SUPREME COURT NO.

COA NO. 34702-8-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

YAN YEFREMOV,
Petitioner.

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

Spokane County Cause No. 15-1-03985-8

The Honorable Annette S. Plese, Judge

PETITION FOR REVIEW

Skylar T. Brett
Attorney for Appellant/Petitioner

LAW OFFICES OF LISE ELLNER
SKYLAR T. BRETT
P.O. Box 18084
Seattle, WA 98118
(206) 494-0098
skylarbrettlawoffice@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

I. IDENTITY OF PETITIONER

Petitioner Yan Yefremov, the appellant below, asks the Court to review the decision of Division III of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Yan Yefremov seeks review of the Court of Appeals unpublished opinion entered on September 28, 2017. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: The term "willful" is equivalent to knowledge, except where a purpose to impose further requirements plainly appears. Does the element of willful escape from community custody require proof of a "purposeful act" where such a requirement has been found in analogous escape contexts and is necessary to prevent conviction for inadvertent conduct?

ISSUE 2: In order to comply with Due Process, jury instructions must accurately describe each element of a charged offense. Did the court violate Mr. Yefremov's right to Due Process by refusing to instruct the jury that the state was required to prove that he acted intentionally or purposely in order to convict him of Escape from Community Custody?

IV. STATEMENT OF THE CASE

Yan Yefremov was on community custody following his release from prison on a drug possession charge. RP (6/7/16) 101. He asked his

Community Corrections Officer (CCO) to help him get into drug treatment multiple times. RP (6/7/16) 102. But Mr. Yefremov had significant problems arranging for treatment through the Department of Corrections (DOC). RP (6/7/16) 102-107.

One night, Mr. Yefremov overdosed on opiates and nearly died. RP (6/7/16) 107-108. Fearing for his life, he checked himself into a treatment facility the next day. RP (6/7/16) 107-108.

Mr. Yefremov chose a treatment facility that met his religious and cultural needs. RP (6/7/16) 109-110. The facility was in a different county than that in which he was serving his community custody. RP (6/7/16) 107. As a result, Mr. Yefremov missed a scheduled meeting with his CCO while he was in treatment. RP (6/7/16) 110.

Mr. Yefremov's treatment provider tried to contact his CCO to verify where he was. RP (6/7/16) 110-111. Mr. Yefremov eventually had to leave the treatment facility to return to Spokane County for a court date. RP (6/7/16) 110. He was later arrested and charged with Escape from Community Custody. RP (6/7/16); CP 1.

The state called only one witness at Mr. Yefremov's trial: his CCO, Jeremy Taylor.

Taylor testified that it was DOC policy to consider any missed community supervision appointment to be "willful," regardless of the reason that the client was unable to make it. RP (6/7/16) 82.

The jury was required to find that Mr. Yefremov had acted willfully in order to convict him of Escape from Community Custody. CP 35.

Mr. Yefremov proposed a jury instruction defining the term "willful" as "acting intentionally and purposeful, and not accidentally or inadvertently." CP 23.

The court refused to give Mr. Yefremov's proposed instruction. RP (6/8/16) 8.

Instead, the court instructed the jury that willfulness was equivalent to knowledge. CP 32.

The jury found Mr. Yefremov guilty of Escape from Community Custody. RP (6/8/16) 42. Mr. Yefremov timely appealed, arguing, *inter alia*, that the trial court erred by refusing to give his proposed jury instruction defining the term "willful." CP 76-78. The Court of Appeals affirmed his conviction in an unpublished opinion. *See* Opinion (attached).

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Supreme Court should accept review and hold that the trial court violated Mr. Yefremov's right to Due Process by refusing to instruct the jury that the state was required to prove that he had acted purposefully in order to convict him of Escape from Community Custody. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).

A. In order to convict Mr. Yefremov of Escape from Community Custody, the state should have been required to prove beyond a reasonable doubt that he committed a "purposeful act."

In order to convict Mr. Yefremov of Escape from Community Custody, the state was required to prove that he:

> … willfully discontinue[d] making himself … available to the department for supervision … by failing to maintain contact with the department as directed by the community corrections officer…

RCW 72.09.310.

Willfulness is equivalent to knowledge unless a purpose to impose further requirements plainly appears. RCW 9A.08.010(4). Knowledge can he characterized as a "lack of mental intent requirement." *State v. Hall*, 104 Wn.2d 486, 493, 706 P.2d 1074 (1985).

