Supreme Court No. 99483-8
(COA No. 36699-5-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID MULLINS,

Petitioner.

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

PETITION FOR REVIEW

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A. INTRODUCTION

> [T]he sufficiency of the evidence test set forth by our Supreme Court in *State v. Homan* . . . conflicts with the sufficiency of the evidence standard for criminal cases announced by the United States Supreme Court in *Jackson v. Virginia*.

State v. Stewart, 12 Wn. App. 2d 236, 243, 457 P.3d 1213 (2020) (Dwyer, J., concurring).

In *State v. Homan*, this Court stated appellate courts could review the record for "substantial evidence" of the essential elements of a crime if the defendant was convicted following a bench trial. In doing so, *Homan* established a different, lower standard of review for convictions obtained by a judge versus a jury.

Homan conflicts with this Court's decisions in *State v. Green* and *State v. Vasquez*. Both opinions follow the sufficient evidence standard of *Jackson*, which the Due Process Clause compels. Under a sufficient evidence standard, a reviewing court must reverse a conviction unless it finds "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

In affirming Mr. Mullins's conviction, the Court of Appeals applied the lower standard of review described in *Homan* rather than what the United States Supreme Court held is required in *Jackson* and what this Court held is required in *Green* and *Vasquez*. The Due Process Clause requires sufficient evidence to support a conviction, not merely substantial

evidence. This Court should accept review, reaffirm *Green* and *Vasquez*, and renounce the standard articulated in *Homan*.

B. IDENTITY OF PETITIONER AND DECISION BELOW

David Mullins, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision, filed December 3, 2020, terminating review. RAP 13.3(b); RAP 13.4(b)(1)-(4).

C. ISSUES PRESENTED FOR REVIEW

1. In *State v. Green*, this Court reversed convictions it had previously affirmed after recognizing due process requires courts to review convictions for sufficiency of the evidence, not substantial evidence. But here, the Court of Appeals applied the lower standard and reviewed the record for "substantial evidence" because Mr. Mullins was convicted by a judge, not a jury. Should this Court accept review to reaffirm that the Due Process Clause, United States Supreme Court precedent, and this Court's precedent mandate that a conviction must be supported by sufficient evidence, regardless of whether the case is decided by a jury or judge, and to disavow *Homan*? RAP 13.4(b)(1), (3), (4).

2. 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." Custody is defined as restraint pursuant to a lawful court order or arrest, and the cases have

interpreted escape from custody to mean leaving the confines of the physical restraint of an officer or a court. Where Mr. Mullins twice left a locked room within the jail but never left the confines of the jail itself, did the prosecution fail to prove beyond a reasonable doubt Mr. Mullins knowingly escaped from custody? RAP 13.4(b)(1)-(4).

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.[1] RP 67; CP 8, 76. The State also 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 an unrelated charge and the outstanding warrants and took him to the Stevens County Jail.[2] 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 processing Mr. Mullins, Deputy Billy

[1] Mr. Mullins appealed from his convictions following the forgery trial. The Court of Appeals affirmed the convictions and remanded the matter for resentencing. *State v. Mullins*, Case No. 36410-1-III. This Court denied review. *State v. Mullins*, Case No. 98660-6. Mr. Mullins is currently awaiting resentencing on that matter.

[2] 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.

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. RP 26-27. Deputy Reece found Mr. Mullins coming down a set of stairs that led to the jail's 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 was 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 at the top of the stairs were 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 never left the jail itself nor 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 wandered the jail revealed a small bag of methamphetamine, as well as Deputy Kenneth Niegel's 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. 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. With respect to the escape charge, the State alleged only that Mr. Mullins escaped from custody, not from a detention facility. CP 72. 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 where the deputy left him 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. RP 87-88.

The Court of Appeals reversed Mr. Mullins's escape conviction because the information was constitutionally defective and remanded for

dismissal without prejudice.[3] Slip op. at 8-9. However, the Court of Appeals rejected Mr. Mullins's challenge to the sufficiency of the evidence. Slip op. at 3-7.

