SUPREME COURT NO. 99324-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY MILLER,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION ONE

Court of Appeals No. 81840-6-I
Pierce County No. 18-1-01695-1

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, JEFFREY MILLER, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Miller seeks review of the November 16, 2020 unpublished decision of Division One of the Court of Appeals affirming his convictions.

C. ISSUES PRESENTED FOR REVIEW

1. Miller was charged with possession of a stolen vehicle and proposed jury instructions regarding actual and constructive possession, mere proximity, and momentary handling. The trial court refused to give the proposed instructions, concluding those principles do not apply to possession of a stolen vehicle. Where there was substantial evidence to support the instructions, which accurately stated the law as applied to this charge, is the court's refusal reversible error?

2. Where the evidence failed to establish that Miller received notice of the subsequent court hearings at which his appearance was required, must the bail jumping charges be dismissed?

D. STATEMENT OF THE CASE

Vladimir Akinshev works for a construction business and drives a truck owned by the company. Around 5:50 a.m. on April 27, 2018, he

discovered that the truck, which had been parked outside his house, was missing. RP 212-14. No one had permission to use the truck except Akinshev. RP 228.

Akinshev called the police to report the truck stolen. RP 215. He also called his employer, Ruslan Kurkov, who used the GPS tracker on the truck to locate it. RP 216, 261. Kurkov texted Akinshev screen shots from the GPS tracker, and Akinshev provided the tracking information to the police. RP 216, 263. The tracking information showed that the ignition was started at Akinshev's house at 4:02 a.m. It showed the path the truck traveled, and it showed that the ignition was turned off in an area on River Road at 4:13 a.m. RP 267, 300.

Tacoma Police Officer Donald Rose responded to Akinshev's call, and he drove to the location shown in the truck's GPS tracking information. RP 334, 349-50. He found the truck at that location, in an area where several trailers were parked. RP 352, 354. The canopy doors on both sides of the truck were open. RP 405. As Rose was waiting for backup to arrive, he saw a person leaning into the left side of the truck's cargo area. Rose could tell that the person's upper torso, head, and arms were inside the bed of the truck, but he could not tell what the person was doing. RP 362-63, 418-19. The person stood back up and started walking toward the trailers in the area, and Rose lost sight of him. RP 366-67.

About two minutes later, Deputy Arthur Centoni arrived to assist Rose. RP 369. The officers were searching the area when Centoni noticed some movement by one of the trailers along the fence line. RP 371, 479. Rose approached the trailer, looked underneath, and saw Jeffrey Miller curled up on his side under the end of the trailer. RP 372-73, 481.

Miller was arrested and placed in handcuffs. RP 376. After being advised of his rights and agreeing to answer questions, Miller said he knew the truck was stolen and who had stolen it. RP 380-81. He gave the culprit's name as Richie and described him for the officer. Miller said Richie had come over two hours earlier, and when he left Miller noticed the truck. Miller said it was obvious the truck was stolen because no one would leave a truck there for so long otherwise. RP 383-84. When asked why he was leaning into the truck, Miller said he didn't want to get in trouble for the truck being stolen, so he was trying to figure out a way to get rid of it. RP 384-85.

Rose left Miller in his patrol car for a few minutes while he spoke to Centoni, and then he resumed his conversation with Miller. RP 387. Miller told Rose that he had not seen the truck over the fence between where it was found and where he was living. He first noticed it when he walked around the fence to borrow a cigarette from a neighbor. RP 388,

425, 427. Miller said Richie had asked him if he knew anyone looking for a generator. RP 389.

After he spoke with Miller, Rose contacted Akinshev. RP 389. Akinshev retrieved the truck, which was still in the location shown on the GPS tracking information. RP 218. The generator which had been stored in the back of the truck was missing. RP 220. Centoni searched the area looking for construction equipment but did not find anything that looked like it belonged in the truck. RP 494.

1. Possession of a stolen vehicle charge

Miller was charged with possession of a stolen vehicle. CP 1; RCW 9A.56.068; RCW 9A.56.140. At trial the State presented testimony from Akinshev, Kurkov, Rose, and Centoni.

The defense called Richard Vanderpool as a witness. He testified to his age, his height, and his hair color, but he invoked the 5th Amendment with respect to questions relating to Miller or the stolen truck. RP 664-67, 671.

