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No. 36699-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

DAVID MULLINS,

Appellant.

---

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

---

BRIEF OF APPELLANT

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KATE R. HUBER  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, WA 98101  
(206) 587-2711  
katehuber@washapp.org  
wapofficemail@washapp.org

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## **A. INTRODUCTION**

David Mullins twice left a locked room within the Stevens County Jail where he was being held on a felony arrest warrant for failing to appear at his trial. Mr. Mullins never left the jail itself but instead wandered around inside of the facility. A deputy stopped Mr. Mullins inside of an internal hallway within the jail and returned him to the room. Despite never leaving the jail, the court convicted Mr. Mullins of escape in the first degree because it found he escaped custody by leaving a secured room inside of the jail without permission.

Insufficient evidence supports the conviction. Mr. Mullins never escaped from custody or from a detention facility. This Court should reverse the conviction and remand for dismissal with prejudice.

## **B. ASSIGNMENTS OF ERROR**

1. The court erred in finding Mr. Mullins guilty of escape in the first degree where the State presented insufficient evidence to prove every element of the offense beyond a reasonable doubt, in violation of the Fourteenth Amendment and article I, section 3.

2. The amended information is constitutionally deficient because it fails to include all the essential elements of escape in the first degree, in violation of the Sixth and Fourteenth Amendments and article I, sections 3 and 22. CP 72.

3. The court erred in calculating Mr. Mullins offender score as a “9+” where the State did not present any certified judgments or equivalent documents to prove Mr. Mullins’s criminal history by a preponderance of the evidence, in violation of the Sentencing Reform Act (SRA) and due process of law.

4. The court erred in sentencing Mr. Mullins based on the State’s representations and arguments concerning facts not proven or acknowledged, in violation of RCW 9.94A.530(2).

5. In the absence of sufficient evidence, the court erred in entering Finding of Fact 6 on count one. CP 77.

6. In the absence of sufficient evidence, the court erred in entering Finding of Fact 7 on count one. CP 77.

7. In the absence of sufficient evidence, the court erred in entering Finding of Fact 9 on count one. CP 77.

8. In the absence of sufficient evidence, the court erred in entering Finding of Fact 5 on count two. CP 78.

9. In the absence of sufficient evidence, the court erred in entering Finding of Fact 7 on count two. CP 78.

10. In the absence of sufficient evidence, the court erred in entering Finding of Fact 3 on count three. CP 79.

11. In the absence of sufficient evidence, the court erred in entering Finding of Fact 5 on count three. CP 79.

**C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. The state and federal due process clauses require the State present sufficient evidence to prove each and every element of a charged offense beyond a reasonable doubt. Escape in the first degree requires proof the defendant “knowingly escape[d] from custody or a detention facility while being detained pursuant to a conviction of a felony.” Here, Mr. Mullins left a locked room within the jail but never left the jail itself. Where Mr. Mullins did not leave the jail, did the State fail to prove beyond a reasonable doubt Mr. Mullins knowingly escaped from custody or a detention facility?

2. An information is constitutionally deficient if it fails to set forth every element of the crime charged, and the remedy for a violation of this “essential elements” rule is reversal of the conviction and dismissal of the charge without prejudice to the State’s ability to refile. The State charged Mr. Mullins with escape in the first degree, but the information omitted the essential mens rea element: that Mr. Mullins acted knowingly. Is the information constitutionally deficient, requiring reversal and remand for dismissal without prejudice?

3. The SRA and due process of law require the State to prove a defendant's offender score by a preponderance of the evidence. Here, the court calculated Mr. Mullins's offender score solely based on the prosecutor's allegations, unsupported by certificates of conviction or other evidence. Did the State fail to prove Mr. Mullins's offender score by a preponderance of the evidence?

4. The SRA requires a court to sentence a defendant based on the facts of the crime for which he has been convicted and prohibits a court from considering facts not proven by the State or acknowledged by the defendant. Here, the State urged the court to sentence Mr. Mullins to the maximum permissible sentence on each offense based on its representations of what the court had done or what the State had requested in cases of other defendants the State believed were similarly situated. Did the court err and exceed its authority in sentencing Mr. Mullins after considering the State's improper arguments on matters outside of the record?

