SUPREME COURT NO.

COA NO. 34529-7-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TYLOR BUTTOLPH,
Petitioner.

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

Spokane County Cause No. 15-1-02282-3

The Honorable Annette Plese, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Tylor Buttolph, the appellant below, asks the Court to review the decision of Division III of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Tylor Buttolph seeks review of the Court of Appeals published opinion entered on July 18, 2017. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

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?

ISSUE 2: In order to comply with Due Process, jury instructions must accurately describe each element of a charged offense. Did the court violate Mr. Buttolph's right to Due Process by refusing to instruct the jury that the state was required to prove that he committed a "purposeful act" in order to convict him of Escape from Community Custody?

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

IV. STATEMENT OF THE CASE

Tylor Buttolph was on community custody. RP 24.[1] He had at least three different Community Custody Officers (CCOs) assigned to him at different times. RP 32.

On May 19, 2015, Mr. Buttolph went to an ultrasound appointment with his girlfriend, who was pregnant with his child. RP 77-78. On the way back, his car broke down. RP 77. The delay caused Mr. Buttolph to miss a meeting with his new CCO. RP 77-78.

The CCO issued a warrant and Mr. Buttolph was arrested about two weeks later. CP 31. Mr. Buttolph served a sanction in jail for missing the meeting. RP 78.

The state also charged Mr. Buttolph with Escape from Community Custody, which is a felony. CP 1.

At trial, the state's evidence took eighteen minutes to present to the jury. *See* RP 23, 37. The only witness was Mr. Buttolph's CCO, Jeremy Taylor. *See* RP *generally*.

In his brief testimony, Taylor said that he met with Mr. Buttolph on May 5th and gave him a card directing him to return for another meeting on May 19th. RP 30. Taylor testified that he unsuccessfully

[1] All citations to the Verbatim Report of Proceedings refer to the 91- page volume transcribed by Heather Gipson.

"attempted to contact" Mr. Buttolph at his home two days after he missed the meeting. RP 31.

Taylor did not clarify whether he had tried to call Mr. Buttolph or had physically gone to his home. RP 31. He also did not say whether he had left any kind of message. RP 31.

Taylor admitted that he did not know why Mr. Buttolph had missed the meeting. RP 33. He said that it is not part of his job to determine why a person cannot make it to his office. RP 34. He admitted that he did not call the area hospitals or do anything to determine whether Mr. Buttolph had missed the appointment inadvertently. RP 34.

The state did not call Mr. Buttolph's prior CCOs to ask whether they had gotten any messages explaining that he had to miss the meeting. *See* RP *generally*.

Mr. Buttolph proposed a jury instruction explaining that, in order to find that he had willfully escaped from community custody, the jury had to find that he had committed a "purposeful act." CP 23. He explained that the Washington Supreme Court had held that the offense of escape from a work release facility requires a purposeful act, and analogized to escape from community custody. RP 39-40.

The court refused to give Mr. Buttolph's "purposeful act" instruction. RP 40.

Instead, the court instructed the jury that escape from community custody must be willful and that: "a persona acts willfully as to a particular fact when he or she acts knowingly as to that fact." CP 35-36.

Because the court did not require the jury to find that he had missed the meeting on purpose, Mr. Buttolph decided not to testify and explain his car breakdown to the jury. RP 77.

Relying on that instruction, the prosecutor told the jury that they were required to convict Mr. Buttolph if they found that he knew about the meeting on May 19th and knew that he had not attended the meeting. RP 56-57.

The jury found Mr. Buttolph guilty. CP 42. Mr. Buttolph timely appealed. CP 64. The Court of Appeals affirmed his conviction in a published opinion. *See* Opinion.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that the state was required to prove that Mr. Buttolph committed a purposeful act in order to convict him of Escape from Community Custody. This issue is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(4).

Mr. Buttolph missed a meeting with his CCO because his car broke down following an ultrasound appointment with his pregnant girlfriend. RP 77-78.

The state did not present any evidence that Mr. Buttolph missed the meeting on purpose. There was no evidence regarding where he was during the meeting or why he was not able to make it. There was no evidence that he left town, moved to a new address, or did anything to avoid detection by his CCO.

