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Division Two

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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	No. 53870-9-II UNPUBLISHED OPINION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 that included (sic) 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 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.

Price, J.

ERIK D. PRICE, J.

We concur:

Worswick J

WORSWICK, P.J.

Veljacic, J.

VELJACIC, J.