenable grounds. Referencing the penalty classification was a reasonable means of including "simple identification" of the underlying charge and was not unduly prejudicial.

Accordingly, we hold that the trial court did not abuse its discretion by denying Kuzkin's motion in limine and admitting evidence that he had been charged with a class C felony or by referencing "class C felony" in the to-convict instructions. CP at 115-16.

We affirm Kuzkin's bail jumping convictions.

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.

Worswick, P.J.

I concur:

Glasgow, J.

MAXA, J. (concurring) – The trial court clearly erred in instructing the jury in the to-convict instruction that to convict Leonid Kuzkin of bail jumping, the State was required to prove that Kuzkin had been charged with a class C felony. To the extent that the court was required to identify the offense with which Kuzkin had been charged, the court should have granted Kuzkin's request to identify the offense by the applicable RCW instead of forcing Kuzkin to choose between informing the jury of the name of the offense or the penalty classification. However, because the trial court's error was harmless, I concur in the result.

Under former RCW 9A.76.170(1)(a) (2001), a person is guilty of bail jumping if he or she (1) was released by court order (2) with knowledge of the requirement of a subsequent personal appearance, and (3) fails to appear. Former RCW 9A.76.170(3) provides that the classification of the bail jumping offense depends on the classification of the offense in the proceeding for which the defendant failed to appear.

The Supreme Court in *State v. Williams* held that the penalty classification of the underlying offense is a not an essential element of bail jumping and does not have to be included in the to-convict instruction. 162 Wn.2d 177, 186-188, 170 P.3d 30 (2007). The court stated that "a simple identification of the alleged crime is sufficient." *Id.* at 188.

This court in *State v. Anderson* held that "neither the exact name nor the penalty classification of the underlying crime is an essential element of bail jumping." 3 Wn. App. 2d 67, 72, 413 P.3d 1065 (2018). The court repeated the statement in *Williams* that only a simple identification of the offense was necessary. *Id.*

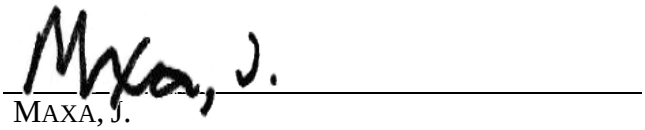
Here, the trial court's to-convict instruction indicated that the penalty classification of the underlying offense was an essential element of bail jumping – the instruction required the State to prove that Kuzkin was convicted of a class C felony to convict him. Under *Williams* and *Anderson*, this was clear error. As an alternative, the trial court gave Kuzkin the choice of stating the name of the underlying offense – possession of methamphetamine – instead of the penalty classification in the to-convict instruction. But under *Anderson*, including the name of the offense as an element of bail jumping also would have been error.

Ordinarily, requiring the State to prove an additional element would benefit the defendant. But stating either the penalty classification or the name of the underlying offense in the to-convict instruction potentially is prejudicial to a defendant because it allows the jury to assume that he or she has a bad character or has the propensity to commit criminal acts. *See State v. Newton*, 109 Wn.2d 69, 73, 743 P.3d 254 (1987).

Williams and *Anderson* support the proposition that the underlying offense must be identified somewhere in the jury instructions, if not in the to-convict instruction. *Williams*, 162 Wn.2d at 188; *Anderson*, 3 Wn. App. 2d at 72. But neither case requires the instructions to state either the penalty classification or the name of the offense, as the trial court suggested here. Instead, "a simple identification of the alleged crime is sufficient." *Williams*, 162 Wn.2d at 188.

Kuzkin suggested such a "simple identification" – use of the RCW describing the offense. The trial court erred in not using the applicable RCW to identify the underlying offense and instead forcing Kuzkin to choose to inform the jury of either the penalty classification or the name of the offense.

Nevertheless, I agree with the State that the error here was harmless because of the overwhelming evidence that supported the actual elements of bail jumping. Therefore, I agree with the result of the majority opinion.



MAXA, J.

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☒ respondent Aaron Bartlett, DPA
[aaron.bartlett@clark.wa.gov]
[prosecutor@clark.wa.gov]
Clark County Prosecutor's Office

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: April 22, 2021
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