

34529-7-III

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

TYLOR BUTTOLPH, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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**INDEX**

**I. APPELLANT’S/RESPONDENT’S ASSIGNMENTS OF ERROR AND ISSUES PRESENTED ..... 1**

**II. ISSUES PRESENTED ..... 2**

**III. STATEMENT OF THE CASE ..... 2**

**IV. ARGUMENT ..... 4**

    A. THE CRIMINAL REQUIREMENT THAT A COMMUNITY CUSTODY VIOLATOR “WILLFULLY” DISCONTINUE TO MAKE HIMSELF AVAILABLE AS CONTAINED IN THE STATUTE SETTING FORTH THE CRIME OF ESCAPE FROM COMMUNITY CUSTODY DOES NOT REQUIRE A GREATER MENS REA THAN “KNOWLEDGE” AS SET FORTH IN RCW 9A.08.010. .... 4

    B. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION..... 13

    C. UNLESS THE DEFENDANT’S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT’S ORDER OF INDIGENCY WAS ENTERED, RAP 14.2 PROVIDES THAT THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT HIS APPEAL..... 15

**V. CONCLUSION ..... 16**

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

*Crosswhite v. Washington State Dep't of Soc. & Health Servs.*,  
No. 33718-9-III, 2017 WL 169089, (Wash. Ct. App.  
Jan. 17, 2017),..... 11

*State v. Bauer*, 92 Wn.2d 162, 595 P.2d 544 (1979) ..... 11

*State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982) ..... 4, 5, 6

*State v. Delmarter*, 94 Wn.2d 634, 618 P.2d 99 (1980) ..... 13

*State v. Fleming*, 137 Wn. App. 645, 154 P.3d 304 (2007)..... 14

*State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975)..... 13

*State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980) ..... 13

*State v. Hall*, 104 Wn.2d 486, 706 P.2d 1074 (1985)..... 5, 6, 8, 9

*State v. Shriner*, 101 Wn.2d 576, 681 P.2d 237 (1984) ..... 6

*State v. Smith*, 104 Wn.2d 497, 707 P.2d 1306 (1985)..... 13

*State v. Sweany*, 174 Wn.2d 909, 281 P.3d 305 (2012)..... 8

**STATUTES**

Laws of 1988, ch. 153, § 6..... 9

RCW 9A.04.010..... 10

RCW 9A.04.090..... 10

RCW 9A.08.010..... 8, 10, 11, 12

RCW 72.09.310 (1992)..... 10, 11

**RULES**

RAP 14.2..... 15, 16

**OTHER**

WPIC 10.05..... 12

**I. APPELLANT’S/RESPONDENT’S ASSIGNMENTS OF ERROR AND ISSUES PRESENTED**

The appellant combines his issues presented with his assignments of error into one “list”:

1. In order to convict a person of Escape from Community Custody, the state is required to prove that s/he committed a “purposeful act.”

**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?

2. The court’s instructions violated Mr. Buttolph’s Fourteenth Amendment right to Due Process.
3. The court’s instructions violated Mr. Buttolph’s Wash. Const. art. I, § 3 Right to Due Process.
4. The court’s instructions improperly relieved the state of its burden of proof.
5. The court erred by refusing to give Mr. Buttolph’s proposed instruction stating that the “willfulness” requirement of Escape from Community Custody requires proof of a “purposeful act.”

**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. Buttolph’s right to Due Process by refusing to instruct the jury that the state was required to prove that he committed a “purposeful act” in order to convict him of Escape from Community Custody?

6. The state presented insufficient evidence to convict Mr. Buttolph.

7. No rational jury could have found beyond a reasonable doubt that Mr. Buttolph willfully escaped from community custody by committing a purposeful act.

**ISSUE 3:** In order to convict for willfully escaping from community custody, the state must prove that the accused committed a “purposeful act.” Did the state present insufficient evidence to convict Mr. Buttolph when there was no evidence that he missed a meeting with his Community Corrections Officer through anything other than happenstance or accident?

8. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

**ISSUE 4:** If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Buttolph is indigent?

## **II. ISSUES PRESENTED**

1. Does the scienter requirement of “willfully” as contained in the 1992 amendment to the statute setting forth the crime of escape from community custody require a higher mens rea than “knowledge” as set forth in RCW 9A.08.010(4)?
2. Was there sufficient evidence to support the conviction?

