

NO. 35606-6-II

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

FILED
BY: *UR*
APR 11 2006
COURT REPORTER

STATE OF WASHINGTON,
Respondent,

v.

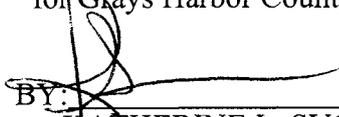
JESSIE J. EICHELBERGER,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE JAMES SAWYER, JUDGE

BRIEF OF RESPONDENT

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T A B L E

Table of Contents

COUNTERSTATEMENT OF THE CASE 1

 Procedural History 1

 Factual Background 1

RESPONSE TO ASSIGNMENTS OF ERROR 1

 The court’s oral command to the defendant was an “order”
 within the meaning of RCW 9A.74.110 sufficient to place
 him into custody 1

 RCW 9A.74.110 does not require proof of separate
 “custody” and “detained” elements 4

 There was sufficient evidence to uphold the defendant’s
 conviction on appeal 4

CONCLUSION 7

TABLE OF AUTHORITIES

Table of Cases

State v. Ammons, 136 Wash.2d 453, 963
P.2d 812 (1998) 4

State v. Barrington, 52 Wn.App. 478, 484, 761
P.2d 632 (1987) *review denied*, 11
Wn.2d 1033 (1988) 5

State v. Breshon, 115 Wash.App. 874, 63
P.3d 871 (2003) 4

State v. Carmillo, 115 Wn.2d 60, 71, 794
P.2d 850 (1990) 5

State v. Hendrix, 109 Wash.App. 508 512, 35
P.3d 1189 (2001), *review denied*, 146
Wash.2d 1018, 51 P.3d 88 (2002) 1

<i>State v. Joy</i> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993)	5
<i>State v. Kroll</i> , 87 Wn.2d 829, 842, 558 P.2d 173 (1976)	5
<i>State v. McCollum</i> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)	5
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	5
<i>State v. Walls</i> , 106 Wash.App. 792, 795, 25 P.3d 1052 (2001)	1
<i>State v. Wilson</i> 125 Wn.2d 212, 217, 883 P.2d 320 (1994)	5

STATUTES

RCW 10.64.025	2
RCW 10.64.025(1)	2
RCW 9A.76.010	1
RCW 9A.76.110	3
RCW 9A.76.110(1)	1, 2

OTHER

<i>Black's Law Dictionary</i> . 7 th ed. 1999	2
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COUNTERSTATEMENT OF THE CASE

Procedural History

The State agrees with the procedure as laid out in the defendant's brief.

Factual Background

The State agrees with the statement of facts presented by the defendant.

RESPONSE TO ASSIGNMENTS OF ERROR

The court's oral command to the defendant was an "order" within the meaning of RCW 9A.74.110 sufficient to place him into custody.

When reviewing a question of statutory interpretation, the Court will give words their plain and ordinary meaning and avoid interpretations that are forced, unlikely, or strained. *State v. Hendrix*, 109 Wash.App. 508 512, 35 P.3d 1189 (2001), *review denied*, 146 Wash.2d 1018, 51 P.3d 88 (2002). Undefined statutory terms are to be given their common meaning unless the legislature intended otherwise. *State v. Walls*, 106 Wash.App. 792, 795, 25 P.3d 1052 (2001).

RCW 9A.76.110(1) states that "[a] person is guilty of escape in the first degree if he or she knowingly escapes from custody...while being detained pursuant to a conviction of a felony..." "Custody" is defined by RCW 9A.76.010 as "restraint pursuant to...an order of a court..."

The defendant claims that the term “order of the court” is ambiguous and because it is “capable of more than one reasonable construction” it must be construed narrowly to mean a “a written command with legal effect.” (Appellant’s Brief at 6). He further argues, that because the court did not issue a written command the defendant was not in custody at the time of the escape. (Appellant’s Brief at 6). No authority is provided to support this contention.

“Order” is defined as “a command, direction, or instruction” *Black’s Law Dictionary*. 7th ed. 1999. There is a second, more narrow, definition of “a written direction or command delivered by a court of judge.” However, in the context of RCW 9A.76.110(1), to give “order” the narrow meaning proposed by the defendant gives a strained and unlikely result. If the legislature had intended to require a written order, that would have been in the statute. For there to be order in judicial proceedings a judge’s oral commands must have effect within the courtroom. It is unlikely that they intended to make a defendant’s “custody” some sort of race between the defendant and the judge to see if the defendant could leave before the judge could sign an order.

In fact, RCW 10.64.025 seems to indicate the exact opposite. RCW 10.64.025(1) requires that:

A defendant who has been found guilty of a felony and is awaiting sentencing **shall be detained** unless the court finds by clear and convincing evidence that the defendant is not likely to flee or to pose a danger to the safety of any

other person or the community if released. Any bail bond that was posted on behalf of the defendant shall, upon the defendant's conviction, be exonerated. (emphasis added)
The statute does not require a written order to accomplish this. Once the defendant was found guilty by the jury, his bond was exonerated and he was detained without written order as a matter of law.