In fact, the state's single witness testified that it was not his job to determine whether Mr. Buttolph's failure to make it to the appointment had been purposeful. RP 33-34.

Still, based on the court's instruction, the prosecutor argued to the jury that the state had proved each element of Escape from Community Custody simply because Mr. Buttolph knew about the meeting and did not attend. RP 56-57.

The court should have required the state to prove that Mr. Buttolph committed some "purposeful act." *State v. Danforth*, 97 Wn.2d 255, 258, 643 P.2d 882 (1982). The court erred by refusing to give Mr. Buttolph's proposed instruction to that effect. *State v. Hayward*, 152 Wn. App. 632, 645, 217 P.3d 354 (2009). The state also presented insufficient evidence to convict Mr. Buttolph of committing a purposeful act. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied,* 176 Wn.2d 1003, 297 P.3d 67 (2013).

In order to convict Mr. Buttolph of Escape from Community Custody, the state was required to prove that he:

> … willfully discontinue[d] making himself … available to the department for supervision by making his … whereabouts unknown or by failing to maintain contact with the department as directed by the community corrections officer…

RCW 72.09.310.

Willfulness is equivalent to knowledge unless a purpose to impose further requirements plainly appears. RCW 9A.08.010(4). Knowledge can he characterized as a "lack of mental intent requirement." *State v. Hall*, 104 Wn.2d 486, 493, 706 P.2d 1074 (1985).

Escape is one of the contexts in which the willfulness element requires more than mere knowledge. *Id.* (*citing Danforth*, 97 Wn.2d at 258). In order to prove that a person has willfully escaped from a work release facility, for example, the state must prove that s/he committed some "purposeful act." *Id.*

The question of whether the "willful" element of Escape from Community Custody requires proof of a purposeful act is an issue of first impression. Indeed, there are only three published cases addressing the offense, none of which construes the *mens rea* element. *See State v. Baker*, 194 Wn. App. 678, 378 P.3d 243 (2016) (regarding sentencing for escape convictions); *State v. Aguilar*, 153 Wn. App. 265, 271, 223 P.3d

1158 (2009) (regarding admissibility of the accused's prior statements to show that he had willfully escaped from community custody); *State v. Rizor*, 121 Wn. App. 898, 901, 91 P.3d 133 (2004) (holding that people on community custody were "inmates" properly charged with Escape from Community Custody).

Danforth and *Hall*, however, construe the willfulness requirement of the now-repealed statute criminalizing escape from a work release facility. *See* former RCW 72.65.070. The willfulness requirement of that offense required the state to prove a "purposeful act" (beyond mere knowledge) in order to ensure that the accused is not convicted based on circumstances beyond his/her control. *Danforth*, 97 Wn.2d at 258. Otherwise, the *Danforth* court reasoned, a person could be impermissibly convicted of escape for failing to return to a work release facility as the result of "a sudden illness, breakdown of a vehicle, etc." *Id.*

This logic applies with equal force to cases alleging Escape from Community Custody. Unlike escape by climbing over a prison wall, a person could miss a meeting with his/her CCO through no fault of his/her own, due to a medical emergency or transportation issues. *See Id.* Accordingly, unless there is a requirement of a "purposeful act," a person could be convicted of willfully escaping from community custody simply because s/he knew that s/he missed a meeting while s/he was in the

hospital being treated for an emergency. The Supreme Court rejected this result in *Danforth*. *Id.*

The requirement of a "purposeful act" in the context of Escape from Community Custody also comports with the tenet that a willful activity is one that is not inadvertent. *See State v. Sisemore*, 114 Wn. App. 75, 78, 55 P.3d 1178 (2002); *State v. LaRue*, 74 Wn. App. 757, 761, 875 P.2d 701 (1994).

Even so, the Court of Appeals held that the Escape from Community Custody statute "does not have a strict temporal component" because a person with a medical emergency or car trouble could escape liability by simply calling his/her CCO and making his/her whereabouts known. Opinion, p. 8.

But the Court of Appeals ignores the disjunctive wording of the statute. A person can be convicted of Escape from Community Custody for *either* "making his or her whereabouts unknown" *or* by "failing to maintain contact with the department as directed by the community corrections officer." RCW 72.09.310.

