

34702-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

YAN YEFREMOV, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Larry Steinmetz
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. APPELLANT’S ASSIGNMENTS OF ERROR 1

II. ISSUES PRESENTED 2

III. STATEMENT OF THE CASE 3

 Substantive facts. 3

IV. ARGUMENT 6

 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. 6

 B. THE DEFENSE ATTORNEY WAS NOT INEFFECTIVE BY NOT OBJECTING TO THE CCO’S TESTIMONY REGARDING THE DEFENDANT “ABSCONDING” FROM MEETINGS WITH THE CCO, AS IT WAS NOT PREJUDICIAL, NOT SUBJECT TO AN ER 404(B) ANALYSIS, AND, IF ANYTHING, IT CONTRIBUTED TO THE DEFENDANT’S THEORY OF THE CASE. 16

 Standard of review. 17

 1. The defendant has not provided any authority that the term “abscond” is prejudicial or subject to an ER 404(b) analysis. 20

 2. Mr. Yefremov has not met his burden to establish there was no legitimate strategic or tactical reason behind his lawyer’s choices. 22

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.....	24
V.	CONCLUSION	25

TABLE OF AUTHORITIES

WASHINGTON CASES

Crosswhite v. Washington State Dep't of Soc. & Health Servs.,
197 Wn. App 539, 389 P.3d 731 (2017)..... 15

In re Pers. Restraint of Stenson, 142 Wn.2d 710,
16 P.3d 1 (2001)..... 17

State v. Bauer, 92 Wn.2d 162, 595 P.2d 544 (1979) 15

State v. Benn, 120 Wn.2d 631, 845 P.2d 289 (1993)..... 22

State v. Danforth, 97 Wn.2d 255, 643 P.2d 882 (1982) 8, 9, 10

State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011) 18

State v. Hall, 104 Wn.2d 486, 706 P.2d 1074 (1985)..... 9, 10, 11, 12

State v. Kolesnik, 146 Wn. App. 790, 192 P.3d 937 (2008) 22

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009) 17

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995)..... 17, 18

State v. Rodriguez, 121 Wn. App. 180, 87 P.3d 1201 (2004)..... 23

State v. Shriner, 101 Wn.2d 576, 681 P.2d 237 (1984) 9

State v. Sweany, 174 Wn.2d 909, 281 P.3d 305 (2012)..... 12

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987) 17

FEDERAL CASES

Cullen v. Pinholster, 563 U.S. 170, 131 S.Ct. 1388,
179 L.Ed.2d 557 (2011)..... 17

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052,
80 L.Ed.2d 674 (1984) 17, 18, 22

OTHER CASES

McMorran v. Moore, 113 Mich. 101, 71 N.W. 505, 506 (1897)..... 20

STATUTES

Laws of 1988, ch. 153, § 6..... 13
RCW 72.09.310 (1992)..... 7, 14
RCW 9A.04.010..... 14
RCW 9A.04.090..... 14
RCW 9A.08.010..... 12, 14, 15, 16

RULES

ER 404 20
RAP 14.2..... 24, 25

OTHER

COMPACT OXFORD ENGLISH DICTIONARY (1971)..... 20
WPIC 10.05..... 16

I. APPELLANT'S ASSIGNMENTS OF ERROR

The appellant combines his issues presented with his assignments of error into one "register":

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. Yefremov's Fourteenth Amendment right to Due Process.
3. The court's instructions violated Mr. Yefremov'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. Yefremov'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. Yefremov'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. Mr. Yefremov was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
7. Mr. Yefremov's attorney provided ineffective assistance of counsel by failing to object to extensive inadmissible, prejudicial evidence.

8. The evidence of Mr. Yefremov's alleged multiple prior incidents of absconding from community custody was inadmissible under ER 404(b).
9. The evidence of Mr. Yefremov's alleged multiple prior incidents of absconding from community custody was inadmissible under ER 403.

ISSUE 3: The Rules of Evidence preclude the introduction of evidence of uncharged misconduct when its only potential purpose is to encourage the jury to infer that the accused is more likely guilty based on an alleged propensity to commit a certain kind of crime. Did Mr. Yefremov's attorney provide ineffective assistance of counsel in his trial for Escape from Community Custody by failing to object to extensive testimony that he regularly "absconded" from community custody?