The Court has previously found that "detained" and "custody" mean the same under RCW 9A.76.110, so to require a written order to effectuate taking the defendant into custody is contrary to the plain language of the statute. *State v. Breshon*, 115 Wash.App. 874, 880, 63 P.3d 871, 874 (2003).

The defendant also argues that, if an oral order is sufficient under RCW 9A.76.110, then the court did not make such an order in this case. (Appellant's Brief at 6). However, Judge McCauley testified that, after the guilty verdict, Mr. Newman, the deputy prosecutor, requested that the defendant be held pending sentencing as the defendant had had some inappropriate contact with potential witnesses. (09/18/06 RP at 54). Judge McCauley stated that he "agreed with Mr. Newman and said that [the defendant] was going to be held, and [he] asked [the defendant] to be seated because [h]e didn't have law enforcement in the courtroom at the time..." (09/18/06 RP at 54.) This is enough to constitute an order.

The defendant also presents argument that the judge's statement of "I'm going to have him taken into custody" "is a statement of future intent, not an order placing restraints on Mr. Eichelberger's liberty..." (Appellant's Brief at 7). However, this is a far-fetched interpretation of

the judge's order. It was clear in this case that the judge was taking the defendant into custody immediately.

The court clerk testified that when “[t]he judge had ordered that [the defendant] be held in custody...[she] called the jail.” (09/18/06 RP at 30). The defendant also began to argue with the judge over whether or not he was going to be detained. The defendant claimed he had to be out to do things and he had to be out pending sentencing. When the judge “disagreed with his argument, that he was going to be held” the defendant fled from the courtroom. (09/18/06 RP at 55).

RCW 9A.74.110 does not require proof of separate “custody” and “detained” elements.

This issue has been previously decided by the Supreme Court in *State v. Ammons*, 136 Wash.2d 453, 963 P.2d 812 (1998) and this Court in *State v. Breshon*, 115 Wash.App. 874, 63 P.3d 871 (2003). The court's have held that the statute “does not require a detention separate from the restriction of freedom imposed by being in custody” and that “‘detained’ and ‘custody’ mean the same thing.” *State v. Breshon*, 115 Wash.App. at 880. This analysis is correct, and there is no new authority provided by the defendant why this precedent should be overturned.

There was sufficient evidence to uphold the defendant's conviction on appeal.

Due process requires that the State bear the burden of proving each and every element of the crime beyond a reasonable doubt. *State v. McCollum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The applicable standard of review is whether, after reviewing 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. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn.App. 478, 484, 761 P.2d 632 (1987) *review denied*, 11 Wn.2d 1033 (1988). Circumstantial evidence is as reliable and probative as direct evidence. *State v. Kroll*, 87 Wn.2d 829, 842, 558 P.2d 173 (1976). A fact finder can infer specific intent as a logical probability from all the facts and circumstances of a case. *State v. Wilson* 125 Wn.2d 212, 217, 883 P.2d 320 (1994).

All reasonable inferences from the evidence must be drawn in favor of the State and interpreted more strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In considering this evidence, "credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Carmillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Here, there is ample evidence for the fact finder to have concluded that the defendant knowingly escaped from custody. As stated above,

when the judge told the defendant he was going to be taken into custody the clerk picked up the phone and called the jail and the defendant began to argue with the court why he should be released. (09/18/06 RP at 54-55). The defendant testified that he heard the judge say “I’m going to have him taken into custody.” (09-18-06 RP at 70). When the judge told the defendant to sit down he “vaulted over the railing behind him, he bent straight forward at the waist so that his head was pointing toward the door, and he ran very fast toward the door bent over.” (09/18/06 RP at 30).

The State does not have to disprove all possible arguments in a case. In this case, the defendant’s actions can reasonably be inferred to show that he knew he was in custody when he fled from the courtroom. The trial court was in the best position to weigh the credibility of the defendant and other witnesses when determining whether or not he acted “knowingly”.

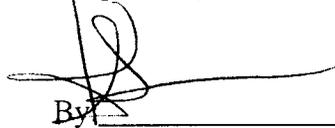
The defendant also argues that the State didn’t prove he knew what “exonerated” meant, or that he knew he was in “custody.” However, the State proved that the defendant knowingly acted, he knew he was supposed to remain in the courtroom and he failed to do so. Whether or not he realized the full criminal extent of his actions is irrelevant.

CONCLUSION

For the reasons stated above, the State asks this Court to affirm the ruling of the trial court.

DATED this 21st day of August, 2007.

Respectfully Submitted,



By

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STATE OF WASHINGTON
BY yn

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STATE OF WASHINGTON,

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DECLARATION OF MAILING

JESSIE J. EICHELBERGER,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 27th day of August, 2007, I mailed a copy of the Brief of Respondent to Manek R. Mistry and Jodi R. Backlund; Backlund & Mistry; 203 East Fourth Avenue, Suite 404; Olympia, WA 98501 and to Jessie J. Eichelberger #823781; Airway Heights Corrections Center; P.O. Box 1899; Airway Heights, WA 99001-1899, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Barbara Chapman