Miller testified that on the day he was arrested, Vanderpool showed up to his home with a white truck and asked if he wanted to make some money dealing stolen property. RP 729. Miller told Vanderpool to get the truck off the property, and Vanderpool left in the truck. RP 731. Miller fell asleep for a couple of hours, then he walked to a neighbor's

home to get a cigarette. While walking to the neighbor's trailer, he spotted the truck. RP 731-33. The truck was empty when he found it, and Miller testified that at no point did he reach into the truck, take anything out, or move anything in relation to the truck. RP 733.

Miller was next to the truck for less than a minute when he heard a police vehicle pull up. He decided to head back home. RP 733-34. He didn't want to have contact with law enforcement because that had never worked out well for him in the past. RP 762. As he was moving between the trailers to go around the fence, he bumped into a stove pipe. When he crouched down to look under the trailer to see if there was another way around, the officers noticed him. RP 734-35. He was placed under arrest, and he told Officer Rose about Vanderpool. RP 736-38. Miller testified he had no intention of doing anything with the truck. RP 739.

Defense counsel requested several instructions regarding possession, arguing the instructions were supported by the evidence, helpful to the jury, and necessary to the defense theory of the case. RP 809-11; CP 280-82. The proposed instructions would have defined actual and constructive possession and informed the jury that neither momentary handling nor mere proximity is sufficient to establish constructive possession. CP 258-63. The court declined to instruct the jury regarding dominion and control, mere proximity or momentary handling, concluding

those concepts had to do with drug possession and were not relevant in this case. RP 820-22.

2. Bail jumping charges

Miller was also charged with two counts of bail jumping based on Miller's failure to appear at scheduled hearings on September 13, 2018 and November 8, 2018. CP 45-46; RCW 9A.76.170(1), (3)(c); RP 535, 589.

In support of the bail jumping charges, the State presented testimony from the deputy prosecuting attorneys who handled the docket on September 13, and November 8, 2018, the dates Miller was required to appear. RP 500, 582. They testified they polled the gallery on those days, and ultimately bench warrants were issued for Miller. RP 529, 534-35; 594-95. One of the witnesses testified that the proceedings at which the court dates were scheduled were conducted on the record, which can only happen if the defendant is present. RP 600. He also testified that when scheduling orders are created a copy is printed for the defendant. RP 590. The scheduling order setting the November 8, 2018, hearing was admitted as an exhibit. The order had signatures on it, including one next to Miller's name. RP 591-92. The State presented no witness who was present in court when the September 13 and November 8 hearings were scheduled,

however. There was no witness who could testify as to Miller's presence or what information he was given regarding the scheduled hearings.

The jury returned guilty verdicts on all three counts. CP 310-12. On appeal, Miller argued that the trial court's refusal to give the proposed instructions on possession denied him due process and that there was insufficient evidence to support the bail jumping convictions. The Court of Appeals affirmed his convictions.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. WHETHER THE REFUSAL TO INSTRUCT THE JURY ON THE DEFENSE THEORY VIOLATES DUE PROCESS IS A SIGNIFICANT CONSTITUTIONAL QUESTION THIS COURT SHOULD ADDRESS. RAP 13.4(b)(3).

An accused person has a due process right to have the jury accurately instructed on the theory of defense, provided the instruction is supported by substantial evidence and accurately states the law. U.S. Const. amends. V, VI, XIV; *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). If these prerequisites are met, it is reversible error to refuse to give a defense-proposed instruction. *State v. Agers*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). The trial court denied Miller due process by refusing to give his proposed instructions on possession.

To convict Miller of possession of a stolen vehicle, the State had to prove he knowingly possessed a stolen motor vehicle and he knew the vehicle was stolen. RCW 9A.56.068(1); CP 328. "'Possessing stolen property' means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1). Miller admitted at trial and to the investigating officer that he knew the truck was stolen. RP 753. The issue at trial was whether the State proved possession. RP 868, 892.

Possession may be actual or constructive. *State v. Lakotiy,* 151 Wn. App. 699, 714, 214 P.3d 181 (2009), *review denied*, 168 Wn.2d 1026 (2010). Actual possession means the property was in the personal custody of the defendant, while constructive possession means there was no actual physical possession, but the defendant had dominion and control over the property. *Id*. (citing *State v. Staley,* 123 Wn.2d 794, 798, 872 P.2d 502 (1994) and *State v. Jones,* 146 Wn.2d 328, 333, 45 P.3d 1062 (2002)); *State v. Plank,* 46 Wn. App. 728, 731, 731 P.2d 1170 (1987) (quoting *State v. Callahan,* 77 Wn.2d 27, 29, 459 P.2d 400 (1969)). Momentary handling, without more, is insufficient to prove possession. *Callahan*, 77 Wn.2d at 29. Moreover, mere proximity to the property is insufficient to establish constructive possession. *Id*.