E. ARGUMENT

1. The Court of Appeals unconstitutionally lowered the standard of proof required by the Due Process Clause when it applied a lower, more deferential standard of review for a conviction following a bench trial.

a. A conviction must be reversed unless the prosecution presented sufficient evidence from which a rational trier of fact could find every essential element of the 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; *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, "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).

Jackson made no distinction between trial by jury or judge. 443 U.S. at 317 (recognizing defendant could be convicted on insufficient

[3] The Court of Appeals found the information did not allege the essential element of "knowingly." Slip op. at 8-9. Mr. Mullins does not seek review of that issue.

evidence by either "a properly instructed jury" or "a trial judge sitting as a jury"). In fact, the Supreme Court noted, "The trier of fact in this case was a judge and not a jury. But *this is of no constitutional significance.*" *Id.* at 317 n.8 (emphasis added). Thus, *Jackson* itself established the same standard of review for the sufficiency of the evidence, regardless of the identity of the trier of fact. *Id.* at 317-19.

This Court first applied the *Jackson* standard in *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). In *Green*, this Court reversed a conviction for insufficient evidence after having previously affirmed it based on the lower "substantial evidence" standard. 94 Wn.2d at 220. The Court recognized that *Jackson* defined "the proper test" as "whether there was sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt." *Id.*

> Accordingly, the appropriate test for determining the sufficiency of the evidence of kidnapping is not that applied in *Green I*, i.e., whether, after viewing the evidence most favorable to the State, there is substantial evidence to support kidnapping. The issue, as framed in *Jackson v. Virginia*, *supra*, is whether, after viewing the evidence most favorable to the State, any rational trier of fact could have found the essential elements of kidnapping beyond a reasonable doubt.

Id. at 221-22. Because the previous decision of the court affirmed based on "substantial evidence," and because *Jackson* compelled a review for

"sufficient evidence," the court reviewed the evidence again under the correct standard and found it lacking. *Id.* at 225-30.

This Court has continued to apply the *Jackson* standard for sufficient evidence, as first adopted in *Green*, throughout its cases. In *State v. Vasquez*, this Court reiterated that the constitution mandates every element of an offense be supported by sufficient evidence, not merely substantial evidence. 178 Wn.2d 1, 6, 309 P.3d 318 (2013). It confirmed the *Jackson* standard that sufficient evidence requires determining whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (internal quotations omitted). In reversing the defendant's conviction, the court emphasized the difference between sufficient evidence and the lower substantial evidence standard.

> The Court of Appeals applied the incorrect standard of review when it stated that "the evidence of intent to defraud [was] substantial when [it] consider[ed] the reasonable inferences available to the jury." *Vasquez*, 166 Wn. App. at 52, 269 P.3d 370. *We have rejected a substantial evidence standard in determining the sufficiency of the evidence because it does not require proof beyond a reasonable doubt. See Green*, 94 Wn.2d at 221–22, 616 P.2d 628.

Id. at 6 (emphasis added).

Thus, this Court reaffirmed a court may uphold a conviction only where a rational trier of fact could have found every essential element of the charged offense beyond a reasonable doubt.

b. The Court of Appeals applied the wrong standard of review and affirmed Mr. Mullins's conviction based on substantial evidence, not sufficient evidence, in violation of the Due Process Clause.

The Court of Appeals rejected the standard of review mandated by the Due Process Clause as interpreted in *Jackson*, *Green*, and *Vasquez* in favor of a more deferential standard for convictions following bench trials. In reliance on this Court's opinion in *Homan*, the Court of Appeals stated:

> In bench trials, "appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *State v. Homan*, 181 Wn.2d 102, 105-106, 330 P.3d 182 (2014). "'Substantial evidence' is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." *Id*. at 106.

Slip op. at 4.

The opinion in *Homan* did present the standard of review for sufficiency of the evidence following a bench trial as "substantial evidence." 181 Wn.2d at 106. The court first recognized that sufficient evidence supports a conviction only where "any rational fact finder could have found the elements of the crime beyond a reasonable doubt." *Id.* at 105. However, it continued on to state:

> following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law. "Substantial evidence" is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise.

Id. at 105-06.

