FILED

DEC 27, 2016

Court of Appeals
Division III
State of Washington

NO. 34529-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

TYLOR BUTTOLPH,
Appellant.

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

The Honorable Annette Plese, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. In order to convict a person of Escape from Community Custody, the state is required to prove that s/he committed a "purposeful act."

> **ISSUE 1:** The term "willful" is equivalent to knowledge, except where a purpose to impose further requirements plainly appears. Does the element of willful escape from community custody require proof of a "purposeful act" where such a requirement has been found in analogous escape contexts and is necessary to prevent conviction for inadvertent conduct?

2. The court's instructions violated Mr. Buttolph's Fourteenth Amendment right to Due Process.
3. The court's instructions violated Mr. Buttolph's Wash. Const. art. I, § 3 right to Due Process.
4. The court's instructions improperly relieved the state of its burden of proof.
5. The court erred by refusing to give Mr. Buttolph's proposed instruction stating that the "willfulness" requirement of Escape from Community Custody requires proof of a "purposeful act."

> **ISSUE 2:** In order to comply with Due Process, jury instructions must accurately describe each element of a charged offense. Did the court violate Mr. Buttolph's right to Due Process by refusing to instruct the jury that the state was required to prove that he committed a "purposeful act" in order to convict him of Escape from Community Custody?

6. The state presented insufficient evidence to convict Mr. Buttolph.
7. No rational jury could have found beyond a reasonable doubt that Mr. Buttolph willfully escaped from community custody by committing a purposeful act.

> **ISSUE 3:** In order to convict for willfully escaping from community custody, the state must prove that the accused committed a "purposeful act." Did the state present insufficient evidence to convict Mr. Buttolph when there was no evidence that he missed a meeting with his Community

Corrections Officer through anything other than happenstance or accident?

8. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 4: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Buttolph is indigent?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Tylor Buttolph was on community custody. RP 24.[1] He had at least three different Community Custody Officers (CCOs) assigned to him at different times. RP 32.

On May 19, 2015, Mr. Buttolph went to an ultrasound appointment with his girlfriend, who was pregnant with his child. RP 77-78. On the way back, his car broke down. RP 77. The delay caused Mr. Buttolph to miss a meeting with his new CCO. RP 77-78.

The CCO issued a warrant and Mr. Buttolph was arrested about two weeks later. CP 31. Mr. Buttolph served a sanction in jail for missing the meeting. RP 78.

The state also charged Mr. Buttolph with Escape from Community Custody, which is a felony. CP 1.

At trial, the state's evidence took eighteen minutes to present to the jury. *See* RP 23, 37. The only witness was Mr. Buttolph's CCO, Jeremy Taylor. *See* RP *generally*.

In his brief testimony, Taylor said that he met with Mr. Buttolph on May 5th and gave him a card directing him to return for another meeting on May 19th. RP 30. Taylor testified that he unsuccessfully

[1] All citations to the Verbatim Report of Proceedings refer to the 91- page volume transcribed by Heather Gipson.

"attempted to contact" Mr. Buttolph at his home two days after he missed the meeting. RP 31.

Taylor did not clarify whether he had tried to call Mr. Buttolph or had physically gone to his home. RP 31. He also did not say whether he had left any kind of message. RP 31.

Taylor admitted that he did not know why Mr. Buttolph had missed the meeting. RP 33. He said that it is not part of his job to determine why a person cannot make it to his office. RP 34. He admitted that he did not call the area hospitals or do anything to determine whether Mr. Buttolph had missed the appointment inadvertently. RP 34.

The state did not call Mr. Buttolph's prior CCOs to ask whether they had gotten any messages explaining that he had to miss the meeting. *See* RP *generally*.

Mr. Buttolph proposed a jury instruction explaining that, in order to find that he had willfully escaped from community custody, the jury had to find that he had committed a "purposeful act." CP 23. He explained that the Washington Supreme Court had held that the offense of escape from a work release facility requires a purposeful act, and analogized to escape from community custody. RP 39-40.

The court refused to give Mr. Buttolph's "purposeful act" instruction. RP 40.

Instead, the court instructed the jury that escape from community custody must be willful and that: "a persona acts willfully as to a particular fact when he or she acts knowingly as to that fact." CP 35-36.

Because the court did not require the jury to find that he had missed the meeting on purpose, Mr. Buttolph decided not to testify and explain his car breakdown to the jury. RP 77.

Relying on that instruction, the prosecutor told the jury that they were required to convict Mr. Buttolph if they found that he knew about the meeting on May 19th and knew that he had not attended the meeting. RP 56-57.

The jury found Mr. Buttolph guilty. CP 42. This timely appeal follows. CP 64.

ARGUMENT

I. TO CONVICT MR. BUTTOLPH OF ESCAPE FROM COMMUNITY CUSTODY, THE STATE WAS REQUIRED TO PROVE THAT HE COMMITTED A PURPOSEFUL ACT.

