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Division III
State of Washington
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No. 36699-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DAVID MULLINS,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. Mr. Mullins's conviction for escape must be reversed and the charge dismissed with prejudice for insufficient evidence.

Escape in the first degree requires proof beyond a reasonable doubt the defendant knowingly escaped from custody or escaped from a detention facility while being detained pursuant to a conviction of a felony. RCW 9A.76.110(a). Here, the State charged Mr. Mullins with escape from custody. CP 72. The State did not charge Mr. Mullins with escape from a detention facility. CP 72. Following a bench trial, the court found Mr. Mullins guilty of escape in the first degree based on its finding the State proved Mr. Mullins escaped from custody. CP 76-77; RP 86-88. The court did not find Mr. Mullins guilty under the alternative means that he escaped from a detention facility. Mr. Mullins asks this Court to reverse his conviction for insufficient evidence. *See* Brief of Appellant at 8-17.

Despite the fact that the information charges only escape from custody and the fact the court's verdict explicitly found only escape from custody, the State urges this court to find the evidence sufficient to support guilt under either means and to affirm the conviction. Brief of Respondent at 5-12. But the State only charged Mr. Mullins with one means of escape: escape from custody. CP 72. And the court only convicted Mr.

Mullins of one means of escape: escape from custody. CP 77. Because the evidence is insufficient to support this conviction, this Court must reverse.

- a. The State presented insufficient evidence to prove Mr. Mullins escaped from custody.

Mr. Mullins left the confines of a locked interview room inside of the Stevens County Jail. RP 23-27, 39-41, 49-50. He walked around inside of the jail facility, walked in a hallway and stairwell area, and walked around in the deputies' desk area. RP 26-27, 39-40, 49-50. He left neither the jail nor the building. RP 35, 51. Mr. Mullins did not escape custody, and the court's findings to the contrary are supported by insufficient evidence.

A person escapes custody when they escape "restraint pursuant to a lawful arrest or an order of a court." RCW 9A.76.010(2). Custody refers to the person's physical restraint by a law enforcement officer. *See, e.g., State v. Walls*, 106 Wn. App. 792, 797-98, 25 P.3d 1052 (2001); *State v. Solis*, 38 Wn. App. 484, 487, 685 P.2d 672 (1984). Here, Mr. Mullins did not escape a restraint and was never out of custody.

The State argues it presented sufficient evidence of escape because it proved Mr. Mullins "left the restraint of the holding cell" and encourages the court to reject Mr. Mullins's argument that "so long as an

individual does not leave the building, he is free to leave his place of restraint and run amok within the building.” Brief of Respondent at 7-8. The State misunderstands Mr. Mullins’s argument.

First, Mr. Mullins does not argue a defendant has a right to be present in an unapproved area or be somewhere without permission. Doing so may open a defendant to any number of policy violations within a facility. It does not, however, mean a defendant meets the legal definition of escape every time a defendant is somewhere in a jail other than the precise area he is supposed to be.

Second, the State fails to cite any cases in support of its conclusory claim sufficient evidence supports the finding of escape from custody. Brief of Respondent at 7-8. The State also fails to explain why the cases cited by Mr. Mullins in support of his argument insufficient evidence supports the escape from custody finding are wrong.¹

Escape from custody refers to escape from the physical restraint of a law enforcement officer. *See* Brief of Appellant at 11-16. Here, the State failed to present sufficient evidence Mr. Mullins escaped the physical restraint of a law enforcement officer. This Court should reverse for insufficient evidence.

¹ The State does discuss cases in support of its alternative argument that the Court should affirm based on a finding of sufficient evidence of escape from a detention facility. Brief of Respondent at 9-12. Mr. Mullins addresses that argument below.

- b. This Court should reject the State's argument the Court may affirm based on the uncharged alternative means of escape from a detention facility.

The information alleges Mr. Mullins escaped from custody. CP 72. The information does not allege Mr. Mullins escaped from a detention facility. CP 72. The court convicted Mr. Mullins based on its finding escaped from custody. CP 77. The court did not find Mr. Mullins escaped from a detention facility. CP 76-77; RP 86-88.

Although leaving either custody or a detention facility may constitute escape, here the State alleged only escape from custody in the information, and the court found only escape from custody. CP 72, 76-77; RP 86-88. Moreover, the court explicitly rejected a finding that Mr. Mullins escaped from a detention facility. RP 87-88. In explaining its verdict, in response to the question, "So the court is making a finding that the confinement to a room within the facility, and leaving that room, is escape from the facility. Is that correct?" the court answered:

No. It's escape from custody. It is -- it is no different from being confined into a patrol vehicle and escaping from that vehicle. In fact the case law -- the mere fact that you're told you're under arrest and an officer escorts you to a patrol car by your elbow you are in custody, and if you flee it's an escape. . . . He's escaped -- he escaped from custody. He was placed -- he was confined in that room. He was not booked into the jail yet at that point.