Accordingly, as in Mr. Buttolph's case, a person can be convicted of the offense for simply failing to attend a meeting that s/he has been directed to attend his his/her CCO, and thereby failing to maintain contact

as directed. This is true regardless of whether s/he has made his or her whereabouts known. RCW 72.09.310.

The trial court erred in Mr. Buttolph's case by refusing to instruct the jury that the state had to prove a purposeful act in order to convict him. The state also presented insufficient evidence to prove that he had committed a purposeful act.

B. The Supreme Court should accept review and hold that the trial court erred by refusing to give Mr. Buttolph's proposed instruction, informing the jury that Escape from Community Custody requires proof of a purposeful act.

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. Amend. XIV; Wash. Const. art. I, § 3.

A court's instructions are improper if they misstate the law regarding an element of an offense. *Hayward*, 152 Wn. App. at 645.[2] Jury instructions also violate an accused person's right to due process if they relieve the state of its burden of proving each element beyond a reasonable doubt. *Id.*

[2] Jury instructions are reviewed *de novo*. *State v. Richie*, 191 Wn. App. 916, 927, 365 P.3d 770 (2015).

As outlined above, the state should have been required to prove that Mr. Buttolph committed some purposeful act in order to convict him of willfully escaping from community custody. *Hall*, 104 Wn.2d at 493; *Danforth*, 97 Wn.2d at 258.

The trial court erred by refusing to give Mr. Buttolph's proposed instruction informing the jury of that requirement. *Hayward*, 152 Wn. App. at 645.

Indeed, juries are regularly instructed that the term "willfully" requires proof of purposeful action. *See e.g.* 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 120.02.01 (4th Ed) (stating that, for an Obstruction charge: "Willfully means to purposefully act with knowledge that…"); 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 36.23 (4th Ed) (stating that, for a Stalking charge: "'Willful' or 'willfully' means to act purposefully, not inadvertently or accidentally"); 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 95.10 (4th Ed) (stating that, for a Reckless Driving charge, "Willful means acting intentionally and purposefully, not accidentally or inadvertently").

The trial court's instructions misstated the law regarding the *mens rea* element of Escape from Community Custody by failing to inform the jury that the state was required to prove that Mr. Buttolph committed some purposeful act. *Hall*, 104 Wn.2d at 493; *Danforth*, 97 Wn.2d at 258.

This omission relieved the state of its burden of proof and violated Mr. Buttolph's right to due process. *Hayward*, 152 Wn. App. at 645.

An improper jury instruction affecting a constitutional right requires reversal unless the state can demonstrate beyond a reasonable doubt that it did not contribute to the verdict. *State v. Schaler*, 169 Wn.2d 274, 288, 236 P.3d 858 (2010).

Here, the state did not present any evidence that Mr. Buttolph missed the meeting with his CCO on purpose. Indeed, the prosecutor argued in closing that the jury was required to convict Mr. Buttolph simply because he knew about the meeting and did not attend. RP 56-57.

The state cannot establish that the instructional error in Mr. Buttolph's case was harmless beyond a reasonable doubt. *Id.*

The trial court erred and violated Mr. Buttolph's right to due process by failing to instruct the jury that the state was required to prove that Mr. Buttolph committed a purposeful act before convicting him of Escape from Community Custody. *Hayward*, 152 Wn. App. at 645; *Hall*, 104 Wn.2d at 493; *Danforth*, 97 Wn.2d at 258. Mr. Buttolph's conviction must be reversed. *Id.*

C. The Supreme Court should accept review and hold that the state presented insufficient evidence to convict Mr. Buttolph because no rational jury could have found beyond a reasonable doubt that he committed a purposeful act. This significant question of

> constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found each element met beyond a reasonable doubt.

Chouinard, 169 Wn. App. at 899.

As argued above, in order to convict Mr. Buttolph of willfully escaping from community custody, the state was required to prove that he committed some purposeful act. *Hall*, 104 Wn.2d at 493; *Danforth*, 97 Wn.2d at 258.