Mr. Buttolph missed a meeting with his CCO because his car broke down following an ultrasound appointment with his pregnant girlfriend. RP 77-78.

The state did not present any evidence that Mr. Buttolph missed the meeting on purpose. There was no evidence regarding where he was during the meeting or why he was not able to make it. There was no

evidence that he left town, moved to a new address, or did anything to avoid detection by his CCO.

In fact, the state's single witness testified that it was not his job to determine whether Mr. Buttolph's failure to make it to the appointment had been purposeful. RP 33-34.

Still, based on the court's instruction, the prosecutor argued to the jury that the state had proved each element of Escape from Community Custody simply because Mr. Buttolph knew about the meeting and did not attend. RP 56-57.

The court should have required the state to prove that Mr. Buttolph committed some "purposeful act." *State v. Danforth*, 97 Wn.2d 255, 258, 643 P.2d 882 (1982). The court erred by refusing to give Mr. Buttolph's proposed instruction to that effect. *State v. Hayward*, 152 Wn. App. 632, 645, 217 P.3d 354 (2009). The state also presented insufficient evidence to convict Mr. Buttolph of committing a purposeful act. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied,* 176 Wn.2d 1003, 297 P.3d 67 (2013).

In order to convict Mr. Buttolph of Escape from Community Custody, the state was required to prove that he:

> … willfully discontinue[d] making himself … available to the department for supervision by making his … whereabouts unknown or by failing to maintain contact

> with the department as directed by the community corrections officer…

RCW 72.09.310.

Willfulness is equivalent to knowledge unless a purpose to impose further requirements plainly appears. RCW 9A.08.010(4). Knowledge can he characterized as a "lack of mental intent requirement." *State v. Hall*, 104 Wn.2d 486, 493, 706 P.2d 1074 (1985).

Escape is one of the contexts in which the willfulness element requires more than mere knowledge. *Id.* (*citing Danforth*, 97 Wn.2d at 258). In order to prove that a person has willfully escaped from a work release facility, for example, the state must prove that s/he committed some "purposeful act." *Id.*

The question of whether the "willful" element of Escape from Community Custody requires proof of a purposeful act is an issue of first impression. Indeed, there are only three published cases addressing the offense, none of which construes the *mens rea* element. *See State v. Baker*, 194 Wn. App. 678, 378 P.3d 243 (2016) (regarding sentencing for escape convictions); *State v. Aguilar*, 153 Wn. App. 265, 271, 223 P.3d 1158 (2009) (regarding admissibility of the accused's prior statements to show that he had willfully escaped from community custody); *State v. Rizor*, 121 Wn. App. 898, 901, 91 P.3d 133 (2004) (holding that people on

community custody were "inmates" properly charged with Escape from Community Custody).

Danforth and *Hall*, however, construe the willfulness requirement of the now-repealed statute criminalizing escape from a work release facility. *See* former RCW 72.65.070. The willfulness requirement of that offense required the state to prove a "purposeful act" (beyond mere knowledge) in order to ensure that the accused is not convicted based on circumstances beyond his/her control. *Danforth*, 97 Wn.2d at 258. Otherwise, the *Danforth* court reasoned, a person could be impermissibly convicted of escape for failing to return to a work release facility as the result of "a sudden illness, breakdown of a vehicle, etc." *Id.*

This logic applies with equal force to cases alleging Escape from Community Custody. Unlike escape by climbing over a prison wall, a person could miss a meeting with his/her CCO through no fault of his/her own, due to a medical emergency or transportation issues. *See Id.* Accordingly, unless there is a requirement of a "purposeful act," a person could be convicted of willfully escaping from community custody simply because s/he knew that s/he missed a meeting while s/he was in the hospital being treated for an emergency. The Supreme Court rejected this result in *Danforth*. *Id.*

The requirement of a "purposeful act" in the context of Escape from Community Custody also comports with the tenet that a willful activity is one that is not inadvertent. *See State v. Sisemore*, 114 Wn. App. 75, 78, 55 P.3d 1178 (2002); *State v. LaRue*, 74 Wn. App. 757, 761, 875 P.2d 701 (1994).

While a requirement of knowing act protects against conviction for inadvertent or accidental conduct for some offenses, one can knowingly meet the elements of Escape from Community Custody based wholly on events outside of his/her control.

In the context of Escape from Community Custody, the element of willful conduct requires the state to prove that the accused committed some purposeful act. *Danforth*, 97 Wn.2d at 258.

The trial court erred in Mr. Buttolph's case by refusing to instruct the jury that the state had to prove a purposeful act in order to convict him. The state also presented insufficient evidence to prove that he had committed a purposeful act.

A. The court erred by refusing to give Mr. Buttolph's proposed instruction, informing the jury that Escape from Community Custody required proof of a purposeful act.

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. Amend. XIV; art. I, § 3.