Escape is one of the contexts in which the willfulness element requires more than mere knowledge. *Id.* (*citing State v. Danforth*, 97 Wn.2d 255, 258, 643 P.2d 882 (1982)). In order to prove that a person has

willfully escaped from a work release facility, for example, the state must prove that s/he committed some "purposeful act." *Id.*

The question of whether the "willful" element of Escape from Community Custody requires proof of a purposeful act is an issue of first impression. Indeed, there are only three published cases addressing the offense, none of which construes the *mens rea* element. *See State v. Baker*, 194 Wn. App. 678, 378 P.3d 243 (2016) (regarding sentencing for escape convictions); *State v. Aguilar*, 153 Wn. App. 265, 271, 223 P.3d 1158 (2009) (regarding admissibility of the accused's prior statements to show that he had willfully escaped from community custody); *State v. Rizor*, 121 Wn. App. 898, 901, 91 P.3d 133 (2004) (holding that people on community custody were "inmates" properly charged with Escape from Community Custody).

Danforth and *Hall*, however, construe the willfulness requirement of the now-repealed statute criminalizing escape from a work release facility. *See* former RCW 72.65.070. The willfulness requirement of that offense required the state to prove a "purposeful act" (beyond mere knowledge) in order to ensure that the accused is not convicted based on circumstances beyond his/her control. *Danforth*, 97 Wn.2d at 258.

Otherwise, the *Danforth* court reasoned, a person could be impermissibly convicted of escape for failing to return to a work release facility as the result of "a sudden illness, breakdown of a vehicle, etc." *Id.*

This logic applies with equal force to cases alleging Escape from Community Custody. Unlike escape by climbing over a prison wall, a person could miss a meeting with his/her CCO through no fault of his/her own, due to a medical emergency or transportation issues. *See Id.*

Accordingly, unless there is a requirement of a "purposeful act," a person could be convicted of willfully escaping from community custody simply because s/he knew that s/he missed a meeting while s/he was in the hospital being treated for an emergency. The Supreme Court rejected this result in *Danforth*. *Id.*

The requirement of a "purposeful act" in the context of Escape from Community Custody also comports with the tenet that a willful activity is one that is not inadvertent. *See State v. Sisemore*, 114 Wn. App. 75, 78, 55 P.3d 1178 (2002); *State v. LaRue*, 74 Wn. App. 757, 761, 875 P.2d 701 (1994). While a requirement of a knowing act protects against conviction for inadvertent or accidental conduct for some offenses, one can knowingly meet the elements of Escape from Community Custody based wholly on events outside of his/her control.

In the context of Escape from Community Custody, the element of willful conduct requires the state to prove that the accused committed some purposeful act. *Danforth*, 97 Wn.2d at 258.

Even so, the Court of Appeals affirmed Mr. Yefremov's conviction, relying on its recent decision in *State v. Buttolph*, ___ Wn. App. ___, 399 P.3d 554 (2017). Opinion, pp. 6-7.

But *Buttolph* was wrongly decided and must be overturned.

Specifically, the *Buttolph* court held that the Escape from Community Custody statute "does not have a strict temporal component" because a person with a medical emergency or car trouble could escape liability by simply calling his/her CCO and making his/her whereabouts known. *Id.* at 557.

But the *Buttolph* court ignores the disjunctive wording of the statute. A person can be convicted of Escape from Community Custody for *either* "making his or her whereabouts unknown" *or* by "failing to maintain contact with the department as directed by the community corrections officer." RCW 72.09.310.

Accordingly, as in both Mr. Yefremov and Mr. Buttolph's cases, a person can be convicted of the offense for simply failing to attend a meeting that s/he has been directed to attend his his/her CCO, and thereby

failing to maintain contact as directed. This is true regardless of whether s/he has made his or her whereabouts known. RCW 72.09.310.

The trial court erred by refusing to instruct the jury that the state had to prove a purposeful act in order to convict Mr. Yefremov.

B. The trial court erred by refusing to give Mr. Yefremov's proposed instruction, informing the jury that Escape from Community Custody required proof that he acted purposely or intentionally.

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. Amend. XIV; Wash. Const. art. I, § 3.