#### **D. STATEMENT OF THE CASE**

Mr. Mullins failed to appear at the second day of his trial for forgery and related charges. CP 32; RP 69. After the jury convicted him

in absentia, the court issued a warrant for his arrest for failing to appear.<sup>1</sup> RP 67; CP 8, 76. In addition, the State filed a new case charging bail jumping, and the court issued a separate warrant for Mr. Mullins's arrest on that case as well. CP 1-2; RP 68.

Officer Michael Welch arrested Mr. Mullins on unrelated charges and on the outstanding warrants and brought him to the Stevens County Jail.<sup>2</sup> RP 53-55; CP 76. When they arrived, deputies were in the middle of distributing dinner and medications to the jail's occupants. RP 24, 40. Rather than immediately formally process Mr. Mullins, Deputy Billy Reece put Mr. Mullins in a locked interview room within the jail's booking office and continued his duties. RP 23-26.

While Deputy Reece was still on rounds, he discovered Mr. Mullins had exited the room in which he had left him. RP 26-27. Deputy Reece found Mr. Mullins coming down a set of stairs that leads to the part of the jail with the holding cells. RP 26-27. The hallway between the interview room where Deputy Reece left Mr. Mullins and the staircase where he found Mr. Mullins is in an internal part of the jail in an area accessible to staff and inmates. RP 26-28, 35-36, 40-41, 48-51. The doors

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<sup>1</sup> Mr. Mullins's appeal from his convictions following the forgery trial is currently pending before this Court under Case No. 36410-1-III,

<sup>2</sup> Although the State initially charged Mr. Mullins with theft of a motor vehicle for the unrelated incident that brought him to Officer Welch's attention, the State did not ultimately proceed on that charge. CP 63-64, 72-73.

at the top of the stairs are locked, and Mr. Mullins did not open them. RP 51.

Deputy Reece brought Mr. Mullins back to the interview room, locked the door, and continued on his rounds. RP 27. When Deputy Reece returned to check on Mr. Mullins, he observed Mr. Mullins opening the door to the interview room and walking out. RP 28. He grabbed Mr. Mullins, handcuffed him, and moved him to a different room with video surveillance. RP 28-29, 33, 45. Mr. Mullins did not leave the jail itself or the building in which the jail is housed during either time he was out of the interview room. RP 36, 51.

A search of Mr. Mullins after he was wandering the jail revealed he possessed a small bag of methamphetamine, as well as Deputy Kenneth Niegel's personal cellular telephone, car keys, and four one dollar bills. RP 29, 42. Deputy Niegel had left the items on his desk and in his lunchbox on his desk. RP 42-43.

The State charged Mr. Mullins with bail jumping for failing to appear at the second day of his forgery trial on September 28, 2018. CP 1-2. The State also charged Mr. Mullins with escape in the first degree, possession of methamphetamine, and theft in the third degree for the incidents occurring in the jail. CP 72-73. The court joined the two cases.

CP 14. Mr. Mullins waived a jury on both matters and proceeded to a bench trial. CP 15, 74.

The court convicted Mr. Mullins of all charges. CP 31-33, 76-81. The court found Mr. Mullins escaped from custody by opening the door and leaving the secured room in which he had been left by the deputy without permission. CP 77; RP 113 (“You were in custody, in a room, . . . and you did not have permission to leave that room, and you certainly did not have any authority to be in any other portion of the jail.”). The court did not find Mr. Mullins had escaped from a detention facility.

The court sentenced Mr. Mullins to 84 months’ confinement on escape in the first degree, 60 months’ confinement on bail jumping, 24 months’ confinement and 12 months’ community custody on possession of methamphetamine, and 364 days’ confinement on theft in the third degree. CP 37, 101-02; RP 114. The court ordered all of the instant sentences run concurrently to each other but ordered they run consecutively to Mr. Mullins’s sentence on the forgery case, leaving Mr. Mullins with a total of 113 months. CP 101; RP 114-15.

## E. ARGUMENT

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

- a. The State is required to prove all essential elements of a charged offense beyond a reasonable doubt.