A court's instructions are improper if they misstate the law regarding an element of an offense. *Hayward*, 152 Wn. App. at 645.[2] Jury instructions also violate an accused person's right to due process if they relieve the state of its burden of proving each element beyond a reasonable doubt. *Id.*

As outlined above, the state should have been required to prove that Mr. Buttolph committed some purposeful act in order to convict him of willfully escaping from community custody. *Hall*, 104 Wn.2d at 493; *Danforth*, 97 Wn.2d at 258.

The trial court erred by refusing to give Mr. Buttolph's proposed instruction informing the jury of that requirement. *Hayward*, 152 Wn. App. at 645.

Indeed, juries are regularly instructed that the term "willfully" requires proof of purposeful action. *See e.g.* 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 120.02.01 (4th Ed) (stating that, for an Obstruction charge: "Willfully means to purposefully act with knowledge that…"); 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 36.23 (4th Ed) (stating that, for a Stalking charge: "'Willful' or 'willfully' means to act purposefully, not inadvertently or accidentally"); 11A Wash. Prac., Pattern

[2] Jury instructions are reviewed *de novo*. *State v. Richie*, 191 Wn. App. 916, 927, 365 P.3d 770 (2015).

Jury Instr. Crim. WPIC 95.10 (4th Ed) (stating that, for a Reckless Driving charge, "Willful means acting intentionally and purposefully, not accidentally or inadvertently").

The trial court's instructions misstated the law regarding the *mens rea* element of Escape from Community Custody by failing to inform the jury that the state was required to prove that Mr. Buttolph committed some purposeful act. *Hall*, 104 Wn.2d at 493; *Danforth*, 97 Wn.2d at 258.

This omission relieved the state of its burden of proof and violated Mr. Buttolph's right to due process. *Hayward*, 152 Wn. App. at 645.

An improper jury instruction affecting a constitutional right requires reversal unless the state can demonstrate beyond a reasonable doubt that it did not contribute to the verdict. *State v. Schaler*, 169 Wn.2d 274, 288, 236 P.3d 858 (2010).

Here, the state did not present any evidence that Mr. Buttolph missed the meeting with his CCO on purpose. Indeed, the prosecutor argued in closing that the jury was required to convict Mr. Buttolph simply because he knew about the meeting and did not attend. RP 56-57.

The state cannot establish that the instructional error in Mr. Buttolph's case was harmless beyond a reasonable doubt. *Id.*

The trial court erred and violated Mr. Buttolph's right to due process by failing to instruct the jury that the state was required to prove

that Mr. Buttolph committed a purposeful act before convicting him of Escape from Community Custody. *Hayward*, 152 Wn. App. at 645; *Hall*, 104 Wn.2d at 493; *Danforth*, 97 Wn.2d at 258. Mr. Buttolph's conviction must be reversed. *Id.*

B. The state presented insufficient evidence because no rational jury could have found beyond a reasonable doubt that Mr. Buttolph committed a purposeful act.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found each element met beyond a reasonable doubt. *Chouinard*, 169 Wn. App. at 899.

As argued above, in order to convict Mr. Buttolph of willfully escaping from community custody, the state was required to prove that he committed some purposeful act. *Hall*, 104 Wn.2d at 493; *Danforth*, 97 Wn.2d at 258.

But the state did not present any evidence of a purposeful act in Mr. Buttolph's case. There was no evidence that Mr. Buttolph intended to avoid detection by his CCO or that he had left town or changed his address. There was not even any evidence creating the inference of a purposeful act, such as previous statements by Mr. Buttolph that he did not intend to report to his CCO as required. *C.f. Aguilar*, 153 Wn. App. at 273 (holding that statements by the accused that he did not intend to report to

his CCO as required were admissible to show that he willfully escaped from community custody).

Rather, the state's only witness testified that he had no idea why Mr. Buttolph had missed the meeting; he simply was not there. RP 33-34.

Even taking the evidence in the light most favorable to the state, no rational jury could have found beyond a reasonable doubt that Mr. Buttolph willfully escaped from community custody by committing a purposeful act. *Chouinard*, 169 Wn. App. at 899. Mr. Buttolph's conviction must be reversed. *Id.*

II. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD DECLINE TO IMPOSE APPELLATE COSTS UPON MR. BUTTOLPH, WHO IS INDIGENT.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3 612 (2016).[3]

[3] Division II's commissioner has indicated that Division II will follow *Sinclair*.

Appellate costs are "indisputably" discretionary in nature. *Sinclair*, 192 Wn. App. at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Buttolph indigent at the end of the proceedings in superior court. CP 84. That status is unlikely to change. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839.

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

The trial court violated Mr. Buttolph's right to due process by refusing to instruct the jury that the state had to proof that he committed a purposeful act to convict him of Escape from Community Custody. The state presented insufficient evidence to convict Mr. Buttolph of that offense. Mr. Buttolph's conviction must be reversed.

In the alternative, if the state substantially prevails on appeal, this court should decline to impose appellate costs on Mr. Buttolph who is indigent.

Respectfully submitted on December 27, 2016,

_____

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

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

Signed at Seattle, Washington on December 27, 2016.

_____

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