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State of Washington  
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36719-3-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

GARRY AULT, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. APPELLANT’S ASSIGNMENT OF ERROR**

Insufficient evidence supports the conviction for second-degree escape.

## **II. ISSUE PRESENTED**

Has a person, arrested by police upon probable cause of commission of a felony but prior to the filing of an information by a prosecuting attorney, been “charged with a felony” for the purposes of RCW 9A.76.120 – Escape in the Second Degree?

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

On March 2, 2018, Gary Ault was arrested by Spokane County Sheriff’s Office (SCSO) Deputy Humphrey for residential burglary and violation of a no contact order. CP 3. Deputy Humphrey placed Mr. Ault in his patrol vehicle in order to transport him to the county jail. CP 3. After arriving outside the jail’s front entrance, Deputy Humphrey opened the vehicle door to retrieve Mr. Ault. CP 3. During the ride, Mr. Ault had slipped out of his handcuffs and, upon the Deputy opening the door, Mr. Ault sprinted away, ignoring commands to stop. CP 3. He was recaptured approximately 30 minutes later. CP 3.

On March 6, 2018, the State filed an information charging Mr. Ault with residential burglary, violation of a no-contact order, and second-degree escape. CP 5. Mr. Ault elected to enter into a felony mental health court

agreement. CP 13. The State then dismissed all but the escape in the second-degree charge. CP 18. On February 5, 2019, Mr. Ault was terminated from mental health court due to new arrests occurring while he was in the program. CP 22. He proceeded to a bench trial on the escape in the second-degree charge, was convicted, and was sentenced. CP 24. He timely appealed. CP 39.

#### **IV. ARGUMENT**

##### **A. STANDARD OF REVIEW.**

In a claim of insufficient evidence, a reviewing court examines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.3d 59 (2006), *as amended* (Jan. 26, 2007). The trial court's conclusions of law are reviewed *de novo*. *In re Long & Fregeau*, 158 Wn. App. 919, 925, 244 P.3d 26 (2010). Unchallenged findings of fact become verities on appeal. *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980).

##### **B. DEFENDANT WAS IN CUSTODY AFTER HAVING BEEN ARRESTED UPON PROBABLE CAUSE FOR THE COMMISSION OF A FELONY.**

Custody is defined as, *inter alia*, "restraint pursuant to a lawful arrest." RCW 9A.76.010. Mr. Ault had been placed under arrest after

Deputy Humphrey developed probable cause that Mr. Ault had committed residential burglary, a felony, and violation of a no-contact order, a gross misdemeanor. RCW 9A.52.025; RCW 26.50.110. The superior court findings of fact and conclusions of law indicate that Mr. Ault had been placed under arrest by Deputy Humphrey and that his arrest was a lawful one. CP 62. These findings are unchallenged by Mr. Ault.

**C. DEFENDANT HAD NOT YET BEEN CHARGED WITH A FELONY BECAUSE THAT POWER DOES NOT LIE WITH THE ARRESTING OFFICER.**

Under Washington State law, there are three methods provided for the charging of a felony: (1) by an information filed by a prosecuting attorney; (2) by an indictment from a grand jury; or (3) by process of court martial. RCW 10.37.015. Police officers may charge misdemeanors. CrRLJ 2.1(b). Police officers may also arrest persons, without warrant, upon probable cause of the commission of a felony. RCW 10.31.100. In such cases, the initial pleading in all criminal proceedings filed by the prosecuting attorney shall be an information. CrR 2.1(a).

While police officers do have authority to initiate criminal charges, their authority is limited to misdemeanors. Felony charging authority lies elsewhere and, under the current legal framework, felony cases are generally initiated by an information filed by an elected or deputy

prosecuting attorney, subsequent to an arrest or case referral by a law enforcement officer.

In the instant case, Mr. Ault, at the time of his escape, had been arrested by Deputy Humphrey upon suspicion that he had committed a felony. It is clear from his actions that the arresting officer intended that Mr. Ault be charged with a felony and had taken him into custody on that basis. However, because police officers lack the authority to charge felonies, and because no information or indictment had been filed at the time of escape, Mr. Ault did not knowingly escape after “[h]aving been charged with a felony,” as required by RCW 9A.76.120.

**D. DEFENDANT COMMITTED THE CRIME OF THIRD-DEGREE ESCAPE.**

One commits the crime of third-degree escape if one “[e]scapes from custody.” RCW 9A.76.130. The superior court conclusions of law indicate that Mr. Ault “knowingly escaped from Deputy Humphrey’s custody” and that he had been “detained as the result of a lawful arrest for Residential Burglary.” CP 62 (Conclusions of Law 3, 1). Mr. Ault, in his opening brief, concedes that he “escaped from custody,” and the lower court’s findings of fact and conclusions of law support this admission. The State agrees.

**E. THIS COURT SHOULD VACATE THE CONVICTION OF SECOND-DEGREE ESCAPE AND REMAND FOR ENTRY OF JUDGMENT FOR THIRD-DEGREE ESCAPE AND RESENTENCING OF THE DEFENDANT.**

When the evidence is insufficient to support a conviction and the conviction is reversed, this Court may remand for entry of an amended judgment on a lesser included offense. *State v. Hutchins*, 73 Wn. App. 211, 218, 868 P.2d 196, 200 (1994). Third-degree escape is a lesser included offense of second-degree escape. *State v. Hendrix*, 109 Wn. App. 508, 515, 35 P.3d 1189, 1192 (2001). Upon remand in such cases, resentencing is appropriate. *Id.*

The record in this case does not support a conviction for second-degree escape, but it does support a conviction for third-degree escape. Mr. Ault asks this Court to remand to the superior court for entry of judgment and sentencing on a charge of third-degree escape. Appellant's Br. at 11. The State joins in this recommendation.

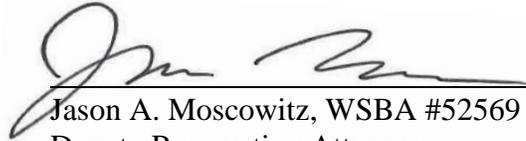
**V. CONCLUSION**

Because Mr. Ault was arrested for a felony and was in the custody of the arresting officer, but had not yet been formally charged with a felony, his escape from police constitutes a third-degree escape and not a second-degree escape. Therefore, this Court should vacate the lower court's conviction for second-degree escape and remand to the lower court for entry

of judgment for the lesser offense of third-degree escape and corresponding resentencing.

Dated this 5 day of December, 2019.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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GARRY B. AULT,

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NO. 36719-3-III

CERTIFICATE OF  
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on December 5, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart  
andrea@2arrows.net

12/5/2019  
(Date)

Spokane, WA  
(Place)

  
\_\_\_\_\_  
(Signature)

# SPOKANE COUNTY PROSECUTOR

December 05, 2019 - 11:10 AM

## Transmittal Information

**Filed with Court:** Court of Appeals Division III  
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