The State is required to prove every element of a charged offense beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A reviewing court must reverse unless it concludes any rational fact finder could have found each essential element beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

Escape in the first degree requires proof beyond a reasonable doubt that the defendant (1) knowingly (2) escaped from custody or escaped from a detention facility (3) while being detained pursuant to a conviction of a felony. RCW 9A.76.110(1).

At issue here is whether the State proved by sufficient evidence that Mr. Mullins escaped from custody or escaped from a detention facility within the meaning of RCW 9A.76.110(1).

b. The State failed to prove Mr. Mullins escaped from custody or a detention facility.

Mr. Mullins left a locked room within the Stevens County Jail without permission and wandered around inside the jail. Mr. Mullins never left the jail; therefore, he did not “escape[] from . . . a detention facility.”<sup>3</sup> RCW 9A.76.110(1). In addition, Mr. Mullins was never out of custody; therefore, he did not “escape[] from custody.” RCW 9A.76.110(1).

The interview room Mr. Mullins left was inside of the booking office. RP 39-40. Deputies sometimes used the room as a “stand-by holding room.” RP 40. The room was part of the jail, and Deputy Niegel testified Mr. Mullins was “in the custody of the jail.” RP 40. When Mr. Mullins left the room and went to the staircase, the stairs Mr. Mullins went up led to the jail’s holding cell. RP 26-27, 49-50. The doors at the top of the staircase are locked. RP 51. The hallway Mr. Mullins walked through between the interview room and the staircase was an internal hallway within the secured part of the jail. RP 26-28, 34-36, 40-41, 48-51. Mr. Mullins did not leave the jail itself or the building. RP 35, 51. He did not

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<sup>3</sup> The court did not find Mr. Mullins escaped from a detention facility. Instead, the court found Mr. Mullins escaped from custody by leaving his confinement of a secured room within the jail. CP 77.

open the doors at the top of the stairs. RP 35, 51. Deputy Reece grabbed Mr. Mullins inside “the foyer outside of the north wing.” RP 41.

Leaving a confined room within a detention facility without permission fails to meet the statutory definition of escape either from custody or from a detention facility. As is relevant here, “detention facility” is defined as “any place used for the confinement of a person arrested for, charged with or convicted of an offense.” RCW 9A.76.010(3)(a). As is relevant here, “custody” is defined as “restraint pursuant to a lawful arrest or an order of a court.” RCW 9A.76.010(2). “Restraint” is not defined in the statute but case law has adopted the dictionary definitions of “an act of restraining, hindering, checking, or holding back from some activity or expression . . . [or] a means, force, or agency that restrains, checks free activity, or otherwise controls.” *State v. Ammons*, 136 Wn.2d 453, 457, 963 P.2d 812 (1998) (quoting Webster’s Third New International Dictionary 1937 (1986)) (finding defendants escaped custody where they failed to report for work release because they were restrained pursuant to court order).

Basic rules of statutory construction require courts rely on the plain language of a statute to interpret its meaning. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015). Where the plain language of a statute is “unambiguous” and has only one reasonable interpretation, the

court's inquiry ends. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). In addition, courts must give criminal statutes "a literal and strict interpretation." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Courts must avoid a reading that results in "absurd results." *Id.* at 730.

Under a common sense interpretation of the plain language of the statute, escaping from a detention facility requires leaving the detention facility, and escaping from custody requires leaving custody. Escaping from custody does not encompass moving from one area to another area without permission within the confines of a detention facility. Here, Mr. Mullins was never out of the detention facility or custody. Instead, he was wandering around within the confines of the jail. Therefore, the State failed to prove Mr. Mullins was guilty of escape in the first degree beyond a reasonable doubt.

The "escapes from custody" portion of the escape statute, as opposed to the "escapes from . . . a detention facility," refers to an individual who escapes the custody of a law enforcement officer. Escape from custody occurs when someone removes himself from the physical restraint of a law enforcement officer. It does not apply when someone is inside of a detention facility. Case law supports this interpretation.