## **III. STATEMENT OF THE CASE**

Defendant Tylor Buttolph failed to report to his community corrections officer (CCO), Jeremy Taylor, as required while he was on an

18-month term of community custody for his prior second degree manslaughter charge. Ex. P4; Report of Trial page 7 (RP hereinafter).<sup>1</sup>

Mr. Buttolph met with CCO Taylor, on May 5, 2015, at CCO Taylor's office. RP 25, 30. Conditions of Mr. Buttolph's community custody included the requirement that he secure written permission from CCO Taylor before leaving the State of Washington or the community of Spokane, obtain written permission before traveling outside the county, notify CCO Taylor upon change of residency or change of employment or residency, and abide by written or verbal directions issued by his CCO. RP 28. At the May 5 meeting, CCO Taylor informed Mr. Buttolph in writing that he was required to meet with CCO Taylor on May 19, 2015. RP 30. On May 19, Mr. Buttolph failed to meet with CCO Taylor as required. RP 30.

Two days later, on May 21, CCO Taylor attempted to contact Mr. Buttolph at his residence; however, he was unable to locate him. RP 31. A warrant was issued for Mr. Buttolph's arrest. RP 31. Mr. Buttolph was finally apprehended on June 3, 2015. RP 32. Between May 19 and June 3, Mr. Buttolph neither contacted, nor attempted to contact CCO Taylor, nor

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<sup>1</sup> Court Reporter Heather Gipson transcribed the trial and sentencing proceedings which consists of 91 pages. These pages will be referenced by "RP."

make Taylor aware of his location. RP 31-32. On May 19, 2015, CCO Taylor learned that Mr. Buttolph had fled the jurisdiction. RP 34. Mr. Buttolph was charged with escape from community custody and was convicted at trial. RP 68; CP 1, 42. He received a 30-day sentence. RP 79; CP 53.

At sentencing, Mr. Buttolph informed the court that he had left the State of Washington and travelled to Montana to meet with his significant other and attend his child's ultrasound. RP 77-78.

#### IV. ARGUMENT

##### **A. THE CRIMINAL REQUIREMENT THAT A COMMUNITY CUSTODY VIOLATOR "WILLFULLY" DISCONTINUE TO MAKE HIMSELF AVAILABLE AS CONTAINED IN THE STATUTE SETTING FORTH THE CRIME OF ESCAPE FROM COMMUNITY CUSTODY DOES NOT REQUIRE A GREATER MENS REA THAN "KNOWLEDGE" AS SET FORTH IN RCW 9A.08.010.**

Mr. Buttolph claims that to convict him of escape from community custody, the State was required to show that he acted purposefully<sup>2</sup> - intentionally, as opposed to knowingly - and that the court erred by not instructing the jury as to that elevated mens rea. In support of this claim, Mr. Buttolph relies almost exclusively on *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982). His reliance on *Danforth* is misplaced.

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<sup>2</sup> Purposefully means intentionally.

In *Danforth*, the defendants left their Spokane work release facility to look for employment,<sup>3</sup> but instead got drunk and awoke in Montana. *Id.* at 256. Two weeks later they were arrested in Kansas. *Id.* Upon their return to Spokane, they were charged with and convicted of first degree escape. Our Supreme Court determined that these defendants could be prosecuted under two separate statutes, either under escape or under failure to return to work release. The court held that former RCW 72.65.070 dealt specifically with escape from work release; therefore it was “the more specific statute, thus preempt[ing] prosecutions under RCW 9A.76.110 [the general escape statute] of those defendants whose crime is failure to return to a work release facility.” 97 Wn.2d at 258. Secondly, the court noted that that the pre-1975 failure to return to work release statute<sup>4</sup> contained the requirement that the conduct be willful, while the former escape statute required the *implied* element of knowledge.<sup>5</sup> The court found this difference between the two concurrent statutes was important; the difference recognized:

a valid legislative distinction between going over a prison wall and not returning to a specified place of custody. The

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<sup>3</sup> Apparently with permission as part of the program.

<sup>4</sup> RCW 72.65.070 was originally enacted in 1967. *State v. Hall*, 104 Wn.2d 486, 494-96, 706 P.2d 1074 (1985).

<sup>5</sup> “In *Descoteaux*, we added the culpability element of knowledge to the statute.” *Hall*, 104 Wn.2d at 493.

first situation requires a purposeful act, the second may occur without intent to escape. It is easy to visualize situations where a work release inmate failed to return because of a sudden illness, breakdown of a vehicle, etc. This explains the requirement of willful action.