But the state did not present any evidence of a purposeful act in Mr. Buttolph's case. There was no evidence that Mr. Buttolph intended to avoid detection by his CCO or that he had left town or changed his address. There was not even any evidence creating the inference of a purposeful act, such as previous statements by Mr. Buttolph that he did not intend to report to his CCO as required. *C.f. Aguilar*, 153 Wn. App. at 273 (holding that statements by the accused that he did not intend to report to his CCO as required were admissible to show that he willfully escaped from community custody).

Rather, the state's only witness testified that he had no idea why Mr. Buttolph had missed the meeting; he simply was not there. RP 33-34.

Even taking the evidence in the light most favorable to the state, no rational jury could have found beyond a reasonable doubt that Mr. Buttolph willfully escaped from community custody by committing a purposeful act. *Chouinard*, 169 Wn. App. at 899. Mr. Buttolph's conviction must be reversed. *Id.*

VI. CONCLUSION

The issue here is significant under the State and Federal Constitutions. Furthermore, because they could impact a large number of criminal cases, they are of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted August 10, 2017.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

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Spokane, WA 99205

and I sent an electronic copy to

Spokane County Prosecuting Attorney
SCPAappeals@spokanecounty.org

Lise Ellner
liseellnerlaw@comcast.net

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on August 10, 2017.

_____
Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

APPENDIX:

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Clerk/Administrator

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July 18, 2017

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CASE # 345297
State of Washington v. Tylor Thomas Buttolph
SPOKANE COUNTY SUPERIOR COURT No. 151022823

Counsel:

Enclosed please find a copy of the opinion filed by the Court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
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RST:pb
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FILED
JULY 18, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 34529-7-III
	)	
Respondent,	)	
	)	
v.	)	PUBLISHED OPINION
	)	
TYLOR T. BUTTOLPH,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — Tylor Buttolph appeals his conviction for escape from community custody. The statute defining this crime requires the defendant to have acted "willfully." RCW 72.09.310. Mr. Buttolph argues the trial court erred when it refused his proposed jury instruction, which equated willfulness with purpose, and instead gave an instruction equating willfulness with knowledge. We conclude the trial court properly instructed the jury and affirm.

FACTS

In 2015, Mr. Buttolph was serving an 18-month term of community custody as part of a felony sentence. One of his community custody conditions was to report to and be

available for contact with his assigned community corrections officer (CCO). His assigned CCO was Jeremy Taylor.

On May 5, 2015, Mr. Buttolph met with CCO Taylor at CCO Taylor's office. At that meeting, CCO Taylor instructed Mr. Buttolph to report back to him on May 19. CCO Taylor wrote this date on the back of a business card and gave it to Mr. Buttolph.

On May 19, Mr. Buttolph did not report for the supervision meeting. He did not contact CCO Taylor either before or at any time after the scheduled meeting. On May 21, CCO Taylor attempted to contact Mr. Buttolph at his residence, but was unable to do so. A warrant was issued for Mr. Buttolph's arrest, and he was arrested on June 3.

The State charged Mr. Buttolph with escape from community custody under RCW 72.09.310. At trial, Mr. Buttolph proposed the following jury instruction: "Willful action, as required by these instructions, requires a purposeful act." Clerk's Papers (CP) at 23. Mr. Buttolph argued that construing "willfulness" in RCW 72.09.310 as only requiring knowledge would make it a crime for a person to miss a community custody meeting even if the person had a transportation or emergency medical issue. He argued *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982), which concerned a person's willful failure to return from work release, supported his position.

The trial court denied Mr. Buttolph's proposed instruction, reasoning that it differed from the Washington Pattern Jury Instructions (WPICs). Instead, the court gave the following instruction, consistent with WPIC 10.05: "A person acts willfully as to a particular fact when he or she acts knowingly as to that fact." CP at 36; *see* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 10.05, at 231 (4th ed. 2016).

The jury found Mr. Buttolph guilty as charged. Mr. Buttolph appeals.

ANALYSIS

A. ESCAPE FROM COMMUNITY CUSTODY MENS REA REQUIREMENT

Mr. Buttolph argues the trial court erred when it declined to give his proposed jury instruction defining "willful action" as a purposeful act.