For example, in *State v. Solis*, the defendant broke loose from the grip of a parole officer trying to arrest him on a parole warrant and ran away. 38 Wn. App. 484, 485, 685 P.2d 672 (1984). This Court held that the officer's act of grabbing the defendant's arms constituted "restraint" such that the defendant was within the officer's custody. *Id.* at 487. Therefore, the defendant escaped the officer's custody when he broke free from her grip, ran away from her, and fled the scene entirely. *Id.* The court affirmed the conviction.

In *Solis*, the defendant claimed he was not in "custody" because the officer had not yet arrested him. The court focused on the meaning of the word "custody" and found the defendant was in the custody of the officer who grabbed his arm and informed him he had a warrant for his arrest. *Id.* at 486 (citing to RCW 9A.76.010(1)). Because the officer restrained the defendant's by grabbing his arm while informing him he had an arrest warrant, he was in the officer's custody. *Id.* at 487.

The court addressed another escape from custody case in *State v. Walls*, 106 Wn. App. 792, 25 P.3d 1052 (2001). In *Walls*, an officer who had verified a valid felony arrest warrant existed approached the defendant, identified himself as a police officer, and informed the defendant he was under arrest. 106 Wn. App. at 794. The officer held the defendant's elbow and was escorting the defendant to his patrol car when

the defendant “bolted,” ran away from the officer, and fled the scene. *Id.* The court affirmed the conviction for escape in the first degree, finding the defendant escaped custody while being detained pursuant to a felony conviction. *Id.* at 797-98.

Similarly, the court affirmed an escape from custody conviction in *State v. Eichelberger*, 144 Wn. App. 61, 180 P.3d 880 (2008). In that case, after the jury found the defendant guilty, the judge announced he was taking the defendant into custody. *Id.* at 64. After twice being told to sit down, the defendant jumped up from the defense table, leapt over the railing, ran out of the courtroom, and ran out of the building. *Id.* at 64-65. The court found the evidence sufficient to convict the defendant of escape in the first degree because it found the defendant was in custody when the court issued the order detaining the defendant. Therefore, the defendant escaped from custody when he ran out of the building while being held on the order. *Id.* at 66-70.

These cases demonstrate that to escape, one must actually leave custody or be fully removed from physical restraint. *See, e.g., State v. Brown*, 29 Wn. App. 770, 777, 630 P.2d 1378 (1981) (defendant’s actions in fleeing while handcuffed at police station, running out of building, and running one block away constituted escape from custody because defendant ran out of police station while handcuffed).

Conversely, escape from a detention center focuses on an escape from a physical place. For example, in *State v. Gomez*, the court compared escape from a detention facility with escape from custody. 152 Wn. App. 751, 217 P.3d 391 (2009). A deputy arrested the defendant and handcuffed him to an immobile chair in the booking room. *Id.* at 752. The defendant slipped out of the handcuffs attached to the chair and left the building. *Id.* The court rejected the defendant's argument that this was an escape from custody and instead held it constituted an escape from a detention facility. *Id.* at 753-54. The court rejected the defendant's argument that, because he was not booked and because the booking room was not part of the jail, the State failed to prove he escaped from a detention facility. Instead, the court found that, because the police used the room where the defendant was handcuffed to a chair as a place for the confinement of people charged, when the defendant slipped out of his cuffs and left the building, he had escaped a detention facility. *Id.* at 754. The court rejected the defendant's argument he merely escaped from custody, which would have subjected him to a lesser charge of escape in the third degree.

If leaving a specific part of detention facility while remaining within the facility constituted "escape[] from custody," the statutory language also criminalizing "escape[] from . . . a detention facility" would

be superfluous. Under such an interpretation, anytime a person left an area where he was confined or was in an area without authority, he would have escaped custody. But ““a court must not interpret a statute in any way that renders any portion meaningless or superfluous.”” *State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014) (quoting *Jongeward v. BNSF Railway Co.*, 174 Wn.2d 586, 601, 278 P.3d 157 (2012)). Therefore, this Court must interpret escaping custody to mean something different than escaping a detention facility.

The court’s finding that Mr. Mullins left custody is misplaced, as the caselaw reveals escape from custody refers not to leaving a physical facility but leaving an officer’s physical restraint. In addition, the State failed to prove Mr. Mullins ever left the Stevens County Jail. Instead, Mr. Mullins remained within the facility. Mr. Mullins’s conviction for escape in the first degree is supported by insufficient evidence because the State failed to prove Mr. Mullins escaped “from custody or a detention facility.” RCW 9A.76.110(1).