*Danforth*, 97 Wn.2d at 258.

The result in *Danforth* was “mandated *both* by the special/general rule and by the need to give effect to the special statute.” *State v. Shriner*, 101 Wn.2d 576, 582, 681 P.2d 237 (1984).

Mr. Buttolph now attempts to import the limited application of *Danforth* into the case at hand. However, *Danforth* has no application here. *Danforth* dealt with two statutes, both now repealed, involving the same subject matter requiring the court to determine scope of the statutes where one was more specific than the other. Moreover, the history of the widely divergent meanings and prior usages of the scienter element “willfulness” was *not* discussed in *Danforth*, but is well documented in Justice Durham’s dissent in *Hall*, 104 Wn.2d at 494-96.

In *Hall*, the court invalidated escape statutes in which the standard of culpability necessary to convict varied according to whether the offender was classified as a state or a non-state prisoner. In the dissenting opinion, Justice Durham outlined the prior usages of “willfulness,” noting that in 1975 our legislature adopted the Model Penal Code to eliminate the

confusion existing in the many definitions ascribed to the various mens rea elements, including the definition of willfulness.

Prior to the enactment in 1975 of the Revised Criminal Code, willful was generally interpreted to mean “an act committed intentionally, deliberately and/or designedly as distinguished from one done accidentally, inadvertently, innocently and/or with lawful excuse.” *State v. Oyen*, 78 Wn.2d 909, 916, 480 P.2d 766 (1971); *see also State v. Russell*, 73 Wn.2d 903, 907, 442 P.2d 988 (1968). While certainly distinct from the historical definition requiring a showing of evil purpose, this definition of willful left unclear whether an act done with knowledge of its probable consequences would be considered to be willful.

Dissatisfaction with the confused state of the law concerning the mens rea requirements for a showing of criminal action led to the adoption of § 2.02, General Requirements of Culpability of the Model Penal Code. The drafters identified four levels of culpability into which all mental states were to be classified: (1) purpose, (2) knowledge, (3) recklessness, and (4) negligence. Model Penal Code § 2.02 (Tent. Draft 4, 1955). They identified a trend which equated the term willful with the second level of culpability - knowledge - and codified that trend as a presumption. Penal Code comments, at 130. An exception to this presumption is applied when “a purpose to impose further requirements plainly appears.” Penal Code § 2.02(8).

In 1975, the Legislature adopted the provisions of the Model Penal Code identifying the four levels of culpability and establishing the definition of willful as the equivalent of acting with knowledge “unless a purpose to impose further requirements plainly appears.” Laws of 1975, 1st Ex.Sess., ch. 260, § 9A.08.010, p. 826. The Legislature specifically directed that these general provisions of the Revised Criminal Code were to apply to other defenses defined in Title 9A or any other statute, unless Title 9A or the other statute provides otherwise. RCW 9A.04.010(2). Thus,

RCW 9A.08.010 applies to RCW 72.65.070 even though that statute was originally enacted in 1967.

*Hall*, 104 Wn.2d at 495-96.

Importantly in *Hall*, both the failure to return to work release statute, and *arguably* the legislative meaning intended for the statute's mens rea of "willfulness"<sup>6</sup> *predated* the 1975 adoption of the model penal code in our state. This construct of legislative interpretation is consistent with cases holding that a court looks to the circumstances existing *at the time of the passage* of the original statute to determine legislative intent. *See State v. Sweany*, 174 Wn.2d 909, 281 P.3d 305 (2012) ("If the statute is ambiguous, we 'may look to the legislative history of the statute and the circumstances *surrounding its enactment* to determine legislative intent. *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003).'" *Sweany*, 174 Wn.2d at 915 (emphasis added)). However, the dissent in *Hall* did not use the above maxim of statutory construction. Instead, it adopted the position that the 1975 passage of the Model Penal Code and its declaration that willfulness is satisfied if a person acts knowingly (RCW 9A.08.010(4)) applied *retroactively* to the formerly enacted failure to return to work

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<sup>6</sup> In *Hall*, the dissent believed that the 1975 adoption of the Model Penal Code and its requirement that willfulness is satisfied if a person acts knowingly (RCW 9A.08.010(4)) applied retroactively to the failure to return to work release.

release statute. Neither position was addressed by the majority that found an equal protection violation existed in the general escape statute and those who escape from work release.