In support, *Homan* cited a Court of Appeals opinion. 181 Wn.2d at 106 (citing *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005)). That opinion, in turn, relied on a civil, not a criminal, case. 128 Wn. App. at 193 (citing *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 792, 98 P.3d 1264 (2004)). *Homan* did not cite to *Jackson*, *Green*, or *Vasquez*. A search reveals only one other case in which this Court has cited to *Homan*, but that case did not include a reference to the "substantial evidence" standard. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016).

c. <u>This Court should accept review because this Court's precedent misled the Court of Appeals to dilute the constitutional requirement that a conviction cannot stand where the government supported an essential element on less than sufficient evidence.</u>

The Court of Appeals relied on language used by this Court in *Homan* to explain the standard of review for challenges to the sufficiency of the evidence following a bench trial. Slip op. at 4. To the extent *Homan* creates a distinction between the standard of review following conviction by a bench trial versus a jury trial it is misleading at best and unconstitutional at worst. It lowers the standard of review by directing the court to consider whether the essential elements are supported by "substantial evidence" instead of "sufficient evidence." *Homan*, 181

Wn.2d at 106. *Homan* also contradicts this Court's opinions in *Green* and *Vasquez*, which hold the Due Process Clause requires sufficient evidence as defined by *Jackson*, not merely substantial evidence.

It bears mention that a concurring judge of the Court of Appeals recognized the conflict between *Homan* and *Green* in a recent decision. In *State v. Stewart*, the court relied on *Homan* to review a conviction for sufficient evidence following a bench trial. 12 Wn. App. 2d 236, 240, 457 P.3d 1213 (2020). The majority noted that because the defendant was convicted by bench trial, its review was "limited to determining whether substantial evidence supports the findings of fact." *Id.* at 240 (quoting *Homan*, 181 Wn.2d at 105-06).

Judge Dwyer highlighted the error in *Homan* and declined to join the majority opinion for that reason.

> [T]he majority reaches its decision by applying the sufficiency of the evidence test set forth by our Supreme Court in *State v. Homan*, 181 Wn.2d 102, 330 P.3d 182 (2014), which conflicts with the sufficiency of the evidence standard for criminal cases announced by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Id. at 243 (Dwyer, J., concurring).

The concurrence continued on to explain that *Homan*'s statement that courts review the evidence for substantial evidence following a bench trial conflicts with *Jackson*'s requirement that courts must review the

evidence to determine whether any rational trier of fact could have found the elements proven beyond a reasonable doubt. *Id.* at 243-48. It also pointed out the same standard governs a court's review of sufficiency of the evidence, whether the conviction resulted from a jury or a bench trial. *Id.* at 246. Finally, the concurrence properly recognized that the lower standard in *Homan* conflicts with the requirement of *Jackson* and "harms defendants by supplanting the demanding beyond a reasonable doubt standard with the less stringent substantial evidence standard." *Id.* at 248.

This Court should accept review because the Court of Appeals's reliance on *Homan* violates the Due Process Clause. RAP 13.4(b)(3). It conflicts with decisions of the United States Supreme Court and this Court. RAP 13.4(b)(1); *Jackson*, 443 U.S. 307; *Green*, 94 Wn.2d 216; *Vasquez*, 178 Wn.2d 1. Finally, substantial public interest favors review because this Court's precedent misleads the Court of Appeals in how to apply the standard the Due Process Clause requires. RAP 13.4(b)(4).

2. The prosecution presented insufficient evidence to convict Mr. Mullins of escape where he was never out of custody and never left the detention facility.

As charged, to convict Mr. Mullins of escape in the first degree, the prosecution was required to prove beyond a reasonable doubt Mr. Mullins (1) knowingly (2) escaped from custody (3) while being detained

pursuant to a conviction of a felony.[4] RCW 9A.76.110(1); CP 72. The court convicted Mr. Mullins of escape from custody. However, insufficient evidence supported Mr. Mullins's conviction.

The government did not prove Mr. Mullins was ever out of custody where he merely exited the room where deputies left him. Mr. Mullins was still in custody when he walked out of the room and into the hallway and stairwell in another area of the jail. Likewise, Mr. Mullins was still in custody when he left the room a second time and walked into another room within the jail. Mr. Mullins never left the jail and never left custody. The Court of Appeals nonetheless rejected Mr. Mullins's sufficiency challenge and concluded, "The evidence supported the bench verdict." Slip op. at 7. This Court should accept review and reverse because the prosecution did not present sufficient evidence.