Moreover, the court’s findings of fact to the contrary are unsupported by the evidence. The court’s finding that Mr. Mullins was “not an inmate of the jail” is inaccurate and, more importantly, irrelevant to the charge. CP 77 (FOF 6). RCW 9A.76.110(1) applies to people escaping “from custody or a detention facility” and does not reference

“inmates.” In addition, RCW 9A.76.010(2), defining “custody,” refers to confinement of people pursuant to lawful arrest, and RCW 9A.76.010(3), defining “detention facility,” refers to any place confining people arrested for, charged with, or convicted of an offense. Neither the offense nor the definitions refer to “inmates.” Mr. Officer Welch arrested Mr. Mullins and brought him to the Stevens County Jail. Deputy Reece detained him in a room within the jail. Therefore, Mr. Mullins was being held within the jail.

The court’s repeated findings that Mr. Mullins escaped custody by leaving the secured room are also unsupported. CP 77 (FOF 7), CP 78 (FOFs 5, 7), CP 79 (FOFs 3, 5). As explained above, Mr. Mullins never left the jail and was still within the custody of the deputies. Mr. Mullins’s actions in leaving the room fail to constitute an escape from either the detention facility or custody. Finally, the State failed to prove that Mr. Mullins intended to escape the custody. CP 77 (FOF 9). Mr. Mullins was not seen actually leaving or trying to leave. He was not observed exiting a door to the jail. He was wandering around within the jail. The court’s findings of fact are unsupported by the evidence.

- c. This Court should reverse the escape conviction with instructions to dismiss the charge with prejudice.

Where insufficient evidence supports a conviction, double jeopardy prevents the State from retrying the defendant for the same offense. *Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) (“Since we hold today the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only ‘just’ remedy available for that court is the direction of a judgment of acquittal.”); *State v. Hummel*, 196 Wn. App. 329, 359, 383 P.3d 592 (2016) (“Reversal for insufficient evidence is ‘equivalent to an acquittal’ and bars retrial for the same offense.” (quoting *State v. Wright*, 165 Wn.2d 783, 792, 203 P.3d 1027 (2009))). Insufficient evidence supports Mr. Mullins’s conviction for escape in the first degree. Therefore, this Court should reverse with instructions to dismiss the charge.

**2. Mr. Mullins’s conviction for escape must be reversed and the charge dismissed without prejudice because the information is constitutionally deficient.**

- a. An information is constitutionally deficient if it fails to set forth every element of the crime charged.

Article I, section 22, and the Sixth Amendment require the State to provide individuals accused of crimes with notice of the “nature and cause” of the offense charged. *State v. Pelkey*, 109 Wn.2d 484, 487, 745

P.2d 854 (1987). Constitutional notice requires the information contain both all the elements of the crime charged and a description of the specific conduct of the defendant which allegedly constituted the crime. Const. art. I, §§ 3, 22; U.S. Const. amends. VI, XIV; *City of Auburn v. Brooke*, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992). The State must set forth every essential element of the crime, both statutory and nonstatutory, in the information. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991).

Defendants may challenge the sufficiency of notice provided in the information for the first time on appeal. *State v. Leach*, 113 Wn.2d 679, 691, 782 P.2d 552 (1989); RAP 2.5(a)(3). The reviewing court must liberally construe the information and analyze whether “the necessary facts appear in any form.” *Kjorsvik*, 117 Wn.2d at 105. If all essential elements do not appear in the information, reversal is required without proof of actual prejudice. *State v. Zillyette*, 173 Wn.2d 784, 786, 270 P.3d 589 (2012). If all essential elements can be found by some fair construction, then the court must determine if the defendant was prejudiced by the inartful language that caused the lack of notice. *Kjorsvik*, 117 Wn.2d at 105-06. Where a defendant is prejudiced, reversal is required. *Id.* at 111. Appellate courts review challenges to the sufficiency of the information de novo. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013).