10. 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. Yefremov 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. Has Mr. Yefremov met his heavy burden to establish his lawyer was ineffective by not objecting to the testimony that he "absconded" several times prior to the present case as testified to by his community corrections officer?

III. STATEMENT OF THE CASE

Mr. Yefremov was charged in the Spokane County Superior Court with one count of escape from community custody. CP 1. The matter proceeded to a jury trial, and Mr. Yefremov was convicted as charged. CP 39. This appeal timely followed.

Substantive facts.

In September of 2015, Jeremy Taylor worked as a State of Washington Community Corrections Officer, supervising adult felony offenders subject to community custody pursuant to a criminal conviction. RP 68-69.¹ CCO Taylor's office was located in Spokane. RP 82.

During this time period, CCO Taylor ("CCO") supervised Mr. Yefremov. RP 71. CCO Taylor advised Mr. Yefremov of the state's expectations, requirements, and conditions of his community custody. RP 72, 74-75. The trial court had ordered Mr. Yefremov to serve 12 months of community custody pursuant to his felony conviction. RP 73-74.² Mr. Yefremov began serving his community custody in April of 2015, but

¹ The record consists of the verbatim reports of proceedings dated June 7, 2016, by Court Reporter Cochran consisting of 117 pages and is referenced as simply "RP"; and by Court Reporter Gipson for the dates of June 8, 2016, and July 26, 2016, consisting of 59 pages and is referenced herein as "2RP."

² Mr. Yefremov had been convicted of a felony possession of a controlled substance, methamphetamine and heroin. RP 73, 83, 100-01.

it was extended beyond the 12-month period because of his multiple violations. RP 75-76. Mr. Yefremov had absconded from supervision, so his time on community custody was tolled. RP 75-76.

As part of Mr. Yefremov's community custody conditions, he was required to meet with CCO Taylor in person two times per month, and once per month "in the field." RP 76-77. With regard to the current offense, Mr. Yefremov was advised and required to meet with CCO Taylor, in person, on September 16, 2015. RP 77-78, 80. He failed to appear for this meeting and provided no notice that he would not be present. RP 78. CCO Taylor attempted to contact Mr. Yefremov by telephone and in person to no avail. RP 78, 82. Approximately 60 days later, Mr. Yefremov was apprehended in Everett, Washington. RP 79. Mr. Yefremov was required to obtain written permission from CCO Taylor prior to leaving Spokane County. RP 79, 86, 91. He did not do so before travelling to Everett. RP 79. Mr. Yefremov also failed to advise CCO Taylor he was leaving the county. RP 91.

During the defense case-in-chief, Mr. Yefremov testified he had an opiate addiction which caused him to engage in "criminal" behavior and to commit crimes. RP 102. He would not meet with his CCO on occasion because of "dirty UAs." RP 103. Mr. Yefremov also acknowledged that he had a "poor appearance for checking in to [his] probation officer, every

single time it was because [he] knew [he] was going to go to jail for a dirty UA because [he] couldn't keep [himself] clean because of the opiates addiction." RP 104. Mr. Yefremov further lamented: "So I would go in. And sometimes I'd go and don't check in, and then I'd get picked up for -- for a -- for my DOC warrant. Then I'm in jail, I get out, I ask for some -- some type of help, and it just never happens. He never did." RP 104.

Mr. Yefremov stated that after conviction, he was ordered by the court to enter into treatment. RP 105-06. Mr. Yefremov claimed when he was "incarcerated," he had attended some treatment. RP 106. He had an overdose the night before he was to check in with CCO Taylor on September 16, 2015. RP 107-08. Mr. Yefremov said he was going to fail his urinalysis on September 16, 2015, and that he would be arrested; he had "multiple arrests" and he was getting nowhere because of his addiction. RP 107-08, 113-14.

He further acknowledged he left Spokane in September of 2016, and went to Everett, Washington. RP 107. He claimed he was in treatment for a week at a church in Everett, and returned to Spokane in early October 2015, because he had a court date. RP 109.

CCO Taylor was not provided any information that Mr. Yefremov had attended any drug treatment. RP 91-92.