A court's instructions are improper if they misstate the law regarding an element of an offense. *State v. Hayward*, 152 Wn. App. 632, 645, 217 P.3d 354 (2009).[1] Jury instructions also violate an accused person's right to due process if they relieve the state of its burden of proving each element beyond a reasonable doubt. *Id.*

As outlined above, the state should have been required to prove that Mr. Yefremov committed some purposeful act in order to convict him of willfully escaping from community custody. *Hall*, 104 Wn.2d at 493; *Danforth*, 97 Wn.2d at 258.

[1] Jury instructions are reviewed *de novo*. *State v. Richie*, 191 Wn. App. 916, 927, 365 P.3d 770 (2015).

The trial court erred by refusing to give Mr. Yefremov's proposed instruction informing the jury of that requirement. *Hayward*, 152 Wn. App. at 645.

Indeed, juries are regularly instructed that the term "willfully" requires proof of purposeful action. *See e.g.* 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 120.02.01 (4th Ed) (stating that, for an Obstruction charge: "Willfully means to purposefully act with knowledge that…"); 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 36.23 (4th Ed) (stating that, for a Stalking charge: "'Willful' or 'willfully' means to act purposefully, not inadvertently or accidentally"); 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 95.10 (4th Ed) (stating that, for a Reckless Driving charge, "Willful means acting intentionally and purposefully, not accidentally or inadvertently").

The trial court's instructions misstated the law regarding the *mens rea* element of Escape from Community Custody by failing to inform the jury that the state was required to prove that Mr. Yefremov committed some purposeful act. *Hall*, 104 Wn.2d at 493; *Danforth*, 97 Wn.2d at 258.

This omission relieved the state of its burden of proof and violated Mr. Yefremov's right to due process. *Hayward*, 152 Wn. App. at 645.

An improper jury instruction affecting a constitutional right requires reversal unless the state can demonstrate beyond a reasonable

doubt that it did not contribute to the verdict. *State v. Schaler*, 169 Wn.2d 274, 288, 236 P.3d 858 (2010).

Here, Mr. Yefremov admitted that he knew about the meeting with his CCO, but testified that he missed it because he felt his life was in danger. RP (6/7/16) 107-108. It should have been up to the jury to determine whether his overdose the night before rendered his failure to make it to the meeting inadvertent, rather than purposeful.

But the court's instructions removed that question from the jury's consideration by informing the jury that willfulness was equivalent to knowledge. CP 32.

Mr. Yefremov's CCO also testified that DOC considers any missed appointment to be "willful," regardless of the reason that the offender is unable to show up. RP (6/7/16) 82. Absent Mr. Yefremov's proposed instruction, the jury likely relied on that testimony to conclude that the state had proved its case whether he had acted purposefully or not.

The state cannot establish that the instructional error in Mr. Yefremov's case was harmless beyond a reasonable doubt. *Id.*

The trial court violated Mr. Yefremov's right to due process by failing to instruct the jury that the state was required to prove that he committed a purposeful act before convicting him of Escape from Community Custody. *Hayward*, 152 Wn. App. at 645; *Hall*, 104 Wn.2d at

493; *Danforth*, 97 Wn.2d at 258. Mr. Yefremov's conviction must be reversed. *Id.*

VI. CONCLUSION

The issue here is significant under the State and federal Constitutions. Furthermore, because it could impact a large number of criminal cases, it is of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted October 27, 2017.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Yan Yefremov/DOC#312858
Monroe Correctional Complex-WSR
PO Box 777
Monroe, WA 98272

and I sent an electronic copy to

Spokane County Prosecuting Attorney
SCPAappeals@spokanecounty.org

Lise Ellner
lisellenerlaw@comcast.net

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on October 27, 2017.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

APPENDIX:

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

September 28, 2017

E-mail
Brian O'Brien
Larry D. Steinmetz
Cnty Prosc Atty Ofc
1100 W Mallon Ave
Spokane, WA 99260-2043

Lise Ellner
Attorney at Law
PO Box 2711
Vashon, WA 98070-2711
Liseellnerlaw@comcast.net

Skylar Texas Brett
Law Office of Skylar Brett
PO Box 18084
Seattle, WA 98118-0084
skylarbrettlawoffice@gmail.com