The defense proposed instructions setting forth these principles. CP 257-65. The proposed instructions would have defined actual and constructive possession, identified factors for the jury to consider, and informed the jury that mere proximity or momentary handling were insufficient to establish possession. *Id*.

The defense theory was that, while Miller knew the truck was stolen, he was never in possession of the vehicle. RP 808-11. He testified that he was merely standing next to the truck looking at it when Rose arrived. RP 733-34. The jury could conclude from this evidence that his mere proximity to the truck was insufficient to establish constructive possession. Even with Rose's testimony that Miller leaned inside the truck before walking away, the jury could conclude this casual and brief inspection of the stolen vehicle did not amount to possession. Because the proposed instructions were supported by substantial evidence and accurately stated the law, Miller was entitled to have the jury instructed on this theory of defense. *See Agers*, 128 Wn.2d at 93.

The Court of Appeals held that the court did not err in refusing to instruct the jury on Miller's theory, because the State's theory was that he was in actual possession of the vehicle and constructive possession was not at issue. Opinion at 4-5. But given the dispute as to whether Miller leaned into the vehicle rather than just looking into it, the jury should have

been instructed on the difference between actual and constructive possession as well as that mere proximity does not amount to possession. Because there was evidence to support the defense theory of the case, the court's refusal to give the proposed instructions denied Miller his due process right to a fair trial by an adequately instructed jury. This Court should grant review and reverse.

2. WHETHER BAIL JUMPING CONVICTIONS CAN BE SUSTAINED WITHOUT PROOF THAT THE DEFENDANT ACTUALLY RECEIVED NOTICE OF SCHEDULED HEARINGS IS A CONSTITUTIONAL QUESTION AND AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE THIS COURT SHOULD REVIEW. RAP 13.4(b)(3), (4).

The burden of proving the essential elements of a crime unequivocally rests on the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. Proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence the State must establish to garner a conviction. *Winship*, 397 U.S. at 364. Therefore, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900

(1998); *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Chapin*, 118 Wn.2d 681, 826 P.2d 194 (1992); *State v. Green*, 94 Wn. 2d 216, 616 P.2d 628 (1980).

Any element of the offense may be proved by circumstantial evidence. *State v. J.P.*, 130 Wn. App. 887, 893, 125 P.3d 215 (2005). But the State cannot meet its burden through pure speculation. *State v. Prestegard*, 108 Wn. App. 14, 22, 28 P.3d 817 (2001). On appeal, the reviewing court must be convinced that substantial evidence supports the State's case. *Id*. at 22-23. Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *Id*. (quoting *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972)). Substantial evidence requires more than "guess, speculation, or conjecture." *Id*. To rise above speculation and conjecture, evidence must support a reasonable inference. *State v. Burkins*, 94 Wn. App. 677, 690, 973 P.2d 15, *review denied*, 138 Wn.2d 1014 (1999).

Miller was charged with bail jumping under Former RCW 9A.76.170(1) [1], which required the State to prove he had been released by

[1] RCW 9A.76.170(1), in effect at the time of the alleged offenses, provided as follows:

> (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for

court order with knowledge of the requirement of a subsequent personal appearance before that court. "In order to meet the knowledge requirement of the [bail jumping] statute, the State is required to prove that a defendant has been given notice of the required court dates." *State v. Cardwell*, 155 Wn. App. 41, 47, 226 P.3d 243, 245 (2010), *review granted, remanded on other grounds*, 172 Wn.2d 1003 (2011).

In *Cardwell*, the defendant was charged with bail jumping for failing to appear at a scheduled hearing. His father appeared in court on the hearing date and explained that the notice of hearing was mailed to the address Cardwell had given when he was released from custody, except that the zip code was wrong. Although the notice was delivered to the address Cardwell provided, Cardwell had not seen it because he did not actually live at that address. *Cardwell*, 155 Wn. App. at 45. Because Cardwell did not receive notice of the hearing date, the evidence was not sufficient to establish bail jumping, and that charge was dismissed with prejudice. *Id*. at 47-48.