- b. The amended information is deficient as to the charge of escape in the first degree because it omits the essential mens rea element.

The escape statute provides:

A person is guilty of escape in the first degree if he or she *knowingly* escapes from custody or a detention facility while being detained pursuant to a conviction of a felony or an equivalent juvenile offense.

RCW 9A.76.110(1) (emphasis added).

The amended information charged Mr. Mullins with escape in the first degree as follows:

COUNT 1

By way of this Information, the Prosecuting Attorney accuses you of the crime of **Escape In The First Degree**, Count 1, the maximum penalty for which is 10 yrs. imprisonment and/or \$20,000 fine, plus restitution, assessments and court costs, in that the said David Raymond Mullins in the County of Stevens, State of Washington, on or about October 8, 2018, then and there, while being detained pursuant to a conviction for Forgery, did escape from the custody.

Contrary to RCW 9A.76.110(1), and against the peace and dignity of the State of Washington.

CP 72.<sup>4</sup> 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.

Where a fact is “necessary to establish the very illegality” of an offense, it is essential element. *Zillyette*, 178 Wn.2d at 158 (quoting *State*

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<sup>4</sup> The original and the amended informations contain identical language charging the offense of escape. CP 64, 72.

*v. Ward*, 148 Wn.2d 803, 811, 64 P.3d 640 (2003)). For escape in the first degree, knowledge is such a fact. Escape in the first degree is not a strict liability offense. Instead, escape in the first degree specifically requires the defendant act “knowingly” as an essential element of the offense. RCW 9A.76.110(1); *State v. Brooks*, 157 Wn. App. 258, 266, 236 P.3d 250 (2010) (requiring proof defendant acted knowingly).

The legislature added knowledge as a statutory element of escape in the first degree in 2001. Laws of 2001, ch. 264, §§ 1, 2. However, even prior to 2001, courts acknowledged knowledge as an essential element. *State v. Hall*, 104 Wn.2d 486, 492, 706 P.2d 1074 (1985) (“[C]ase law has engrafted a culpability element [on to RCW 9A.76.110], that is, the prosecution must show the defendant *knew* that his actions would result in leaving confinement without permission.” (internal quotations omitted)); *State v. Descoteaux*, 94 Wn.2d 31, 34-35, 614 P.2d 179 (1980) (interpreting former statute to require proof defendant acted knowingly), *overruled on other grounds by State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982). Only escape in the third degree lacks knowledge as an essential element, and only in some circumstances. *Compare* RCW 9A.76.110(1) (“A person is guilty of escape in the first degree if he or she *knowingly* escapes . . .”) *with* RCW 9A.76.130(1)(a)

(“A person is guilty of escape in the third degree if he or she escapes from custody.”).

In *State v. Cruz*, the Washington Supreme Court reaffirmed the essential elements rule that “[a] information must include all essential elements of the crime to be constitutionally sufficient.” No. 96599-4, slip op. at 5 (Wash. Nov. 21, 2019). In *Cruz*, the State charged the defendant with rendering criminal assistance but failed to include three essential elements of the offense, including two of the mens rea elements. Slip op. at 7-8. The Court highlighted the importance of the mens rea element, in particular, and noted that in the instant case, “the challenged information wholly omitted reference to the mental state required to commit the crime.” *Id.* at 14. Because the State failed to include the essential elements in the information, the Court affirmed the reversal of the defendant’s conviction and remand for dismissal without prejudice. *Id.* at 19. Finally, the Court reaffirmed the well-established rule that where the information lacks the essential elements, the defendant need not establish prejudice, even where he challenges the information for the first time on appeal. *Id.* at 7.

Here, as in *Cruz*, the State failed to include the essential mens rea element in the information. Escape in the first degree requires the State allege in the information the defendant *knowingly* escaped from detention

or custody. Here, the information contains no mens rea element at all. As such, it fails to allege all of the essential elements of the offense, and prejudice is presumed.

- c. The constitutionally deficient information requires reversal of the escape conviction and remand for dismissal without prejudice.