During closing argument, the deputy prosecutor remarked that Mr. Yefremov had been given a number of opportunities by his CCO before he was charged with escape from community custody. The deputy prosecutor remarked:

I want to point out that this isn't a situation where the department was out to get him. You've heard the testimony that Mr. Yefremov had absconded seven times before that. You heard the testimony that Mr. Yefremov said he would miss his appointments on purpose to avoid getting in trouble because when he'd done that before, showed up and have a dirty UA, they put him in jail, and that's why he would miss on purpose.

He was given a rather long leash in this matter, chance after chance, and you've heard the testimony of CCO Taylor in terms of his preference. Probably too many chances, but finally no more chances. A warrant went out for his arrest because he absconded.

2RP 28.

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. Yefremov claims that to convict him of escape from community custody, the State was required to show that he acted purposefully,³ as

³ Purposefully means intentionally.

opposed to knowingly, and that the trial court erred by not instructing the jury as to this asserted mens rea.

The legislature has defined the crime of “Community Custody Violator” as:

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.

At the time of trial, the court instructed the jury as to the elements and definitions of the crime:

A person commits the crime of escape from community custody when he, while an inmate on community custody, willfully discontinues to make himself available to the department for supervision by failing to maintain contact with the department as directed by the community custody officer.

CP 34.

A person acts willfully when he or she acts knowingly.

CP 32.

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

CP 31.

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

CP 33.

In support of his claim, Mr. Yefremov relies on *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982). His reliance on *Danforth* is misplaced.

In *Danforth*, the defendants left their Spokane work release facility to look for employment,⁴ 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 potentially 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

⁴ Apparently with permission as part of the program.

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 the pre-1975 failure to return to work release statute⁵ contained the requirement that the conduct be willful, while the former escape statute required the *implied* element of knowledge.⁶ 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 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).

⁵ RCW 72.65.070 was originally enacted in 1967. *State v. Hall*, 104 Wn.2d 486, 494-96, 706 P.2d 1074 (1985).

⁶ “In *Descoteaux*, [94 Wn.2d 31, 614 P.2d 179 (1980), *overruled on other grounds in State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982)] [the court] added the culpability element of knowledge to the statute.” *Hall*, 104 Wn.2d at 493.

Mr. Yefremov 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 *State v. Hall*, 104 Wn.2d 486, 494-96, 706 P.2d 1074 (1985).

In *Hall*, the court invalidated the 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”⁷ *predated* the 1975 adoption of the Model Penal Code in our

⁷ 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.

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, 915, 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” (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 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. Yefremov 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”⁸ law was passed after the 1975 adoption of RCW 9A.04.090,⁹ the general requirements of culpability set forth in RCW 9A.08.010 apply to this community custody statute, 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.”

⁸ 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.

⁹ 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.”

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.*, 197 Wn. App 539, 550-51, 389 P.3d 731 (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,"¹⁰ 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

¹⁰ CP 32.

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 32 (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.

B. THE DEFENSE ATTORNEY WAS NOT INEFFECTIVE BY NOT OBJECTING TO THE CCO'S TESTIMONY REGARDING THE DEFENDANT "ABSCONDING" FROM MEETINGS WITH THE CCO, AS IT WAS NOT PREJUDICIAL, NOT SUBJECT TO AN ER 404(B) ANALYSIS, AND, IF ANYTHING, IT CONTRIBUTED TO THE DEFENDANT'S THEORY OF THE CASE.

Mr. Yefremov also argues that defense counsel rendered ineffective assistance of counsel by failing to object to the testimony from CCO Taylor regarding the word "abscond," in that it allowed the jury to draw "an impermissible propensity inference." Appellant's Br. at 13. In support of this claim, he argues that if the jury believed CCO Taylor's statement that Mr. Yefremov "absconded," the jury could draw the inference that he failed to appear for the scheduled meeting on the date charged in the information. This argument has no merit.

Standard of review.

