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COURT OF APPEALS
DIVISION II

NO. 33778-9-II

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

BY Chum
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STATE OF WASHINGTON,

Respondent,

v.

MARVIN HOWELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-00847-2

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED September 11, 2006, Port Orchard, WA
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

 A. PROCEDURAL HISTORY.....1

 B. FACTS2

III. ARGUMENT.....4

 A. VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE AND ADMITTING THE TRUTH OF THE STATE'S EVIDENCE AND ALL INFERENCES THAT REASONABLY CAN BE DRAWN FROM THEM, A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT BECAUSE: (1) DEFENDANT WAS REQUIRED TO SERVE A PERIOD OF COMMUNITY CUSTODY FOLLOWING A 1999 FELONY CONVICTION IN KITSAP SUPERIOR COURT; (2) DEFENDANT WAS ARRESTED ON A PROBATION VIOLATION, HANDCUFFED, AND PLACED IN A DOC CAGE CAR AND THEN ESCAPED FROM THE CAGE CAR WHEN THE DOC OFFICERS BRIEFLY WENT INTO A RESIDENCE AND LEFT THE CAR UNATTENDED.4

 B. RCW 9A.76.110, ESCAPE IN THE FIRST DEGREE, IS NOT UNCONSTITUTIONALLY VOID AS APPLIED TO FACTS IN THIS CASE BECASUE THE CRIME IS CLEARLY DEFINED SO THAT A PERSON OF ORDINARY INTELLIGENCE COULD UNDERSTAND WHAT CONDUCT IS PROHIBITED AND THE STANDARDS FOR A VIOLATION OF THE STATUTE ARE SUFFICIENT SO AS TO

	PREVENT ARBITRARY ENFORCEMENT.....	8
IV.	CONCLUSION.....	11

TABLE OF AUTHORITIES
CASES

Haley v. Med. Disciplinary Bd.,
117 Wn. 2d 720, 818 P.2d 1062 (1991).....9

State v. Chapman,
78 Wn. 2d 160, 469 P.2d 883 (1970).....5

State v. Delmarter,
94 Wn. 2d 634, 618 P.2d 99 (1980).....5

State v. Eckblad,
152 Wn. 2d 515, 98 P.3d 1184 (2004).....8

State v. Franklin,
106 Wn. App. 792, 25 P.3d 1052 (2001).....5, 6, 10

State v. Green,
94 Wn. 2d 216, 616 P.2d 628 (1980).....4

State v. Groom,
133 Wn. 2d 679, 947 P.2d 240 (1997).....10

State v. Perencevic,
54 Wn. App. 585, 774 P.2d 558 (1989).....5, 6, 10

State v. Salinas,
119 Wn. 2d 192, 829 P.2d 1068 (1992).....4

State v. Solis,
38 Wn. App. 484, 685 P.2d 672 (1984).....6, 7, 10

State v. Sullivan,
143 Wn. 2d 162, 19 P.3d 1012 (2001).....8, 9

Wainwright v. Stone,
414 U.S. 21, 94 S. Ct. 190, 38 L. Ed. 2d 179 (1973).....10

STATUTES

RCW 9A.76.1105, 8, 9, 10

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether, viewing the evidence in the light most favorable to the State and admitting the truth of the State's evidence and all inferences that reasonably can be drawn from them, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt when: (1) Defendant was required to serve a period of community custody following a 1999 felony conviction in Kitsap Superior court; (2) Defendant was arrested on a probation violation, handcuffed, and placed in a DOC cage car and then escaped from the cage car when the DOC officers briefly went into a residence and left the car unattended?

2. Whether RCW 9A.76.110, Escape in the first Degree, is unconstitutionally void as applied to facts in this case where the crime is clearly defined so that a person of ordinary intelligence could understand what conduct is prohibited and the standards for a violation of the statute are sufficient so as to prevent arbitrary enforcement?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Marvin Howell was charged by information filed in Kitsap County Superior Court with one count of escape in the first degree. CP 1. After a trial, the jury convicted Howell of the charged offense. CP 41. Howell

received a sentence at the bottom end of the standard range sentence of 63 to 84 months. CP 42

B. FACTS

In 1999, Howell was convicted of a felony pursuant to a prosecution undertaken in Kitsap Cause No. 99-1-00632-0. CP 24. As a part of his sentence, Howell was required to serve a period of community custody. CP 24. Community corrections officer (hereinafter, "CCO") Tim Thompson was tasked with the supervision of Howell. RP 8-9.

On June 1, 2005, CCO Thompson prepared an order of arrest and detention of Howell for alleged violations of his community supervision. RP 9-10. CCO Thompson (assisted by CCO Doug Butcher) then went to an apartment in Bremerton, Washington, where Howell was believed to be residing. RP 11, 42-43. CCO Thompson entered the apartment and located the Howell lying on the floor. RP 13. CCO Thompson arrested Howell and handcuffed him. RP 13-14.