RP 87-88.

The State's argument that this Court is free to examine the facts and determine for itself whether Mr. Mullins left custody or left a detention facility and affirm based on the sufficiency of either means is incorrect. Brief of Respondent at 6-12. The court's finding of an escape from custody is the basis of Mr. Mullins's insufficiency challenge. The State is bound by the factual findings the court made, and the absence of a factual finding is construed against the party with the burden, in this case, the State. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) ("In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue."); *see In re Welfare of A.B.*, 168 Wn.2d 908, 927, 232 P.3d 1104 (2010) (noting reviewing courts may imply findings of facts only where "circumstances clearly demonstrate that the finding was actually made by trial court" and "lack of an essential finding is presumed equivalent to a finding against the party with the burden of proof"). The State may not now seek affirmance on an alternative grounds not charged by the State and not found by the trier of fact.

- c. Alternatively, the State also presented insufficient evidence to prove Mr. Mullins escaped from a detention facility.

Even if this Court could affirm on an uncharged alternative the trier of fact explicitly rejected, the State also failed to present sufficient evidence Mr. Mullins escaped from a detention facility. Escape from

detention facility requires leaving a physical place. *State v. Gomez*, 152 Wn. App. 751, 217 P.3d 391 (2009). The State’s contrary interpretation of *Gomez* ignores the facts this Court relied on in its opinion.

In *Gomez*, the defendant “slipped his hands out of the cuffs, walked into the hallway, glanced around, and left the building through the back door.” 152 Wn. App. at 752 (emphasis added). This Court found the defendant’s actions in physically leaving the jail constituted an escape from a detention facility.² *Id.* at 753-54. Because the defendant left “a[] place used for the confinement of a person charged,” he left a detention facility. *Id.* at 754.

Here, Mr. Mullins left a room within the jail. RP 39-41. He did not leave the jail. RP 35, 51. Even if this Court could consider this uncharged alternative, the State failed to prove Mr. Mullins escaped from a detention facility when he never left the facility.

d. This Court should reverse Mr. Mullins’s escape conviction and remand for dismissal with prejudice.

Insufficient evidence supports Mr. Mullins’s conviction for escape in the first degree. This Court should reverse the conviction and remand

² As explained in the opening brief, this Court also held these actions did not constitute an escape from custody. *Gomez*, 152 Wn. App. at 153; Brief of Appellant at 14-16.

with instructions for the trial court to dismiss the charge and to resentence Mr. Mullins on the remaining counts.

2. This Court must reverse Mr. Mullins’s conviction for escape and dismiss the charge without prejudice because the information is constitutionally deficient.

An “information is constitutionally adequate only if it sets forth all essential elements of the crime, statutory or otherwise, and the particular facts supporting them.” *State v. Hugdahl*, ___ Wn.2d ___, 458 P.3d 760, 762 (2020). A charging document that does not contain all essential elements and a description of the facts supporting those elements is deficient. *Id.*; *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Where the State fails to include an essential element in the information, the court must reverse the conviction and remand for dismissal without prejudice without conducting a prejudice analysis. *State v. Zillyette*, 173 Wn.2d 784, 786, 270 P.3d 589 (2012).

The State admits “knowingly” is an essential element of escape. Brief of Respondent at 14. The State admits the essential elements rule requires the State to include all essential elements in an information. Brief of Respondent at 12-13. The State acknowledges the Supreme Court has already considered an information alleging escape that did not plead the essential element of knowingly and admits the Court held the absence of “knowingly” renders an information defective, requiring reversal and

remand for dismissal of the charge without prejudice. Brief of Respondent at 13-14 (citing *State v. Brown*, 169 Wn.2d 195, 234 P.3d 211 (2010)).

Yet the State argues the information charging Mr. Mullins is not deficient, despite this identical defect. This Court should reject the State's argument.

As the Supreme Court held in *Brown*, knowingly is an essential element of the crime of escape. 169 Wn.2d at 197 (citing *State v. Descoteaux*, 94 Wn.2d 31, 34, 614 P.2d 179 (1980), *overruled on other grounds by State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982)). Even applying the liberal construction in favor of validity, as courts must when a defendant challenges an information for the first time on appeal, where the information fails to allege the element of knowingly, that element does not appear in the information under any fair construction. *Id.* at 198. An information's reference to the statutory provision or the inclusion of other language does not implicitly allege the element of knowledge. *Id.* Therefore, the information is deficient, and the court must dismiss the charge without prejudice. *Id.*

This Court should reject the State's argument that it need not allege the essential element of knowingly because "the very word 'escape' implies the mens rea element." Brief of Respondent at 15. First, binding precedent holds otherwise. *Brown*, 169 Wn.2d at 197-98; *State v. Hall*,

104 Wn.2d 486, 492, 706 P.2d 1074 (1985); *Descoteaux*, 94 Wn.2d at 34-35. Second, the only cases the State cites in support of its argument address the elements of assault, not the elements of escape. Brief of Respondent at 16-17. These cases are inapposite and fail to support the State's argument.