Knowledge continues to be the culpability element that must be proven to convict under RCW 9A.76.110 all who fall within its parameters, except those who escape from work release. Those who escape from work release must be shown to have willfully failed to return to be convicted of first degree escape. By applying this culpability requirement, RCW 9A.76.110 and RCW 72.65.070 will be reconciled and a work release prisoner's right to equal protection of the laws will be safeguarded.

*Hall*, 104 Wn.2d at 493-94.

Unlike *Danforth* and *Hall*, both of which examined laws enacted *prior* to 1975, here there is no confusion as to the legislative meaning intended for crimes that require the scienter of "willfulness" when such crimes were enacted after the 1975 adoption of the Model Penal Code. Mr. Buttolph was convicted of "escape from community custody." That law was originally passed in 1988, and was amended to its current form in 1992.

As originally passed it stated:

An inmate in community custody who wilfully fails to comply with any one or more of the controls placed on the inmate's movements by the department of corrections shall be deemed an escapee and fugitive from justice, and upon conviction shall be guilty of a class C felony under chapter 9A.20 RCW.

Laws of 1988, ch. 153, § 6.

In 1992, the law was amended in a manner that eliminated the failure to comply language, language that made the offense a crime of omission. The 1992 amendment required a defendant's *affirmative act* of willfully discontinuing to make himself or herself available to the department for supervision:

An inmate in community custody who 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 shall be deemed an escapee and fugitive from justice, and upon conviction shall be guilty of a class C felony under chapter 9A.20 RCW.

RCW 72.09.310 (1992 c 75 § 6).

Because the “willful discontinuation”<sup>7</sup> law was passed after the 1975 adoption of RCW 9A.04.090,<sup>8</sup> the general requirements of culpability set forth in RCW 9A.08.010 apply to this community custody statute,

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<sup>7</sup> Calling the crime an “escape” is somewhat misleading where the crime only requires the willful discontinuation of making oneself available to the department of corrections for supervision.

<sup>8</sup> 9A.04.010 provides: “The provisions of chapters 9A.04 through 9A.28 RCW of this title are applicable to offenses defined by this title or another statute, unless this title or such other statute specifically provides otherwise.”

RCW 72.09.310. Therefore, the willfulness requirement is met by a showing the act was committed knowingly. RCW 9A.08.010(4) provides:

Requirement of Wilfulness Satisfied by Acting Knowingly.  
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.

There is no further requirement plainly appearing in the escape/wilfully discontinue statute. Soon after the Model Penal Code's adoption, our State Supreme Court acknowledged that the scienter of "wilfully" was *consistent* with the scienter of "knowingly."

Such an interpretation is consistent with the legislature's later definition of the term "wilful" for the purposes of the recently enacted criminal code. Pursuant to RCW 9A.08.010 the requirement of wilfulness is satisfied if a person acts knowingly with respect to the material elements of the offense. We find this definition accords with the intent of the legislature in the nonsupport statute. We therefore conclude that the proper construction of the term "wilful" as used in RCW 26.20.030 and .080 is "with knowledge of the needs of children for food, clothing, shelter and medical attendance, and of one's failure to provide support for meeting those needs."

*State v. Bauer*, 92 Wn.2d 162, 168, 595 P.2d 544 (1979). It is noteworthy that here, as in *Bauer*, the statute discussed is outside of Title 9A.

In *Crosswhite v. Washington State Dep't of Soc. & Health Servs.*, 33718-9-III, 2017 WL 169089, at \*4 (Wash. Ct. App. Jan. 17, 2017), this Court applied the reasoning in *Bauer* and found that willful, as used in

RCW 74.34.020(3) (the abuse of a vulnerable adult statute) was satisfied by acting knowingly.

Because the legislature has not plainly indicated a purpose to impose further requirements on the term “willful” in the escape from community custody statute, the trial court properly gave instruction no. 7 that “a person acts willfully as to a particular fact when he or she acts knowingly as to that fact,”<sup>9</sup> and did not err by refusing defendant’s proposed instruction that “Willful action, as required by these instructions, requires a purposeful act.” CP 23. Purposeful means intentional. RCW 9A.08.010(1)(a). The defendant’s proposed instruction would elevate the mens rea for the present crime from “knowledge or knowingly” to “intentional or intentionally,” contrary to the intent of the legislature as expressed in RCW 9A.08.010(4). The trial court did not err by instructing the jury in a manner consistent with RCW 9A.08.010(4), and WPIC 10.05, that “[a] person acts willfully as to a particular fact when he or she acts knowingly as to that fact.” CP 36 (Instruction No. 7). There was no due process violation here because, as above, the trial court properly instructed the jury on all of the elements of the offense.

