

No. 35292-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Richard Brooks,

Appellant.

07 JUN -14 AM 9:01
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY _____
DEPT

Clallam County Superior Court

Cause No. 06-1-00226-1

The Honorable Judge Kenneth D. Williams

Appellant's Reply Brief

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ARGUMENT

I. THE COURT’S INSTRUCTIONS CREATED A MANDATORY PRESUMPTION AND RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT MR. BROOKS KNEW HIS ACTIONS WOULD RESULT IN LEAVING CUSTODY WITHOUT PERMISSION.

Respondent argues that a charge of escape involves only one mental state, and claims this case is analogous to *State v. Gerdts*, 136 Wn. App. 720, 150 P.3d 627 (2007) and *State v. Boyd*, ___ Wn.App. ___, 155 P.3d 188 (2007). Brief of Respondent, pp. 1-2. This is incorrect.

At trial, the very first element the state was required to prove was that “That on or about the 23rd day of May, 2006, the Defendant escaped from custody...” Instruction No. 7,CP 32. Although the word “intentional” is not used in the element, an intentional act is presumed from the sentence structure and the word choice. The word “Defendant” is the subject, and the word “escaped” is an active verb. These words would not accurately describe an unconscious person dragged from prison against her or his will.

Not all intentional actions resulting in departure from custody will result in conviction.¹ Accordingly, the state is also required to prove

¹ For example, a person detained in a work camp may intentionally walk from one location to another without realizing that she or he has crossed an unmarked boundary constituting the edge of the work camp. To convict a person of escape, the state must show

“[t]hat the Defendant knew that his actions would result in leaving custody without permission...” Instruction No. 7, CP 32. Once again, the language implicitly carries a requirement that the state prove an intentional act. The phrase used (“the Defendant knew that his actions would result...”) confirms that the defendant’s guilt is established only if the defendant has taken action-- that is, acted intentionally.

Accordingly, conviction requires proof of two mental states. In the “to convict” instruction, one mental state is implied, the other is explicit. This is different from the situation in *Gerds, supra*, in which the defendant was convicted of “knowingly and maliciously causing physical damage...” In that case, the state was not required to prove an intentional act; instead, it was required to show knowing and malicious conduct. This case also differs from *Boyd, supra*. In *Boyd*, the defendant was charged with violating the voyeurism statute, under which a person is guilty if he or she “knowingly views, photographs, or films... [t]he intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy.”

both an intentional act and knowledge that the act results in leaving custody without permission.

See Boyd, supra, at p. 8, *citing* RCW 9A.44.115. The statutes prohibits knowing action, not intentional action.

Here, under the court's instructions, the state was required to prove both an intentional act ("the Defendant escaped from custody") and knowledge ("the Defendant knew that his actions would result in leaving custody without permission"). Instruction No. 7, CP 32. This case is indistinguishable from *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). The erroneous mandatory presumption conflated two mental states-- the intentional act and the requirement of knowledge-- and prejudiced Mr. Brooks. It is possible the jury believed that Mr. Brooks intentionally fled the deputy without knowing that he was already in custody. Under the court's instructions, the jury was required to presume that he knew he was in custody and that his actions would result in leaving custody, even if they believed that Mr. Brooks did not *in fact* know he was in custody. Because of this, the escape conviction must be reversed and the case remanded for a new trial. *State v. Mertens*, 148 Wn.2d 820 at 834, 64 P.3d 633 (2003).

Respondent does not address Mr. Brooks' argument relating to Instruction No. 12. Because of this, Mr. Brooks', stands on the argument made in the opening brief.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DEFINE THE TERM “ARREST.”

Respondent argues that “the arrest is simply part of the *res gestae* of this Defendant’s actions,” and that “ ‘Arrest’ is not a technical term.” Brief of Respondent, p. 3. However, Respondent concedes that the jury “wanted to know if there were specific actions or declarations that needed to be made for an arrest to have been effectuated.” Brief of Respondent, p. 4. In other words, the jury wanted to know the meaning of the term “arrest.” Respondent’s brief points out the trial court’s error, and supports Mr. Brooks’ argument. Accordingly, the conviction must be reversed and the case remanded for a new trial.

III. THE TRIAL JUDGE MISSTATED THE LAW AND IMPROPERLY COMMENTED ON THE EVIDENCE BY GIVING INSTRUCTION NO. 10.

Mr. Brooks stands on the argument made in the opening brief.

IV. MR. BROOKS WAS NOT IN CUSTODY WHEN HE FLED DEPUTY LEY, BECAUSE DOC DID NOT PROPERLY ISSUE A WARRANT FOR HIS ARREST.

Mr. Brooks stands on the argument made in the opening brief.

V. MR. BROOKS WAS DENIED A FAIR TRIAL BY DEPUTY LEY’S VIOLATION OF THE COURT’S ORDER *IN LIMINE*.

Mr. Brooks stands on the argument made in the opening brief.

VI. THE TRIAL COURT ERRED BY REFUSING TO SUPPRESS EVIDENCE DERIVED FROM DEPUTY LEY'S ILLEGAL SEIZURE OF MR. BROOKS.

Mr. Brooks stands on the argument made in the opening brief.

VII. IF ANY ISSUES ARE WAIVED ON APPEAL, MR. BROOKS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Brooks stands on the argument made in the opening brief.

CONCLUSION

For the foregoing reasons, Mr. Brooks' conviction for Escape in the First Degree must be reversed and the case dismissed with prejudice.

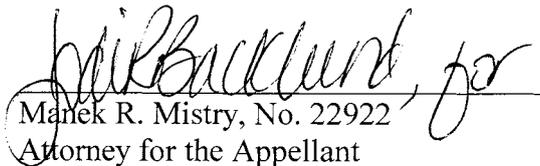
In the alternative, Mr. Brooks must be granted a new trial.

Respectfully submitted on June 1, 2007.

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COURT OF APPEALS
DIVISION II

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CERTIFICATE OF MAILING

STATE OF WASHINGTON
BY JMB
DEPUTY

I certify that I mailed a copy of Appellant's Reply Brief to:

Richard Brooks, DOC# 797079
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

and to:

Timothy F. Davis
Clallam County Prosecutor
223 East 4th Street
Port Angeles, WA 98362-3015

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on June 1, 2007.

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

Signed at Olympia, Washington on June 1, 2007.


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