The State's analogy ignores the heightened importance of the mens rea element and fails to address the Supreme Court's recent decision in *State v. Pry*, which Mr. Mullins discussed in the opening brief.³ 194 Wn.2d 745, 452 P.3d 536 (2019). In *Pry*, the Court held the State's failure to include the mens rea element in an information requires reversal of the defendant's conviction and remand for dismissal without prejudice. 194 Wn.2d at 755-56. The same failure occurred here.

Finally, in arguing the element of knowingly is inherent in the word escape, the State ignores the fact it is not merely the act of leaving a detention custody or facility that constitutes escape. Leaving custody or a detention facility only becomes escape when the action is taken knowingly. RCW 9A.76.110(a). Nor does the evidence demonstrating Mr. Mullins did, in fact, act knowingly save the information's defect.

³ In Mr. Mullins's opening brief, counsel mistakenly titled the opinion *State v. Cruz*, based on the name of the defendant for whom the Court granted relief. Brief of Appellant at 21-22. The correct title of the case is *State v. Pry*, 194 Wn.2d 745, 452 P.3d 536 (2019), based on the name of the lead defendant.

Evaluating whether an information is deficient is different from analyzing whether the State presented sufficient evidence to support the missing element. As the *Hugdahl* Court recognized, “The State cannot rely on trial testimony, jury instructions, or the failure to request a bill of particulars to cure a charging deficiency. *Hugdahl*, 458 P.3d at 765. If the information fails to allege an essential element it is constitutionally deficient, despite the introduction of sufficient evidence at trial proving the missing element.

By charging only that Mr. Mullins “did escape from the custody,” the amended information omitted the essential mens rea element of escape in the first degree: knowingly. CP 72. Where a necessary element is not found in any form in an information, prejudice is presumed, and the remedy is dismissal. *Hugdahl*, 458 P.3d at 763; *Pry*, 194 Wn.2d at 753. For all these reasons, and the reasons stated in the opening brief, this Court should find the State’s failure to include the essential element of knowingly in the information renders it deficient. Brief of Appellant at 17-22. Therefore, this Court should reverse Mr. Mullins’s escape conviction and remand for dismissal of that charge without prejudice.

3. The sentencing court erred in calculating Mr. Mullins’s offender score merely based on the State’s unsupported criminal history allegation.

The court calculated Mr. Mullins’s offender score based on the prosecutor’s mere allegations that Mr. Mullins’s score was fifteen for each

offense without proof of any judgments and sentences or any other supporting evidence. CP 20-23; RP 99-106. As the Washington Supreme Court just reiterated in *State v. Cate*, a case the State ignores, the State's unsupported summary fails to meet its burden of proving a defendant's offender score. 194 Wn.2d 909, 453 P.3d 990 (2019). Because the State failed to sustain its burden of proving Mr. Mullins's criminal history by a preponderance of the evidence, this Court must reverse and remand for resentencing.

In *Cate*, the sentencing court found the defendant's offender score was a "9+" where the State "failed to provide copies of the relevant judgment and sentence forms" but instead provided a summary of the defendant's criminal history. 194 Wn.2d at 911. The defendant did not object. *Id.* The Washington Supreme Court held:

A prosecutor's unsupported summary of criminal history is not sufficient to satisfy the State's burden. And it is not sufficient that the defendant does not object to the offender score calculation since such a rule would effectively shift the burden of providing criminal history to the defendant.

Id. at 913 (citing *State v. Hunley*, 175 Wn.2d 901, 910, 912, 287 P.3d 584 (2012)). The Court also noted, "It is irrelevant that the prosecutor summarized criminal history since such a summary does not satisfy the State's burden of proof." *Id.* at 913 (citing *Hunley*, 175 Wn.2d at 910).

Cate reaffirmed established precedent that bare assertions fail to satisfy the State's burden and that the absence of an objection does not cure this defect. 194 Wn.2d at 913; *Hunley*, 175 Wn.2d at 910; *State v. Ford*, 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999). Here, as in *Cate*, the court based Mr. Mullins's offender score solely on the prosecutor's summarized criminal history. Here, as in *Cate*, Mr. Mullins did not object, but the absence of an objection is not an affirmative acknowledgement. 194 Wn.2d at 913.

Applying *Cate* and *Hunley*, the State failed to prove Mr. Mullins's criminal history. The State did not present any certified judgments or any evidence of Mr. Mullins's alleged prior convictions. Instead, the State merely listed without support what it claimed Mr. Mullins's prior convictions were. The State's claim that the prosecutor's mere recitation of Mr. Mullins's criminal history, absent any proof, is sufficient to sustain the State's burden, has once again been soundly rejected by the Supreme Court. Brief of Respondent at 21-22; *Cate*, 194 Wn.2d at 913.