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<sup>9</sup> CP 36.

**B. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION**

Contrary to defendant's assertions, the crime of escape from community custody requires an *affirmative* act. The elements of the statute require proof that the defendant *willfully (knowingly) discontinued making himself available* to the department of corrections by: (a) making his whereabouts unknown; or (b) failing to maintain contact with his community corrections officer. CP 35 (Instruction No. 6). The evidence at trial established the above.

In reviewing the sufficiency of the evidence, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Smith*, 104 Wn.2d 497, 507, 707 P.2d 1306 (1985); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence. Indeed, circumstantial evidence often may be more probative than direct evidence. *State v. Gosby*, 85 Wn.2d 758, 766, 539 P.2d 680 (1975). Further, specific criminal intent may be inferred from conduct where it is plainly indicated as a matter of logical probability. *State v. Delmarter*,

94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Fleming*, 137 Wn. App. 645, 648, 154 P.3d 304 (2007).

Here, it was established that Mr. Buttolph was on community supervision for a prior felony and, as required, met with his CCO at his office on May 5, 2015. RP 30. It is uncontroverted that Mr. Buttolph was advised in writing that he was required to meet with his CCO again on May 19. *Id.* It is uncontroverted that he did not make his meeting with his CCO on May 19. RP 30. Mr. Buttolph was also informed that he was not to leave the County of Spokane or the State of Washington without obtaining prior written approval from his CCO. RP 30.

CCO Taylor testified on cross-examination that on May 19, 2015, he learned that Mr. Buttolph had fled the jurisdiction. RP 34. That evidence was uncontroverted. Mr. Buttolph was finally apprehended on June 3, 2015, *weeks* after he was required to meet with his CCO. RP 32. It was clear beyond peradventure that during the period between May 19 and June 3, Mr. Buttolph neither contacted, nor attempted to contact his CCO, nor did he make his CCO aware of his location. RP 31-32.

From these undisputed facts and inferences, the jury could determine that on or about May 19, 2015, Mr. Buttolph *willfully discontinued making himself available* to his CCO by making his whereabouts unknown. He had fled the jurisdiction without the required

written permission, did not contact his CCO as was required in writing, and failed to contact his CCO at any time from May 19 to June 3.

**C. UNLESS THE DEFENDANT’S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT’S ORDER OF INDIGENCY WAS ENTERED, RAP 14.2 PROVIDES THAT THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT HIS APPEAL.**

Effective January 31, 2017, RAP 14.2 reads:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. *When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.* The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A “nominal party” is one who is named but has no real interest in the controversy.

(Emphasis added).

The trial court determined the defendant to be indigent for purposes of his appeal on June 13, 2016, based on a declaration provided by the

defendant. CP 84-85. The State is unaware of any change in the defendant's circumstances. Should the defendant's appeal be unsuccessful, the Court should only impose appellate costs in conformity with RAP 14.2 as amended.

## V. CONCLUSION

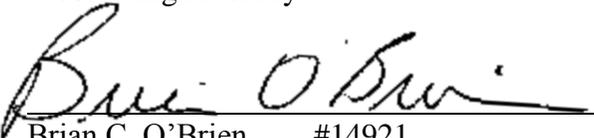
The scienter requirement of "willfully" as contained in the 1992 amendment to the statute setting forth the crime of escape from community custody does not require a higher mens rea than "knowledge" as set forth in RCW 9A.08.010(4). Therefore, the jury was properly instructed on the elements of the offense.

There was more than sufficient evidence presented to the jury to support the defendant's conviction for the crime of "escape" from community custody.

Therefore, the State respectfully requests that this Court affirm the judgment and sentence of the lower court.

Dated this 13 day of March, 2017.

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

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
TYLOR BUTTOLPH,  
  
Appellant.

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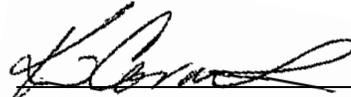
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that on March 13, 2017, I e-mailed a copy of the Brief of Respondent in this matter,  
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