

**Ala. Code 1975, § 13A-10-33**

**Escape in the Third Degree**

The defendant is charged with escape in the third degree.

A person commits the crime of escape in the third degree when he/she escapes or attempts to escape from custody.

To convict, the State must prove beyond a reasonable doubt each of the following elements:

- (1) The Defendant escaped or attempted to escape;
- (2) The Defendant was in custody, **[insert description]**, at the time; **(AND)**
- (3) The Defendant acted **[insert appropriate mens rea element - See Use Notes]**.

*Custody* is a restraint or detention by a public servant pursuant to a lawful arrest, conviction or order of court, but does not include mere supervision of probation or parole, or constraint incidental to release on bail. [13A-10-30(b)(1)]

**[Read as appropriate]:** An *attempt* to commit a crime means that, with the intent to commit a specific offense, a person did an overt act towards the commission of that offense. [13A-4-2(a)]

If you find from the evidence that the State has proved beyond a reasonable doubt each of the above elements of escape in the third degree, then you shall find the defendant guilty of escape in the third degree.

If you find that the State has failed to prove any one or more of the elements of escape in the third degree, then you cannot find the defendant guilty of escape in the third degree.

**[If lesser-included offenses are included, the Court should instruct on those offenses at this point.]**

**Use Notes**

The term *custody* refers to a public servant. Public servant is not defined in this article. However, a definition can be found in a prior article in the same chapter: *Public servant* is any officer or employee of government, including legislators and judges and any person or agency participating as an adviser, consultant, or otherwise in performing a governmental function. [13A-10-1(7)]

The statute does not state a specific mens rea element. In *Oliver v. State*, 466 So. 2d 159 (Ala. Crim. App. 1984), the court, quoting a national treatise, noted that an escape from custody included a willful departure. Willful, of course, means deliberate, and deliberate means premeditated or intentional. Thus, one might surmise that escape in Alabama includes the mens rea element of "intent." The facts of a particular case though might support an escape conviction on a showing of less than "intent." See, e.g., *United States v. Bailey*, 444 U.S. 394 (1980) (interpreting federal statute without mens rea requirement, intermediate appellate court imposed intent to avoid confinement element; Supreme Court reversed, holding knowledge by prisoner that he left prison without permission sufficient; prisoners had claimed necessity to leave and absence of any intent to escape).

Insert the appropriate mens rea element considering the indictment and the evidence before the court. There are few, if any, strict liability offenses in the Code. See Commentary for 13A-2-3 and 13A-2-4(b). There are four mens rea elements in the Alabama Code: intentionally, knowingly, recklessly and with criminal negligence. See 13A-2-2.

- (1) A person acts *intentionally* with respect to a result or to conduct described by a statute defining an offense when his/her purpose is to cause that result or to engage in that conduct. [13A-2-2(1)]
- (2) A person acts *knowingly* with respect to conduct or to a circumstance described by a statute defining an offense when he/she is aware that his/her conduct is of that nature or that the circumstance exists. [13A-2-2(2)]
- (3) A person acts *recklessly* with respect to a result or to a circumstance when he/she is aware of and consciously disregards a substantial and unjustifiable risk that the risk will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. [13A-2-2(3)]
- (4) A person acts with *criminal negligence* with respect to a result or to a circumstance when he/she fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation. A court or jury may consider statutes or ordinances regulating the defendant's conduct as bearing upon the question of criminal negligence. [13A-2-2(4)]

[Approved 8-20-15.]