Likewise, the State's repeated claim that Mr. Mullins had an affirmative obligation to object to his offender score or make an offer of proof to contradict the State's allegations is entirely incorrect. Brief of Respondent at 21-22. The Supreme Court has repeatedly held it is the State, not the defendant, who bears the burden of proving criminal history.

Cate, 194 Wn.2d at 913; *Hunley*, 175 Wn.2d at 910; *Ford*, 137 Wn.2d at 482-83. The prosecution is not relieved of its burden of proving prior convictions unless the defendant affirmatively acknowledges the “facts and information” of the underlying criminal history. *Hunley*, 175 Wn.2d at 912; *State v. Mendoza*, 165 Wn.2d 913, 928, 205 P.3d 113 (2009); *see also Cate*, 194 Wn.2d at 914. Acknowledging the *offender score* is not an affirmative acknowledgment of *the facts and information* regarding criminal history. *State v. Ramirez*, 190 Wn. App. 731, 734, 359 P.3d 929 (2015) (explaining there must be “an *affirmative* acknowledgement by the defendant of *facts and information* introduced for the purposes of sentencing” to excuse the prosecution from not producing evidence (quoting *Mendoza*, 165 Wn.2d at 928)).

Finally, the State offers no support for its baseless argument that by signing the last page of the judgment and sentence, Mr. Mullins affirmatively agreed to his offender score. Brief of Respondent at 21. This Court should reject the State’s claim unsupported by any legal authority. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (declining to consider arguments unsupported by any “citation of authority”); RAP 10.3(a)(6) (providing briefs should contain “citations to legal authority” in support of argument).

The State failed to sustain its burden of proving Mr. Mullins's criminal history by a preponderance of the evidence. This Court must reverse and remand for resentencing.

4. The sentencing court improperly considered the prosecutor's arguments regarding facts not within the record in sentencing Mr. Mullins.

The court imposed Mr. Mullins's sentence after reading the prosecutor's sentencing memorandum and hearing the prosecutor's sentencing arguments that Mr. Mullins deserved a lengthy and exceptional sentence based on the State's comparison of Mr. Mullins's case to two handpicked cases the prosecutor thought were similar. RP 103-04; CP 28-29. This unconfirmed information on unrelated cases of different offenders was not relevant to Mr. Mullins's sentencing and was not related to Mr. Mullins's crimes or criminal history. Therefore, it was not appropriate information for the court's consideration at sentencing. Brief of Appellant at 26-28.

First, the State inaccurately claims Mr. Mullins did not object to the court's consideration of the other cases. Brief of Respondent at 23. This is incorrect. Mr. Mullins explicitly challenged "the propriety of talking about other defendant's cases" and urged the court the prosecutor's comparisons were improper. RP 107. Second, the State argues this Court should assume the sentencing court did not consider the arguments of the

prosecutor at sentencing and, therefore, Mr. Mullins failed to show the court “gave any weight to the reference to other similar cases.” Brief of Respondent at 23. This Court should reject the State’s argument.

The State ignores the fact that the court followed most of the State’s recommendations. The State recommended the court run the sentences on these convictions consecutively to Mr. Mullins’s sentence on his previously imposed case, and the court followed this recommendation. CP 23-30, 101; RP 99-106, 114. The State recommended the court impose an 84 month sentence on the escape conviction, a 60 month sentence on the bail jumping conviction, and a 24 month sentence on the possession conviction. CP 29-30. The court agreed and ordered the State’s recommended sentence on each charge. CP 37, 101; RP 114-15.

The fact that the court followed the State’s recommendations shows the court considered and relied on the State’s sentencing arguments. Because it was improper for the court to consider the information about other people’s cases in sentencing Mr. Mullins, this Court should reverse the sentence and remand for the court to resentence Mr. Mullins free from consideration of improper facts.

B. CONCLUSION

The State failed to prove Mr. Mullins guilty of escape in the first degree beyond a reasonable doubt. The Court must reverse the escape conviction and remand for dismissal with prejudice. Alternatively, if the Court finds the evidence sufficient, the information is constitutionally deficient because it fails to include all the essential elements of the offense. Therefore, the Court should reverse the escape conviction and remand for dismissal without prejudice.

In addition, the Court should reverse the sentences and remand for resentencing because the State failed to prove Mr. Mullins's offender score and because the court improperly considered evidence outside of the record.

DATED this 16th day of April, 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', with a stylized flourish at the end.

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STATE OF WASHINGTON,)	
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RESPONDENT,)	
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v.)	NO. 36699-5-III
)	
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APPELLANT.)	

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