Howell was escorted out of the residence and placed in the Department of Corrections "cage car." RP 14, 45. The cage car is a specially modified Crown Victoria outfitted with a Plexiglas panel separating the front and rear passenger compartments. RP 15. The rear passenger compartment is equipped with a disabled door handle, so that once an individual is placed in the rear seat compartment normal accesses in and out of the vehicle must

be done with the assistance of another person opening the rear door from the exterior. RP 15-16.

After placing Howell in the cage car, CCO Thompson and Butcher returned to the residence to speak with Ms. Howell and to search the residence for other possible probation violations. RP 16-17. After approximately 10 minutes, Thompson and Butcher returned to the vehicle. RP 17. Howell, however, was no longer in the vehicle. RP 17-18. Thompson and Butcher searched for Howell, but were unable to locate him. RP 21. Howell was eventually arrested approximately fifteen days later. RP 21.

III. ARGUMENT

- A. **VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE AND ADMITTING THE TRUTH OF THE STATE'S EVIDENCE AND ALL INFERENCES THAT REASONABLY CAN BE DRAWN FROM THEM, A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT BECAUSE: (1) DEFENDANT WAS REQUIRED TO SERVE A PERIOD OF COMMUNITY CUSTODY FOLLOWING A 1999 FELONY CONVICTION IN KITSAP SUPERIOR COURT; (2) DEFENDANT WAS ARRESTED ON A PROBATION VIOLATION, HANDCUFFED, AND PLACED IN A DOC CAGE CAR AND THEN ESCAPED FROM THE CAGE CAR WHEN THE DOC OFFICERS BRIEFLY WENT INTO A RESIDENCE AND LEFT THE CAR UNATTENDED.**

Howell argues there is insufficient evidence to support his conviction of escape in the first degree. App.'s Br. at 8. This claim is without merit because, viewing the evidence in the light most favorable to the State and admitting the truth of the State's evidence and all inferences that reasonably can be drawn from them, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

A claim of sufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn from them. *Salinas*,

119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A reviewing court is to defer to the trier of fact on matters of witness credibility. *State v. Chapman*, 78 Wn.2d 160, 164, 469 P.2d 883 (1970).

To find a defendant guilty of the crime of escape in the first degree, a jury must find the following: (1) the person must be detained pursuant to a felony conviction and (2) the escape must be from either custody or a detention facility. *State v. Franklin*, 106 Wn. App. 792, 25 P.3d 1052 (2001).

First, in addressing whether Howell was detained pursuant to a felony conviction, it is undisputed that Howell was convicted on July 12, 1999, for (1) Felony violation of a Court Order and (2) Assault in Violation of a Court Order. CP 24, App.'s Br. at 16. Additionally, it is undisputed the judgment and sentence for the above mentioned felony included a requirement of community custody supervision. CP 24, RP 8-9, App's Br. at 16. Therefore, the relevant question is whether a rational trier of fact could have found that Howell escaped from custody pursuant to this conviction.

Washington courts have previously held a detention for alleged violations of community supervision is a detention "pursuant to conviction of a felony" within meaning of RCW 9A.76.110. *State v. Perencevic*, 54 Wn. App. 585, 774 P.2d 558 (1989), *review denied*, 113 Wn.2d 1017, 781 P.2d

1320. In *Perencevic*, the defendant was being held at a jail, in part, due to warrants for several probation violations stemming from felony convictions. *Perencevic*, 54 Wn.App at 586. The defendant then tried to dig through the walls of the jail, and was then charged and convicted of first degree escape. *Perencevic*, 54 Wn.App at 586-7. On appeal, the court affirmed the conviction, stating,

Because there was a causal relationship between the warrants and the prior felony convictions, we hold that Perencevic's detention for his alleged supervision violation was "pursuant to a conviction of a felony."

Perencevic, 54 Wn.App at 589.

This same rule of law was reiterated in *State v. Walls*, 106 Wn. App. 792, 25 P.3d 1052 (2001). In *Walls*, the defendant was arrested on a warrant for violating the conditions of his community placement. *Walls*, 106 Wn. App. at 794. As the arresting officer began to handcuff the defendant, he ran away from the officer and was detained a short time later after a short chase. *Walls*, 106 Wn. App. at 794. On appeal, the court held that *Walls* was on probation/community supervision for his prior felonies, the warrant for his arrest was based on a probation violation. *Walls*, 106 Wn. App. at 798. The court then concluded that the officer had detained *Walls* "pursuant to a conviction fro a felony." *Walls*, 106 Wn. App. at 798.

Similarly, in *State v. Solis*, 38 Wn. App. 484, 685 P.2d 672 (1984),

the defendant was arrested on a warrant for probation violations. *Solis*, 38 Wn. App. at 485. The defendant, however, broke free from the arresting officer and ran away. *Solis*, 38 Wn. App. at 485. On appeal, the defendant argued that he was not being detained pursuant to a felony conviction, but that he was detained only for the probation violation. *Solis*, 38 Wn. App. at 486. The court, however, rejected this argument, and concluded that the defendant was being detained pursuant to a conviction for a felony. *Solis*, 38 Wn. App. at 487.