The essential element of knowledge is missing from the information. Where a necessary element is not found in any form in an information, prejudice is presumed, and the remedy is dismissal. *Cruz*, slip op. at 6-7, 18-19; *Kjorsvik*, 117 Wn.2d at 105-06. 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 based merely on the State's unsupported criminal history allegation.**

- a. The State bears the burden of proving a defendant's offender score by a preponderance of the evidence.

The SRA creates a grid of presumptive standard range sentences based on the seriousness level of the offense of conviction and the defendant's offender score. RCW 9.94A.505, .510, .515, .517, .518, .525, .530; *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1990). The offender score is the sum of points accrued as a result of prior and other current convictions. RCW 9.94A.525.

A trial court's sentencing authority derives strictly from statute. *State v. Ammons*, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986). Even where no objection is raised below, a defendant may challenge a sentencing court's failure to follow the dictates of the SRA for the first time on appeal. *Ford*, 137 Wn.2d at 484-85; *In re the Personal Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). An appellate court reviews de novo the sentencing court's calculation of the offender score. *State v. Rivers*, 130 Wn. App. 689, 699, 128 P.3d 608 (2005).

Due process requires the State to prove a defendant's offender score by a preponderance of the evidence. U.S. Const. amend XIV; Const. art. I, § 3; RCW 9.94A.500(1); *State v. Hunley*, 175 Wn.2d 901, 915, 287 P.3d 584 (2012) ("The burden to prove prior convictions at sentencing rests firmly with the State."). This includes proving the existence, validity, and comparability of prior convictions by a preponderance of the evidence. RCW 9.94A.500(1), RCW 9.94A.525(3); *Hunley*, 175 Wn.2d at 909-10.

"Bare assertions, unsupported by evidence, do not satisfy the State's burden to prove the existence of a prior conviction." *Hunley*, 175 Wn.2d at 910. Instead, due process requires the State bear the "ultimate burden of ensuring the record" supports the defendant's criminal history and offender score. *Ford*, 137 Wn.2d at 480-81. The best evidence of a

prior conviction is a certified copy of the judgment and sentence. *Rivers*, 130 Wn. App. at 698. The State may prove prior convictions by other evidence only if (1) it shows a certified copy of the judgment and sentence is unavailable due to some reason other than the serious fault of the proponent, and (2) the evidence introduced in lieu of certified copies of the judgment and sentence is of comparable reliability. *Id.* at 698-99. The State's burden is not obviated by a defendant's silence or failure to object. *Hunley*, 175 Wn.2d at 910; *Ford*, 137 Wn.2d at 482-83.

The State fails to meet its burden if it simply provides a list of prior convictions and does not introduce any other evidence. *Hunley*, 175 Wn.2d at 910. This lack of evidence, if it results in the convictions being counted in the defendant's offender score, falls "below even the minimum requirements of due process." *Ford*, 137 Wn.2d at 481. This is because "a prosecutor's assertions are neither fact nor evidence, but merely argument." *Hunley*, 175 Wn.2d at 912 (quoting *Ford*, 137 Wn.2d at 483 n.3). "Accordingly, the defendant's mere failure to object to State assertions of criminal history at sentencing does not result in an acknowledgement. There must be some *affirmative* acknowledgment of the facts and information alleged at sentencing in order to relieve the State of its evidentiary obligations." *Id.* (citing *Ford*, 137 Wn.2d at 482-83).

- b. The State failed to prove Mr. Mullins's offender score where it merely relied on the prosecutor's unsupported statements.

The State filed a sentencing memorandum. CP 16-30. The State asserted Mr. Mullins's offender score was 15 for each current offense. CP 20-23. The State did not include any copies of the underlying judgment and sentence documents, records establishing dates of incarceration or release, or other supporting documentation. Instead, the State merely listed without support what it claimed Mr. Mullins's prior convictions were.

Likewise, at the sentencing hearing, the State relied on its undocumented oral assertions of Mr. Mullins's record. RP 99-106. The State claimed, "Mr. Mullins has 20 prior felonies," which it clarified to mean 17 prior felonies as well as 3 other current offenses.<sup>5</sup> RP 100. The State highlighted several specific alleged prior convictions in passing, again without support. RP 101-02.