CASE # 347028
State of Washington v. Yan Gennadyevich Yefremov
SPOKANE COUNTY SUPERIOR COURT No. 151039858

Counsel:

Enclosed please find a copy of the opinion filed by the Court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:pb
Enc.

c: **E-mail** Hon. Annette Plese
c: Yan Gennadyevich Yefremov
#312858
Monroe Corr. Ctr. WSR - C408.
Box 777
Monore, WA 98272

FILED
SEPTEMBER 28, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 34702-8-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
YAN Y. YEFREMOV,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, A.C.J. — Yan Yefremov appeals his conviction for escape from community custody. The statute defining this crime requires the defendant to have acted "willfully." RCW 72.09.310. Mr. Yefremov argues the trial court erred when it refused his proposed jury instruction, which equated willfulness with purpose, and instead gave an instruction equating willfulness with knowledge. He also argues he received ineffective assistance of counsel because defense counsel did not object when the community corrections officer (CCO) testified that he had absconded from community custody in the past. We disagree with Mr. Yefremov's contentions and affirm.

FACTS

In April 2014, Mr. Yefremov began serving a 12-month term of community custody as part of a felony sentence. His assigned CCO was Jeremy Taylor. One of Mr. Yefremov's community custody conditions was to report to and be available for contact with CCO Taylor. Mr. Yefremov was required to report to the Department of Corrections (Department) two times per month. CCO Taylor advised Mr. Yefremov of the expectations and conditions of community custody.

Mr. Yefremov violated the community custody conditions several times. This extended his term of community custody beyond the time it would have ordinarily ended.

At one of their meetings, CCO Taylor instructed Mr. Yefremov to personally meet with him on September 16, 2015. CCO Taylor wrote this date on the back of a business card and gave it to Mr. Yefremov. The business card also listed CCO Taylor's cellular telephone number, his office telephone number, and the address where Mr. Yefremov was required to report.

Mr. Yefremov did not report for the September 16 supervision meeting. He did not contact CCO Taylor either before or at any time after the scheduled meeting. CCO Taylor called Mr. Yefremov's primary number as well as Mr. Yefremov's emergency contact. CCO Taylor was unable to reach Mr. Yefremov at either number.

A warrant was issued for Mr. Yefremov's arrest. The Department attempted to arrest Mr. Yefremov at his last known address, but was unable to do so. Mr. Yefremov was arrested roughly 60 days later.

PROCEDURE

The State charged Mr. Yefremov with escape from community custody under RCW 72.09.310. At trial, the State called CCO Taylor. During direct examination, the State asked CCO Taylor why Mr. Yefremov was still under community custody in September 2015, when his 12-month term of community custody began in April 2014. CCO Taylor responded that community custody sentences are tolled when the supervisees "abscond from supervision or willfully make themselves not available." Report of Proceedings (RP) (June 7, 2016) at 76. CCO Taylor noted that "Mr. Yefremov had multiple prior violations, to include absconding from supervision." RP (June 7, 2016) at 75-76. Defense counsel did not object to this testimony.

Later on, the State asked CCO Taylor whether Mr. Yefremov had enrolled in any substance abuse treatment programs that were available to him. CCO Taylor responded that Mr. Yefremov was enrolled in outpatient services at one point, but that he was removed from those services due to "one of his prior violation processes of absconding." RP (June 7, 2016) at 80. Defense counsel did not object to this testimony.

On cross-examination, defense counsel asked CCO Taylor whether Mr. Yefremov had ever committed a community custody violation that resulted in a criminal prosecution. CCO Taylor responded that, "Prior to this [Mr. Yefremov] had seven prior abscondings." RP (June 7, 2016) at 89. Defense counsel did not object to this testimony. Continuing, CCO Taylor confirmed that none of these prior absconding offenses had resulted in a criminal prosecution.

Mr. Yefremov testified. He testified he had been addicted to opiates for 15 years, which caused him to engage in criminal behavior. He acknowledged his poor attendance at his supervision meetings. He testified that every time he missed his meetings, it was because he knew he would test positive for drugs. He further testified that this was why he missed the September 16, 2015 supervision meeting.