Leaving a confined room within a detention facility without permission fails to meet the statutory definition of escape from custody.

[4] RCW 9A.76.110(1) prohibits escape "from custody or a detention facility." The information charged Mr. Mullins only with escape from custody, not escape from a detention facility. CP 72. In response to Mr. Mullins's sufficiency challenge, the State argued the Court of Appeals should affirm his conviction under either theory of escape. Brief of Respondent at 5-12. Mr. Mullins argued the State charged Mr. Mullins only with escape from custody and demonstrated the trial court convicted him on that theory alone while explicitly rejecting a finding of escape from a detention facility. Reply Brief at 1-5; RP 87-88. Mr. Mullins also argued the evidence was insufficient to prove escape under either theory. Brief of Appellant at 8-17; Reply Brief at 1-7. The Court of Appeals agreed the information charged Mr. Mullins only with escape from custody and rendered its opinion based on that theory alone. Slip op. at 2-3, 5.

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 this Court 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)). In *Ammons*, this Court applied that definition to hold the defendants escaped custody when they failed to report for work release. 136 Wn.2d at 457-60. Because the defendants were restrained pursuant to the court order imposing a work release sentence, they escaped that restraint when they did not appear for work release as ordered. *Id.* at 460.

Basic rules of statutory construction require courts to 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 offers more than one reasonable interpretation, the rule of lenity requires courts to interpret the statute in the defendant's favor. *Id.* at 711-12. In addition, courts must give criminal statutes "a literal and strict interpretation," and avoid a reading that creates "absurd results." *State v. Delgado*, 148 Wn.2d 723, 727, 730, 63 P.3d 792 (2003).

Under a common sense interpretation of the plain language of the statute, escaping from custody requires leaving physical custody or physical restraint. Escaping from custody does not encompass moving from one area to another area within the confines of a jail simply because a person does not have permission to do so. It does not apply when someone remains inside of a detention facility. Case law supports this interpretation.

In *State v. Solis*, the court analyzed what it means to be in custody for purposes of escape. 38 Wn. App. 484, 685 P.2d 672 (1984). There, the defendant broke loose from the grip of an officer trying to arrest him on a parole warrant and ran away. *Id.* at 485. The court held the officer's act of physically grabbing the defendant's arms while executing a warrant constituted "restraint" such that the defendant was within the officer's custody. *Id.* at 487. He escaped the officer's custody when he broke free from her grip, ran away from her, and fled the scene entirely. *Id.* at 486-87 (citing to RCW 9A.76.010(1)).

Similarly, in *State v. Walls*, the court found a defendant was in custody when an officer was physically holding him while escorting him to his patrol car on an arrest warrant. 106 Wn. App. 792, 794, 25 P.3d 1052 (2001). Because the defendant was in the officer's custody pursuant

to a lawful arrest warrant, the court found he escaped that custody when he "bolted," ran from the officer, and fled the scene. *Id.* at 797-98.

Finally, in *State v. Eichelberger*, after a jury found the defendant guilty, the judge announced he was taking the defendant into custody. 144 Wn. App. 61, 64, 180 P.3d 880 (2008). 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 held the defendant was in custody because the court issued an order detaining the defendant. *Id.* at 66-70. Therefore, the defendant escaped from custody when he ran out of the building and was no longer detained by the order. *Id.* at 70-72.

These cases demonstrate that to escape from custody, one must actually leave custody or be fully removed from physical restraint. A defendant does not escape from custody when he remains subject to physical restraint.

Mr. Mullins left the confines of a locked interview room inside of the Stevens County Jail without permission. RP 23-27, 39-41, 49-50. The interview room was inside of the booking office, and Deputy Niegel testified Mr. Mullins was "in the custody of the jail." RP 39-40. Mr. Mullins wandered around inside of the jail, walked in an internal hallway and stairwell area, and walked around the deputies' desk area. RP 26-27,

39-40, 49-50. The stairs led to the jail's holding cell. RP 26-27, 49-50. The door at the top of the staircase was locked, and Mr. Mullins did not open it. RP 35, 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. Deputy Reece grabbed Mr. Mullins inside "the foyer outside of the north wing." RP 41. Mr. Mullins did not leave the jail itself or the building. RP 35, 51.