Jury instructions are proper when they correctly inform the jury of the applicable law. *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). This court reviews alleged errors of law in jury instructions de novo. *Id.*

An inmate in community custody is guilty of escape from community custody if he or she "*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." RCW 72.09.310 (emphasis added).

Neither RCW 72.09.310 nor the chapter defines "willfully," nor has any court interpreted this section. The mens rea requirement of "willfulness" has been defined in numerous ways depending on its context. *See State v. Bauer*, 92 Wn.2d 162, 167, 595 P.2d 544 (1979); *Crosswhite v. Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 550 n.3, 389 P.3d 731 (collecting definitions), *review denied*, 188 Wn.2d 1009, 394 P.3d 1016 (2017). In 1975, the legislature enacted the Washington Criminal Code, Title 9A RCW, which provided that:

> Requirement of Wilfulness[1] 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.

See LAWS OF 1975, 1st Ex. Sess., ch. 260, *codified at* RCW 9A.08.010(4).[2] This statute represented a change from the preexisting common law, under which willfulness

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[1] Older statutes and cases often use the formerly-preferred "wilful." *Crosswhite*, 197 Wn. App. at 551 n.4.

[2] Although the escape from community custody statute is codified in chapter 72.09 RCW, the general provisions of the Washington Criminal Code—which include the general requirements of culpability—are also applicable to offenses defined in other statutes, unless the other statute specifically provides otherwise. *See* RCW 9A.04.090.

generally required more than knowledge. *See State v. Hall*, 104 Wn.2d 486, 495, 706 P.2d 1074 (1985) (Durham, J., dissenting).

When construing the meaning of "willfulness" in a criminal statute, this court's focus is on the legislative context. *Bishop v. City of Spokane*, 142 Wn. App. 165, 171, 173 P.3d 318 (2007). In *Bishop*, we considered the statute prohibiting the obstruction of a law enforcement officer. *Id.* The statute had previously contained a "knowledge" requirement, but the legislature amended it in 1994, substituting a requirement of "willfulness." *Id.*

We concluded that the amendment from "knowing" to "willful" did not "plainly" indicate a change in the mens rea requirement. *Id.* We reasoned that the legislature is presumed to know the statutory scheme, including the provision in RCW 9A.08.010(4), which equates "willfulness" with "knowledge." *Id.* We further reasoned that if the legislature "had intended a more stringent mental element, it would have stated that purpose directly." *Id.*

Similarly, in this case, when the legislature enacted the escape from community custody statute in 1988, it presumably knew that RCW 9A.08.010(4) equated willfulness with knowledge. *See* LAWS OF 1988, ch. 153, § 6. Thus, it would have stated its purpose directly if it had intended a greater mens rea requirement.

Nevertheless, Mr. Buttolph argues the escape from community custody statute clearly demonstrates a purpose to impose a greater mens rea requirement because without one, a person could be found guilty if he or she missed a supervision meeting due to a medical emergency or car accident. In support of this contention, he relies on *Danforth*, 97 Wn.2d 255.

In *Danforth*, two work release inmates resided in a work release center in Spokane. *Id.* at 256. One day, they became intoxicated and later woke up in Montana. *Id.* Two weeks later, they were apprehended in Kansas, were returned to Washington, and were charged with escape under RCW 9A.76.110. *Id.*

The issue on appeal was whether they were properly charged. *Id.* at 257. In addition to the general escape statute, Washington also had a statute at the time that made it a crime to willfully fail to return to a work release program. *Id.* That statute provided that "[a]ny prisoner approved for placement under a work release plan who wilfully fails to return to the designated place of confinement at the time specified shall be deemed an escapee." *Id.* (quoting former RCW 72.65.070 (1967)).[3] Because both statutes applied to

[3] The failure to return to work release statute was enacted in 1967, which was when "willfulness" was generally understood to mean something more than "knowledge." *See* LAWS OF 1967, ch. 17, § 7; *Hall*, 104 Wn.2d at 495 (Durham, J., dissenting).

the individuals' conduct, the question on appeal was whether work release inmates could also be prosecuted under the general escape statute. *Id.*