After both parties rested, Mr. Yefremov proposed the following jury instruction: "Willful means acting intentionally and purposely, and not accidentally or inadvertently." Clerk's Papers (CP) at 23. The trial court denied Mr. Yefremov's proposed instruction, reasoning that it differed from the Washington Pattern Jury Instructions (WPICs). Instead, the court gave the following instruction, consistent with WPIC 10.05: "A person acts willfully when he or she acts knowingly." CP at 32; *see* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 10.05, at 231 (4th ed. 2016).

The jury found Mr. Yefremov guilty as charged. Mr. Yefremov appeals.

ANALYSIS

ESCAPE FROM COMMUNITY CUSTODY MENS REA REQUIREMENT

Mr. Yefremov argues that the crime of escape from community custody requires proof of a purposeful act, and that the trial court erred when it declined to give his proposed jury instruction defining "willful" as "acting intentionally and purposely." CP at 23.

Jury instructions are proper when they correctly inform the jury of the applicable law. *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). This court reviews alleged errors of law in jury instructions de novo. *Id.*

An inmate in community custody is guilty of escape from community custody if he or she "*willfully* discontinues making himself or herself available to the department for supervision by making his or her whereabouts unknown or by failing to maintain contact with the department as directed by the community corrections officer." RCW 72.09.310 (emphasis added). Since 1975, RCW 9A.08.010(4) has provided that "[a] requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears." *See* LAWS OF 1975, 1st Ex. Sess., ch. 260.

This court recently addressed whether the "willfulness" requirement in the escape from community custody statute is equivalent to a purposeful mens rea or a knowledge mens rea. *See State v. Buttolph*, __ Wn. App. __, 399 P.3d 554 (2017). In that case, Tylor Buttolph was convicted of escape from community custody under RCW 72.09.310. *Buttolph*, 399 P.3d at 555. On appeal, he argued, like Mr. Yefremov does here, that construing "willfulness" in RCW 72.09.310 as only requiring knowledge would make it a crime for a person to inadvertently miss a community custody meeting. *Buttolph*, 399 P.3d at 555. Mr. Buttolph relied principally on *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982) for the proposition that the legislature plainly intended to impose a greater mens rea requirement for this statute. *Buttolph*, 399 P.3d at 555. Mr. Yefremov also relies on this same case.

This court rejected Mr. Buttolph's argument, holding that the "willfulness" requirement in RCW 72.09.310 is satisfied by a person acting knowingly with respect to the material elements of the crime. *Buttolph*, 399 P.3d at 557. This court reasoned that "when the legislature enacted the escape from community custody statute in 1988, it presumably knew that RCW 9A.08.010(4) equated willfulness with knowledge." *Id.* at 556. Therefore, this court reasoned, if the legislature had intended a greater mens rea requirement, it would have stated its purpose directly. *Id.*

This court further rejected Mr. Buttolph's reliance on *Danforth* for the proposition that the legislature plainly intended to impose a greater mens rea requirement. *Danforth* involved a former statute that made it a crime to willfully fail to return to a work release program. *Danforth*, 97 Wn.2d at 257. To avoid criminal liability under that statute, the person had to return to the designated place "'*at the time specified.*'" *Id.* (emphasis added) (quoting former RCW 72.65.070 (1967)). The *Danforth* court reasoned that a "purposeful" mens rea was required so as not to criminalize a person's inadvertent failure to return to a specific place on time. *Id.* at 258.

However, this court distinguished the escape from community custody statute from the former failure to return to work release statute. *Buttolph*, 399 P.3d at 557. Because a person can avoid criminal liability under RCW 72.09.310 by simply contacting the Department—which was not the case under former RCW 72.65.070—this court reasoned that a purpose to impose a greater mens rea requirement did not plainly appear, as it did in *Danforth*. *Buttolph*, 399 P.3d at 557.

In light of *Buttolph*'s holding that the "willfulness" requirement in RCW 72.09.310 is satisfied by a person acting knowingly, we conclude that the trial court did not err in denying Mr. Yefremov's proposed jury instruction.

ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Yefremov argues defense counsel provided ineffective assistance because he failed to object to CCO Taylor's testimony that he had "abscond[ed]" from community custody in the past. RP at 76, 80, 89. Mr. Yefremov argues the only purpose for this testimony was to show his propensity for criminal activity and to unduly prejudice his case. For this reason, he argues the trial court would have excluded this testimony under ER 403 and ER 404(b) had defense counsel objected.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant receives ineffective assistance if the attorney's conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) prejudiced the defendant, i.e., there is a reasonable probability the attorney's conduct affected the case's outcome. *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (1993). Because ineffective assistance of counsel is an issue of constitutional magnitude, it may be considered for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

"There is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions in the exercise of reasonable professional judgment."