However, the Court of Appeals held that Mr. Mullins was outside the "custody" of the deputies once he left the interview room. Slip op. at 7. Because "Mr. Mullins was not where he was supposed to be," the court reasoned he was no longer restrained and therefore had escaped custody. Slip op. at 7. The Court of Appeals accordingly affirmed the conviction.

The Court of Appeals is wrong. Mr. Mullins's actions in leaving a room fail to constitute escape from custody. Simply leaving the area in one portion of the jail where one is "supposed to be" and entering another portion of the jail does not render a person no longer in custody. The person is still subject to the physical restraint of the jail. When a person is present in an unapproved area without permission, he may be committing any number of policy violations within a facility. It does not, however, mean a defendant meets the legal definition of escape every time he is somewhere in a jail other than the precise area he is supposed to be.

The Court of Appeals' interpretation conflates the meaning of escape from custody and escape from a detention facility. If leaving a specific part of a jail while remaining within the jail constituted "escape[] from custody," the statutory language also criminalizing "escape[] from . . . a detention facility" would be superfluous. RCW 9A.76.110(1). Under such an interpretation, anytime a person left an area or was in an area without authority, he would have escaped custody, and a person could never escape from a detention facility without first having escaped from 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.

Mr. Mullins never left the jail. He never left the custody of the deputies. The Court of Appeals misinterpreted the meaning of "custody" and affirmed Mr. Mullins's conviction even though the State failed to present sufficient evidence that he escaped custody. This Court should accept review. RAP 13.4(b)(1)-(4).

F. CONCLUSION

The Court of Appeals applied the wrong standard and reviewed Mr. Mullins's escape conviction for "substantial evidence," not "sufficient evidence." Insufficient evidence supports Mr. Mullins's conviction for escape from custody, and the Court of Appeals misinterpreted the statute when it rejected his challenge. This Court should grant review, renounce *Homan*, and reverse Mr. Mullins's conviction because a rational trier of fact could not have found the prosecution proved the essential elements of escape from custody beyond a reasonable doubt. RAP 13.4(b).

DATED this 30th day of December 2020.

Respectfully submitted,

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APPENDIX A

December 3, 2020, Opinion

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

STATE OF WASHINGTON,	)	
	)	No. 36699-5-III
Respondent,	)	(Consolidated with
	)	No. 36700-2-III)
v.	)	
	)	
DAVID RAYMOND MULLINS,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

KORSMO, J. — David Mullins appeals from multiple convictions, but challenges only one of them in this action—his conviction for first degree escape. We reverse that conviction due to a defective charging document and remand to the trial court for further proceedings.

FACTS

Officer Michael Welch of the Colville Police Department arrested Mr. Mullins October 8, 2018, on the basis of two outstanding arrest warrants and probable cause to believe he had engaged in vehicle theft. One warrant was for a forgery conviction that still awaited sentencing. Welch transported Mullins to the Stevens County jail. Corrections Deputy Billy Reece took Mullins to Interview Room 1 in the booking area. Unable to book Mullins immediately because the deputies were feeding and providing

medication to the other inmates, Reece secured him in the interview room and gave him a meal before returning to the other prisoners.

Shortly thereafter, Mullins was observed coming down a stairwell and was taken back to the interview room and once again secured therein. Once again, Mullins was able to open the door and leave.[1] He again was apprehended in the building and discovered to be in possession of personal items belonging to one of the jailers.[2] He was placed in a different room in the booking area and then transported to the hospital upon alleging a medical need to visit the facility. He was returned to the jail and ultimately booked in to the facility shortly after midnight.

The prosecutor charged one count of first degree escape in the following manner:

> 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 [sic] custody.

Clerk's Papers (CP) at 72. The charge was ultimately tried to the bench. The court convicted Mr. Mullins of first degree escape, finding that he was not an inmate of the jail, but did escape the custody of corrections officers by leaving the secured room in which he had been confined. CP at 77.

Mr. Mullins timely appealed to this court. A panel conducted video argument of the appeal.