Here, as in *Cardwell*, the circumstances do not support an inference that Miller actually received notice of the scheduled hearings. There was no testimony from anyone present in court when those hearings were scheduled. While there was evidence those proceedings were

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> service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

conducted on the record, which means the defendant must be present, there was no evidence as to what was said or what Miller was told. No recordings or transcripts from those proceedings were entered in evidence. A scheduling order was admitted as an exhibit, but there was no testimony that Miller received a copy of that order, that the signature on the order was his, or how or when the signature was placed there. The State's argument that Miller had knowledge of the required court appearances was based on speculation and conjecture, not substantial evidence. The evidence is insufficient for a rational trier of fact to find beyond a reasonable doubt that Miller had notice of the September 13 or November 8 hearings. The Court of Appeals's decision to the contrary must be reversed.

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Miller's convictions.

DATED this 16th day of December, 2020.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in *State v. Jeffrey Miller,* Court of Appeals Cause No. 81840-6-I, as follows:

Jeffrey Miller/DOC#728191
Cedar Creek Corrections Center
PO Box 37
Littlerock, WA 98556

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Catherine E. Glinski
Done in Manchester, WA
December 16, 2020

FILED
11/16/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JEFFREY MARK MILLER, Appellant.	DIVISION ONE No. 81840-6-I UNPUBLISHED OPINION

DWYER, J. — Jeffrey Miller appeals from the judgment entered on a jury's verdicts finding him guilty of possession of a stolen vehicle and two counts of bail jumping. He contends that the trial court abused its discretion when it refused to instruct the jury that constructive possession cannot be proved by mere proximity. Further, he avers that the jury's verdicts on both counts of bail jumping were not supported by a constitutionally sufficient quantum of evidence. Finding no error, we affirm.

I

On the morning of April 27, 2018, Vladimir Akinshev discovered that his work truck was missing from the front yard of his home where he had parked it. Akinshev called the police. The truck was equipped with a GPS tracking device. Akinshev provided screenshots from the tracking device to the police. Officer Donald Rose went to the location indicated by the tracking device and found the vehicle.

Officer Rose observed Jeffrey Miller leaning into the left side of the vehicle's cargo area. Miller was bent at the waist and his head, arms, and upper torso were inside the vehicle. Officer Rose used his radio to request assistance.

Miller left the vehicle and began walking away. About two minutes after Miller had left Officer Rose's sight, another police officer, Deputy Arthur Centoni, arrived. Deputy Centoni and Officer Rose searched the area where Officer Rose had last seen Miller walking. Officer Rose discovered Miller "curled up" under a trailer.

Officer Rose ordered Miller to show his hands and to come out from under the trailer. After Miller had done so, Officer Rose placed Miller in handcuffs. Officer Rose then advised Miller of his Miranda[1] rights. Miller explained that he knew that the vehicle was stolen and that he believed it had been stolen (and left where the officers found it) by someone named "Richie." Miller stated that he knew the truck was stolen because "[n]o one leaves a car here that long." Miller told Officer Rose that he had been in the bed of the truck because he did not want to "get in trouble" for the stolen truck, and therefore was trying to find a way to "get rid of it." Miller was arrested and charged with possession of a stolen motor vehicle.

On July 12, 2018, the trial court entered an order continuing the trial and requiring Miller to appear for an omnibus hearing on September 13, 2018. The order was signed by both Miller and his attorney. Miller failed to appear on

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

September 13, 2018, and a bench warrant was issued. The State amended the information to add a count of bail jumping.

On September 25, Miller appeared in court and the judge quashed the warrant. Miller signed a new scheduling order indicating that he was required to be present for a hearing on November 8. On November 8, Miller again failed to appear. A bench warrant was issued. A second count of bail jumping was added to the information.

At trial, Miller's counsel requested that the jury be instructed about constructive possession, specifically that "[m]ere proximity or momentary handling is not enough to support a finding of constructive possession." The trial court rejected the proposed instruction, reasoning that while it might be appropriate in cases dealing with "very portable" substances such as drugs or weapons, it was not applicable to possession of a stolen vehicle. The State argued that Miller actually possessed the truck, not that he constructively possessed the truck, and that the instruction was unnecessary.