Benn, 120 Wn.2d at 665. A defendant cannot claim ineffective assistance if defense counsel's trial conduct can be characterized as legitimate trial strategy or tactic. *Id.* "The decision whether to object is a classic example of trial tactics, and only in egregious circumstances will the failure to object constitute ineffective assistance of counsel." *State v. Kolesnik*, 146 Wn. App. 790, 801, 192 P.3d 937 (2008). This court reviews ineffective assistance claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

ER 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Evidence of prior bad acts is not admissible to show a defendant is a "criminal type." *State v. Brown*, 132 Wn.2d 529, 570, 940 P.2d 546 (1997). ER 403 provides that the relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

Applying the strong presumption that counsel has rendered adequate assistance and has made all significant decisions in the exercise of reasonable professional judgment, defense counsel's decision not to object to CCO Taylor's testimony can be properly characterized as a strategic one. CCO Taylor made the first two references to Mr. Yefremov's multiple acts of absconding while trying to make some other point—he

was trying to explain why Mr. Yefremov was still under community custody in September 2015, and why Mr. Yefremov was removed from his substance abuse treatment program. Objections would have drawn the jury's attention away from the questions at hand and focused their attention on Mr. Yefremov's prior absconding offenses. By the time CCO Taylor mentioned the multiple acts of absconding a third time, the jury had already learned of them. Accordingly, even were we to assume that CCO Taylor's testimony was improper, we conclude defense counsel was not ineffective by not objecting.

Moreover, Mr. Yefremov fails to establish prejudice. He testified about his poor attendance at his supervision meetings and admitted he missed them because he knew he would test positive for drugs. Given his open discussion of his history of absconding, there is no reasonable probability that CCO Taylor's references affected the case's outcome.

Because defense counsel's trial conduct was likely tactical and Mr. Yefremov has failed to demonstrate prejudice, we conclude Mr. Yefremov's right to effective assistance of counsel was not violated.

APPELLATE COSTS

Mr. Yefremov, noting his indigent status, asks this court to exercise its discretion and not impose appellate costs in the event the State substantially prevails. The State has substantially prevailed. The State requests this court to only impose appellate costs in conformity with RAP 14.2 as amended.

RAP 14.2, recently amended, governs the award of appellate costs. The rule generally requires an award of appellate costs to the party that substantially prevails. The rule permits an appellate court, in its decision, to decline an award of appellate costs, or to direct a commissioner or clerk to decide the issue. A commissioner or clerk is precluded from awarding appellate costs if it finds that the defendant lacks the current or likely future ability to pay such costs. If a trial court earlier found that the defendant was indigent for purposes of appeal, that finding continues unless the commissioner or clerk determines by a preponderance of the evidence that the defendant's financial circumstances have significantly improved since the earlier finding.

A majority of this panel has determined that our commissioner shall decide the issue of appellate costs. In the event the State seeks an award of appellate costs, we direct our commissioner to enter an order consistent with RAP 14.2.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, A.C.J.

WE CONCUR:

Korsmo, J.

Siddoway, J.

LAW OFFICE OF SKYLAR BRETT

October 27, 2017 - 11:51 AM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	34702-8
Appellate Court Case Title:	State of Washington v. Yan Gennadyevich Yefremov
Superior Court Case Number:	15-1-03985-8

The following documents have been uploaded:

- 347028_Petition_for_Review_20171027114928D3295882_2699.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Yefremov Petition for Review.pdf

A copy of the uploaded files will be sent to:

- Liseellnerlaw@comcast.net
- bobrien@spokanecounty.org
- lsteinmetz@spokanecounty.org
- scpaappeals@spokanecounty.org

Comments:

Sender Name: Valerie Greenup - Email: valerie.skylarbrett@gmail.com
Filing on Behalf of: Skylar Texas Brett - Email: skylarbrettlawoffice@gmail.com (Alternate Email: valerie.skylarbrett@gmail.com)

Address:
PO Box 18084
Seattle, WA, 98118
Phone: (206) 494-0098

Note: The Filing Id is 20171027114928D3295882