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[1] The deputies discovered that Mullins had used the "spork" provided with the meal to open the door.

[2] Portions of the incident were captured on a video that was played at trial.

ANALYSIS

Mr. Mullins argues that both the evidence and the charging document were insufficient. He also argues that the offender score was inappropriately calculated. Having granted relief on that latter ground in a companion case, *State v. Mullins*, No. 36410-1-III (Wash. Ct. App. May 14, 2020) (unpublished), http://www.courts.wa.gov /opinions/pdf/364101_unp.pdf, and with resentencing required here, we need not further discuss the proof of prior conviction argument.

We consider first the sufficiency of the evidence contention before turning to the sufficiency of the charging document.

Sufficiency of the Evidence

Mr. Mullins argues that because he never left the jail building, there was insufficient evidence that he escaped "custody" or that he escaped from a "detention facility." We disagree. Since there was no allegation that he escaped a detention facility and that was not the theory of escape found by the trial judge, we need not discuss that particular theory except to the extent it overlaps with the charged theory of the case.

Review of the sufficiency of the evidence from a bench trial is conducted under well settled standards. Evidence is sufficient to support a verdict if the trier-of-fact has a factual basis for finding each element of the offense proved beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). The evidence is viewed in the light most

favorable to the prosecution. *Green*, 94 Wn.2d at 221. Appellate courts defer to the trier-of-fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In bench trials, "appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *State v. Homan*, 181 Wn.2d 102, 105-106, 330 P.3d 182 (2014). "'Substantial evidence' is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." *Id*. at 106.

A person commits first degree escape if he "knowingly escapes from custody or a detention facility while being detained pursuant to a conviction of a felony." RCW 9A.76.110(1). This statute was adopted by Laws of 2001, ch. 264, § 1. Prior to that amendment, the offense was committed when a person "detained pursuant to a conviction of a felony" "escapes from custody or a detention facility." LAWS OF 1982, 1st Ex. Sess., ch. 47, § 23.

By comparison, second degree escape involves escape from a detention facility without regard for the reason for incarceration. RCW 9A.76.120(1)(a). However, any escape from custody when held for a felony offense also constitutes second degree escape. RCW 9A.76.120(1)(b). Third degree escape is any other escape from custody. RCW 9A.76.130. Thus, while the location and reason for custody may matter for the inferior degrees of escape, it is not relevant for first degree escape. The reason for the

custody—a felony conviction—distinguishes first degree escape from the other degrees of the offense. The location and nature of the custody are not relevant.

The term "custody" is defined as "restraint pursuant to a lawful arrest or an order of a court, or any period of service on a work crew." RCW 9A.76.010(2). In turn, "restraint" means 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)).[3]

Mr. Mullins argues that because he never left the building, he remained both in the detention facility and in custody because only his location within the building changed. Br. of Appellant at 11. As noted previously, he was not charged with escaping the facility, so the only question before this court is whether he escaped custody when he repeatedly removed himself from the locked conference room in which the corrections officers attempted to secure him prior to booking him in to the jail.[4] We believe that to be the case. He was not in the location he was supposed to be in.

[3] A "detention facility" is "any place used for the confinement of a person (a) arrested for, charged with or convicted of an offense, or . . . (d) otherwise confined pursuant to an order of a court . . . or (e) in any work release, furlough, or other such facility or program." RCW 9A.76.010(3).

[4] Presumably he was not charged under the "detention facility" prong of the statute because he had not been formally booked into the jail. Whether someone escapes a detention facility when they are captured within the jail building, is not a question before us due to the charging decision.

Informative are *State v. Gomez*, 152 Wn. App. 751, 754, 217 P.3d 391 (2009). *Ammons*, and *State v. Breshon*, 115 Wn. App. 874, 63 P.3d 871 (2003). *Gomez* involved a defendant who slipped out of handcuffs and left a booking room, and then the building. The evidence was sufficient to show escape from a detention facility. 152 Wn. App. at 752-753. Mr. Gomez defended on the basis that he merely had escaped custody (third degree escape) rather than a detention facility (second degree escape). *Id*. at 753. Satisfied with the proof that the room constituted a detention facility, this court affirmed, noting that Mr. Gomez should have remained in the room until the officer returned to him. *Id*. at 754.