The State presented no certified judgments or other evidence of any of the alleged prior convictions. Despite the absence of evidence, the court calculated Mr. Mullins offender score as 9+ for each offense, listed alleged prior convictions without cause numbers or dates of incarceration,

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<sup>5</sup> Mr. Mullins actually had two other current offenses, as the theft in the third degree offense is a gross misdemeanor that does not count as an other current offense under the SRA.

and imposed the maximum of the corresponding range for each offense.  
CP 35-36, 99-100.

c. This Court should remand for resentencing.

The court erred in calculating Mr. Mullins's offender score based only on the prosecutor's unsubstantiated summary. *Hunley*, 175 Wn.2d at 905. Where the State fails to prove the defendant's offender score, the defendant is entitled to reversal of the sentence and remand for resentencing. *Id.* at 906 n.2; *State v. Ramirez*, 190 Wn. App. 731, 733, 359 P.3d 929 (2015) (reversing and remanding for resentencing where court's findings of fact fail to support offender score). This Court should reverse Mr. Mullins's sentencing and remand to the trial court for resentencing.

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

RCW 9.94A.530(2) provides, "In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is . . . admitted, acknowledged, or proved in a trial or at the time of sentencing." Instead, a defendant is entitled to sentencing solely based on his current conviction, his offender score, and the circumstances of the crime as proven or admitted. *State v. Houf*, 120 Wn.2d 327, 333, 841 P.2d 42(1992) ("The SRA structures the sentencing

decision to consider only the actual crime of which the defendant has been convicted, his or her criminal history, and the circumstances surrounding the crime.”). The purpose of the rule, often referred to as the real facts doctrine, is to protect defendants from the court’s “consideration of unreliable or inaccurate information” in sentencing. *State v. Morreira*, 107 Wn. App. 450, 456-57, 27 P.3d 639 (2001) (quoting *State v. Handley*, 115 Wn.2d 275, 282, 796 P.2d 1266 (1990)).

Here, the court considered arguments from the State that included information that was not “admitted, acknowledged, or proved” at Mr. Mullins’s trial. In both its sentencing memorandum and oral presentation to the court, the State argued the court should impose maximum consecutive sentences on Mr. Mullins because his case was more egregious than other people’s cases in which the State made similar requests. RP 103-04; CP 27-29. The State compared Mr. Mullins’s case to two other defendants in particular. Specifically, the State compared Mr. Mullins’s case to Mr. Jones-Tolliver, in which the State also asked for consecutive sentences where the defendant was convicted of bail jumping and had an offender score of 9+, as well as to Mr. Scalise, who had a similar criminal history and for whom the State also sought an exceptional sentence. RP 103-04; CP 28-29.

While proportionality is a general purpose of the SRA, the legislature accomplished proportionality by creating a scheme under which every person convicted of the same crime faces the same punishment as other defendants who have a comparable criminal history. RCW 9.94A.010(3). Nothing in the SRA permits the State to hand-pick specific cases and hold them up as relevant points of comparison for a particular defendant.

Where a court imposes a sentence based on improper considerations, it exceeds its sentencing authority because it acts beyond its statutorily given authority. *See generally Goodwin*, 146 Wn.2d at 872-74 (recognizing court only has authority to sentence defendant within confines of statutory sentencing scheme); *State v. Mail*, 121 Wn.2d 707, 711-14, 854 P.2d 1042 (1993) (recognizing court is bound by procedures and even standard range sentences may be challenged where court considered improper information). Here, the court considered improper information before imposing a sentence on Mr. Mullins. Therefore, Mr. Mullins is entitled to resentencing free from consideration of improper facts.

#### **F. CONCLUSION**

The State failed to prove Mr. Mullins guilty of escape in the first degree beyond a reasonable doubt. Therefore, the Court should reverse

the 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 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 21st day of November, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', written in a cursive style.

KATE R. HUBER (WSBA 47540)  
Washington Appellate Project (91052)  
Attorneys for Appellant  
[katehuber@washapp.org](mailto:katehuber@washapp.org)  
[wapofficemail@washapp.org](mailto:wapofficemail@washapp.org)

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

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

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SIGNED IN SEATTLE, WASHINGTON THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2019.

X \_\_\_\_\_ 

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