Our Supreme Court held that they could not, and that the specific failure to return to work release statute preempted prosecutions under the general escape statute for the defendants' behavior. *Id.* at 258. The court further held that although the general escape statute only required a knowledge mens rea, the "willful" requirement in the failure to return to work release statute required more than a knowledge mens rea. *Id.* The court reasoned that a "purposeful" mens rea was required so as not to criminalize the failure to return to a specific place of custody "because of a sudden illness, breakdown of a vehicle, etc." *Id.* Preventing sudden illnesses or car accidents from resulting in convictions, the court concluded, was a valid purpose for it to impose a greater mens rea requirement for this particular statute. *See Hall*, 104 Wn.2d at 492-93 (commenting on *Danforth*).

However, this same logic does not apply to RCW 72.09.310. The reason why the *Danforth* court recognized a greater mens rea requirement with the former statute was because the temporal component for what constituted an "escape" was very strict—the person was deemed an escapee if he or she "fail[ed] to return to the designated place of confinement *at the time specified*." Former RCW 72.65.070 (emphasis added). Thus, if a

person had an emergency and did not return to the work release center on time, he or she was guilty.

In contrast, the temporal component for what constitutes an "escape" under RCW 72.09.310 is not strict. Under this statute, a person is deemed an escapee if he or she "discontinues making himself or herself available . . . by making his or her whereabouts unknown," or fails "to maintain contact with the department." RCW 72.09.310. Thus, if a person has a medical emergency or a car accident, the person can avoid criminal liability by contacting the department and making his or her whereabouts known. Because RCW 72.09.310 does not have a strict temporal component, a purpose to impose a greater mens rea requirement does not plainly appear here, as it did in *Danforth*.

Accordingly, we hold that the "willfulness" requirement in RCW 72.09.310 is satisfied by a person acting knowingly with respect to the material elements of the crime. The trial court did not err in denying Mr. Buttolph's proposed jury instruction.

B. SUFFICIENCY OF THE EVIDENCE

Mr. Buttolph also argues the State's evidence was insufficient to convict him for escape from community custody. He argues that the evidence was insufficient because there was no evidence he acted purposefully. As discussed above, RCW 72.09.310 does

not require proof that the defendant acted purposefully. Because Mr. Buttolph bases his challenge to the sufficiency of the evidence on his prior argument that we have rejected, we need not address this argument.

C. APPELLATE COSTS

Mr. Buttolph asks this court to decline to impose appellate costs in its decision terminating review on the basis of his indigency.

An appellate court has discretion to require a convicted defendant to pay appellate costs to the State. *See* RCW 10.73.160(1); RAP 14.2. Generally, "the party that substantially prevails on review" will be awarded appellate costs, unless the court directs otherwise in its decision terminating review. RAP 14.2. An appellate court's authority to award costs is "permissive," and a court may, pursuant to RAP 14.2, decline to award costs at all. *See State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). Lately, we have exercised our discretion to deny the State an award of appellate costs if the defendant establishes he or she lacks the current or likely future ability to pay those costs.

The State asks this court to "only impose appellate costs in conformity with RAP 14.2 as amended." Br. of Resp't at 16. It is unclear from this statement whether or not the State intends to seek appellate costs.

On June 10, 2016, this court issued a general order relating to defendants' requests to deny cost awards when the State substantially prevails on appeal. If inability to pay is a factor alleged to support the defendant's request, as it is here, the general order requires defendants to file a report as to continued indigency with this court no later than 60 days after they file their opening briefs. Mr. Buttolph has not complied with this requirement.

Because Mr. Buttolph has not complied with this court's general order, the record is insufficient for us to determine if he has the current or likely future ability to pay appellate costs. In the event the State files a cost bill with this court, Mr. Buttolph may object. In that case, we defer this issue to our commissioner. *See* RAP 14.2.

Affirmed.

Lawrence-Berrey, J.

WE CONCUR:

Fearing, C.J.

Siddoway, J.

LAW OFFICE OF SKYLAR BRETT

August 10, 2017 - 4:11 PM

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Appellate Court Case Title:	State of Washington v. Tylor Thomas Buttolph
Superior Court Case Number:	15-1-02282-3

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