In *Ammons*, the defendants were convicted of first degree escape for failing to report to a work crew; they defended on the basis that they were not in "custody" while at work crew. 136 Wn.2d at 454-456. The court disagreed and determined that the defendants were "in custody" both pursuant to a court order and by the assignment to the work crew. *Id*. at 460. *Breshon* involved the question of whether defendants ordered to report to a drug treatment facility were "in custody" despite a failure to report to the facility. 115 Wn. App. at 876-877. Division Two of this court concluded that the defendants were "in custody" pursuant to the court order to report to the treatment facility. *Id*. at 878-879. *Breshon* discussed the *Ammons* holding:

> In any event, the majority did not require a detention separate from the restriction of freedom imposed by being in custody, even if that was custody from restraint arising from a court order. We, therefore, reject the

> argument that Breshon and Simmons were not detained because they were not at least partially confined.

Id.; *accord State v. Kent*, 62 Wn. App. 458, 461, 814 P.2d 1195 (1991) (failure to return to jail from work release or hospital visit constituted escape due to not being where one was supposed to be).

Also informative is *State v. Bryant*, 25 Wn. App. 635, 608 P.2d 1261 (1980). There the defendant fled a courtroom, evading an officer; he was chased through the hallways and down the stairs before being "dogged" to the ground by the chief criminal deputy prosecutor. *Id*. at 636-637. This court concluded that Mr. Bryant had escaped custody once "he removed himself from the Deputy Sheriff's physical restraint." *Id*. at 638. Likewise, a prisoner who ran from a courtroom upon being ordered into custody was guilty of escape in the first degree because the order had placed him in custody. *State v. Eichelberger*, 144 Wn. App. 61, 70-72, 180 P.3d 880 (2008).

Similarly here, Mr. Mullins was not where he was supposed to be, and therefore was outside the "custody" of the corrections staff to whom the Colville police had entrusted him, once he slipped the restraint of the conference room in which he had been placed. He was restrained in the physical custody of the officers due to placement in the secured room, and escaped their custody when he freed himself from that location. *Id*. He no longer was "restrained" where he had been left.

The evidence supported the bench verdict.

Adequacy of Charging Document

Mr. Mullins also alleges that the charging document is defective because it omitted the knowledge element. The State responds that we should impute knowledge from the word "escape." Mr. Mullins has the better argument.

Again, well settled standards govern our review. "All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). When challenged for the first time after a verdict has been returned, courts will liberally construe the document to see if the necessary facts can be found. If not, the charge will be dismissed without prejudice. Even if the charge is stated, a defendant who shows prejudice from "inartful" pleading also receives a dismissal of charges without prejudice. *Id*. at 105-106. The initial question to be answered is whether "the necessary facts appear in any form, or by fair construction can they be found, in the charging document." *Id*. at 105. The liberal construction standard for belated challenges is designed to discourage "sandbagging" by withholding a challenge that could otherwise be timely remedied. *Id*. at 103.

As dutifully noted by the prosecutor, our case law previously has concluded that a charging document omitting the knowledge element of escape is constitutionally defective. *State v. Brown*, 169 Wn.2d 195, 198, 234 P.3d 212 (2010). The State nonetheless argues

that *Brown* did not consider its argument that the word "escape" necessarily conveys the concept of knowledge. We disagree that the argument requires a different result.

First, this court must follow the decisions of the Washington Supreme Court. *State v. Gore*, 101 Wn.2d 481, 486-487, 681 P.2d 227 (1984). If the State's new argument is to be considered, that court must do the considering. Second, the fact that the legislature expressly added the knowledge element to the existing statute in 1982 strongly indicates that knowledge was not implicit in the concept of escape. Prior to that amendment, the statute had employed "escapes" as a verb. If "escapes" already meant "knowingly escapes," there was no need for the 1982 amendment.

Even if we were not required to follow *Brown*, the State's argument is unconvincing in light of the statute's history. Accordingly, we reverse the escape conviction without prejudice to the State refiling the charge.

Reversed and remanded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, J.

Pennell, C.J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF DECEMBER, 2020, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	DAVID MULLINS 337510 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF DECEMBER, 2020.

X_____

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