In the present case, Howell was arrested and placed in the cage car after CCO Thompson had prepared an order of arrest and detention of Defendant Howell for alleged violations of his community supervision. RP 9-10. Howell then escaped when the cage car was briefly left unattended. Given these facts, the present case is indistinguishable from *Perencevic*, *Solis*, and *Walls*.

Viewing the evidence in a light most favorable to the State and admitting the truth of the State's evidence and all inferences that reasonably can be drawn from them, a rational trier of fact could have found Defendant Howell knowing escaped from custody after he was detained pursuant to a felony conviction when he escaped from a DOC cage car after he was arrested for probation violations and was handcuffed, and placed in the cage car.

B. RCW 9A.76.110, ESCAPE IN THE FIRST DEGREE, IS NOT UNCONSTITUTIONALLY VOID AS APPLIED TO FACTS IN THIS CASE BECAUSE THE CRIME IS CLEARLY DEFINED SO THAT A PERSON OF ORDINARY INTELLIGENCE COULD UNDERSTAND WHAT CONDUCT IS PROHIBITED AND THE STANDARDS FOR A VIOLATION OF THE STATUTE ARE SUFFICIENT SO AS TO PREVENT ARBITRARY ENFORCEMENT.

Howell next claims that his due process rights under the Fourteenth Amendment were violated when he was charged with escape in the first degree, rather than the lesser crime of escape in the third degree.

A statute is presumed constitutional; the burden is on the party challenging the statute to prove that it is unconstitutionally vague beyond a reasonable doubt. *State v. Sullivan*, 143 Wn.2d 162, 180, 19 P.3d 1012 (2001). A statute is unconstitutionally vague if it fails to define an offense with sufficient definiteness so that persons of ordinary intelligence can understand what conduct is proscribed or if it does not provide standards sufficiently specific so as to prevent arbitrary enforcement. *State v. Eckblad*, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004); *Sullivan*, 143 Wn.2d at 182, 19 P.3d 1012. But, a statute is not void for vagueness merely because an individual cannot predict exactly when his or her conduct is prohibited. *Sullivan*, 143 Wn.2d at 184, 19 P.3d 1012. Nor is a statute vague because some of its terms are undefined, and a court will not invalidate a statute simply because it could have been drafted with greater

precision. *Sullivan*, 143 Wn.2d at 184, 19 P.3d 1012. Similarly, a statute is not sufficiently definite if it is framed in terms so vague that persons of “common intelligence” must necessarily guess at its meaning and differ as to its application. *Sullivan*, 143 Wn.2d at 182, *citing*, *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990). As the court in *Sullivan* noted, however, this does not require impossible standards of specificity or absolute agreement because some measure of vagueness is inherent in the use of our language. *Sullivan*, 143 Wn.2d at 182, *citing*, *Douglass*, 115 Wn.2d at 179; *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 740, 818 P.2d 1062 (1991). Rather, “Condemned to the use of words, we can never expect mathematical certainty from our language.” *Sullivan*, 143 Wn.2d at 182, *citing*, *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d at 740.

Under the plain language of RCW 9A.76.110 (1), escape in the first degree occurs when a person knowingly escapes from custody while being detained pursuant to a conviction of a felony. It is readily apparent that when community custody is imposed pursuant to a conviction, a later detention pursuant to a community custody violation, in turn, is a detention pursuant to that felony conviction. A person of ordinary intelligence can understand that such a detention is pursuant to a felony conviction because the conviction, and the community supervision that followed it, is the only basis for the

detention. A person of ordinary intelligence, therefore, can understand that if her or she escapes while being detained on a probation violation, he or she has escaped from detention pursuant to a felony conviction.

In addition, a sufficiently specific prior judicial construction of a statute can save a statute from unconstitutional vagueness, as the statute is then read as the court has interpreted it. *State v. Groom*, 133 Wn.2d 679, 692, 947 P.2d 240 (1997) citing *State v. Richmond*, 102 Wn.2d 242, 245, 683 P.2d 1093 (1984); *Wainwright v. Stone*, 414 U.S. 21, 94 S. Ct. 190, 38 L. Ed. 2d 179 (1973). As outlined above, Washington Courts have consistently held that a detention is pursuant to a felony conviction if the detention is for a probation violation stemming from a felony conviction. See e.g., *Perencevic*, 54 Wn. App. at 589; *Walls*, 106 Wn. App. at 798; and, *Solis*, 38 Wn. App. at 487. Any potential vagueness in the statute, therefore, has been resolved by these prior judicial interpretations.

Howell's argument that that statute is unconstitutionally vague, therefore, must fail because: (1) the statute is clear on its face; and, (2) the courts have consistently held that a detainment pursuant to a probation violation qualifies as a detention pursuant to a felony conviction. For all of these reasons the Defendant has failed to meet his burden of proving beyond a reasonable doubt that RCW 9A.76.110(1) is void for vagueness.

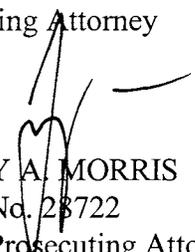
IV. CONCLUSION

For the foregoing reasons, Howell's conviction and sentence should be affirmed.

DATED September 11, 2006.

Respectfully submitted,

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DOCUMENT 1