The jury was instructed that

> [a] person commits the crime of Unlawful Possession of a Stolen Vehicle when he or she possesses a stolen motor vehicle.
>
> Unlawful possession of a stolen vehicle means knowingly to *receive, retain, possess, conceal, or dispose* of a stolen motor vehicle knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

Jury Instruction 12 (emphasis added).

Miller was found guilty of possession of a stolen vehicle and both counts of bail jumping. He now appeals.

II

Miller contends that the trial court abused its discretion by rejecting his proposed instruction on constructive possession. Because constructive possession was not at issue, we disagree.

We review the trial court's refusal to issue a jury instruction based on the evidence in a case for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A trial court abuses its discretion when its decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court does not err by refusing to issue a specific instruction when a more general instruction adequately explains the law and allows each party to argue its case theory to the jury. State v. Hathaway, 161 Wn. App. 634, 647, 251 P.3d 253 (2011).

Here, the trial court gave the jury a complete and accurate statement of the law that did not deprive Miller of his ability to present a defense. Miller was not defending against an allegation of constructive possession. Therefore, his argument that he did not actually possess the truck was not precluded by the absence of an instruction that "[m]ere proximity or momentary handling is not enough to support a finding of constructive possession." See State v. Castle, 86 Wn. App 48, 61-62, 935 P.2d 656 (1997) ("mere proximity" instruction not required when the State did not rely on mere proximity to prove possession). Given that there was no argument or evidence presented that Miller's possession

of the stolen truck was constructive, an instruction on constructive possession was both unnecessary and potentially confusing to the jury.

Because the trial court's instructions gave a complete and accurate statement of the law and Miller was not precluded from arguing his theory of the case, the trial court did not abuse its discretion when it refused to give Miller's proposed instruction.

III

Miller next asserts that insufficient evidence supports his convictions for bail jumping. Because a rational trier of fact could have found that all of the elements of bail jumping had been proved beyond a reasonable doubt, we disagree.

The due process clauses of the federal and state constitutions require that the government prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (citing U.S. CONST. amend. XIV, § 1); State v. Johnson, 188 Wn.2d 742, 750, 399 P.3d 507 (2017) (citing WASH. CONST. art. I, § 3). After a verdict, the relevant question when reviewing a challenge to the sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119

Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).

At trial, the elements of bail jumping were as set forth in former RCW 9A.76.170(1) (2001),[2] which provided:

> Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state . . . and who fails to appear . . . is guilty of bail jumping.

Thus, to prove that Miller was guilty of bail jumping, the State was required to establish: (1) that he was held for, charged with, or convicted of a particular crime; (2) that he was released by court order or admitted to bail with the requirement of a subsequent personal appearance; and (3) that he knowingly failed to appear as required. State v. Williams, 162 Wn.2d 177, 184, 170 P.3d 30 (2007).

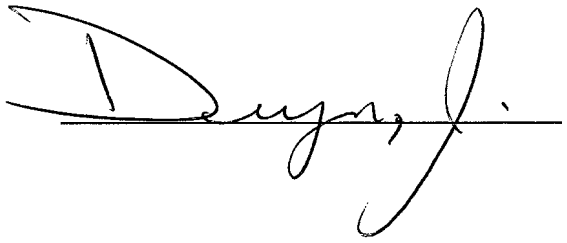
Miller challenges the sufficiency of the evidence that he had knowledge of the subsequent personal appearance requirement. Miller contends that because there was no testimony from an individual present in court when the September 13 and November 8 hearings were scheduled, the State failed to prove that Miller received actual notice.

This argument is not persuasive. The State was not required to present witnesses that were present in court on the days that the scheduling orders were

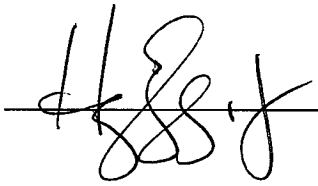
[2] In 2020, the legislature amended RCW 9A.76.170. We cite to the version of the statute that Miller was charged with violating.

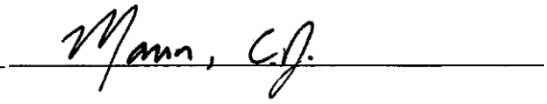
entered. The State presented testimony about the procedures by which defendants are typically notified of hearing dates. The State also presented copies of the two scheduling orders, each of which had been signed by both Miller and his attorney. A rational trier of fact could conclude from this evidence that Miller had knowledge of the subsequent hearing dates.

Affirmed.



We concur:





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