The law affords trial counsel wide latitude in the choice of tactics. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 736, 16 P.3d 1 (2001). Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

To prevail on an ineffective assistance of counsel claim, Mr. Yefremov must show that (1) his lawyer's performance was deficient and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

A lawyer's performance is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a presumption of reasonableness, meaning the reviewing court must "give the attorneys the benefit of the doubt," and must also "affirmatively entertain the range of possible reasons [defense] counsel may have had for proceeding as they did." *Cullen v. Pinholster*, 563 U.S. 170, 196, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) (citations omitted). In conjunction, a fair assessment of a lawyer's performance requires that every effort be

made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. *Strickland*, 466 U.S. at 689.

With regard to the second prong, prejudice results if the outcome of the trial would have been different had defense counsel not rendered deficient performance. *McFarland*, 127 Wn.2d at 337.

As such, an appellate court strongly presumes that counsel is effective and the defendant must show the absence of any legitimate strategic or tactical reason supporting defense counsel's actions. *McFarland*, 127 Wn.2d at 337. To rebut this presumption, the defendant bears the heavy burden of "establishing the absence of any conceivable legitimate tactic explaining counsel's performance." *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

At the time of trial and during direct examination, CCO Taylor explained why the Department of Corrections still had jurisdiction over Mr. Yefremov past the 12 months originally ordered by the trial court:

Washington State Department of Corrections use the terminology, what we call "tolling." So when an offender escapes from community custody or absconds or fails to report, their time is technically suspended. Or if an offender is in-custody on new charges with the court, their time is – is suspended at that point in time and they owe us the remainder of that community custody upon release.

RP 41.

CCO Taylor further remarked:

Mr. Yefremov had multiple prior violations, to include absconding from supervision. When they abscond from supervision or willfully make themselves not available to us, their time tolls. That's the terminology we use to call, "tolling." And their time is essentially suspended. Or if they are arrested and incarcerated on any new charges, their time also tolls during that, because they're not actively being supervised.

RP 75-76.

Um, at one point I believe [the defendant] was enrolled with some outpatient services. But through one of his prior violation processes of absconding, I believe he did -- he was removed from those services.

RP 80.

During cross-examination, defense counsel asked CCO Taylor if there were any DOC violations of Mr. Yefremov which resulted in criminal prosecution. RP 89. CCO Taylor answered stating Mr. Yefremov had seven prior "abscondings," with no community custody notification until the current case. RP 89.

CCO Taylor also remarked that DOC had a directive that if a probationer misses an appointment, it is considered "willful," even if there is an excuse for missing the appointment. RP 81-82.

1. The defendant has not provided any authority that the term “abscond” is prejudicial or subject to an ER 404(b) analysis.¹¹

Mr. Yefremov’s claim falters on several grounds. The ordinary meaning of “absconded” is “concealed, or hidden away, secluded, or secret.” COMPACT OXFORD ENGLISH DICTIONARY, 9 (1971). One court has defined “absconding” as “a design to withdraw clandestinely, to hide or conceal one’s self, for the purpose of avoiding legal proceedings.” *McMorran v. Moore*, 113 Mich. 101, 104, 71 N.W. 505, 506 (1897). Mr. Yefremov has not provided any authority that the term “abscond” is harmful or injurious, criminal in nature, or that it should be construed as a prior bad act.

CCO Taylor explained that the defendant’s history of not meeting with him did not result in any charges or criminal prosecution. RP 89. The information the jury had was that Mr. Yefremov’s failures to meet with his CCO were not criminal in nature. Certainly, the jury had no information or knowledge that such activity was “a prior bad act.”

¹¹ ER 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character or a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Moreover, it was the defense theory of the case that Mr. Yefremov did not show up for his meeting with CCO Taylor on September 16, 2015, because of his drug addiction and need for treatment. To support that theory, *Mr. Yefremov testified* that he had an out-of-control opiate addiction, and that his addiction caused him to engage in “criminal behavior,” including committing crimes. RP 102. He further asserted that he would not meet with his CCO because of the potential for a “dirty” uranalysis results. RP 103. He also contended that he requested help from DOC for his drug addiction to no effect. RP 103. To further enhance his theory that he required drug treatment across the state, he admitted he had a poor history of checking in with his CCO because of the potential for a “dirty UA.” RP 103-04.

[E]very single time it was because I knew I was going to go to jail for a dirty UA because I couldn't keep myself clean because of the opiates addiction. I mean, I don't know if people know this, what opiate addiction means, but it pretty much destroys your life. It -- you've got to go through bad withdrawal and stuff.

So I would go in. And sometimes I'd go and don't check in, and then I'd get picked up for -- for a -- for my DOC warrant. Then I'm in jail, I get out, I ask for some -- some type of help, and it just never happens. He never did.

RP 104.

In furtherance of his theory, Mr. Yefremov contended that he overdosed the evening prior to his September 16, 2015, scheduled meeting with his CCO. He knew he would not pass the drug test the next day, and

immediately headed to Everett for treatment without meeting with CCO Taylor.

If anything, CCO Taylor's testimony supported Mr. Yefremov's theory of the case that he failed to show for a number of meetings because of his claimed drug addiction.

2. Mr. Yefremov has not met his burden to establish there was no legitimate strategic or tactical reason behind his lawyer's choices.

A defendant cannot claim ineffective assistance if defense counsel's trial conduct can be characterized as legitimate trial strategy or tactic. *State v. Benn*, 120 Wn.2d 631, 665, 845 P.2d 289 (1993). 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).

Here, defense counsel had a reasonable tactical reason not to object to the testimony as it furthered his theory of the case as discussed above. On this record, Mr. Yefremov has not met the heavy burden of showing that his attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment...." *Strickland*, 466 U.S. at 687.

Even if Mr. Yefremov's lawyer was deficient in the manner that he contends, however, Mr. Yefremov has not shown that he suffered actual

prejudice. “The prejudice prong of a claim of ineffective assistance of counsel compares well to a harmless error analysis – essentially no harm, no foul.” *State v. Rodriguez*, 121 Wn. App. 180, 187, 87 P.3d 1201 (2004) (quoting *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999)). The remark by CCO Taylor that the defendant “absconded” several times prior to the present case pales in comparison to Mr. Yefremov’s unabashed proclamations during his case-in-chief in support of his theory of the case that he engaged in “criminal behavior,” he had been incarcerated, he committed crimes because of addiction, he had “multiple arrests,” and he purposefully did not meet with his CCO on the date of the offense and on other multiple occasions because he knew he would fail the required urinalysis. If Mr. Yefremov’s attorney committed an error by failing to object to the CCO’s testimony, it was harmless in light of Mr. Yefremov’s testimony and his theory of the case.

It is uncertain how Mr. Yefremov claims on appeal that his alleged overdose the night before made his failure to contact his CCO inadvertent the next day¹² when he testified that he intentionally did not make the appointment because of his fear he would not pass the required urinalysis at the meeting with the CCO. It was the product of his own choice.

¹² Appellant’s Br. at 10.

Accordingly, the defense lawyer's representation was neither deficient nor prejudicial and his ineffective assistance of counsel claim fails.

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 August 12, 2016, based on a declaration provided by the

defendant. CP 69-75. 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.

Mr. Yefremov fails to meet his heavy burden that his defense counsel was ineffective at the time of trial.

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

Dated this 5 day of April, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney



Larry Steinmetz #20635
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

YAN YEFREMOV,

Appellant.

NO. 34702-8-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on April 5, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Skylar T. Brett
skylarbrettlawoffice@gmail.com

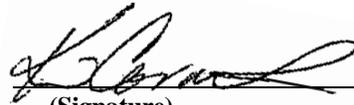
Lise Ellner
liseellnerlaw@comcast.net

4/5/2017

(Date)

Spokane, WA

(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

April 05, 2017 - 4:00 PM

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_20170405155855D3933328_6724_Briefs.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Yefremov Yan 347028 Resp Br LDS.pdf

A copy of the uploaded files will be sent to:

- skylarbrettlawoffice@gmail.com
- bobrien@spokanecounty.org
- scpaappeals@spokanecounty.org
- Liseellnerlaw@comcast.net

Comments:

Sender Name: Kim Cornelius - Email: kcornelius@spokanecounty.org

Filing on Behalf of: Larry D. Steinmetz - Email: lsteinmetz@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:
1100 W Mallon Ave
Spokane, WA, 99260-0270
Phone: (509) 477-2873

Note: The Filing Id is 20170405155855D3933328