

NO. 34702-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

YAN YEFREMOV,
Appellant.

FILED
Feb 08, 2017
Court of Appeals
Division III
State of Washington

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

Spokane County Cause No. 15-1-03985-8

The Honorable Annette S. Plese, Judge

BRIEF OF APPELLANT

Skylar T. Brett
Attorney for Appellant

Law Office of Skylar Brett
P.O. Box 18084
Seattle, WA 98118
(206) 494-0098
skylarbrettlawoffice@gmail.com

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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. Yefremov’s Fourteenth Amendment right to Due Process.
3. The court’s instructions violated Mr. Yefremov’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. Yefremov’s proposed instruction defining the “willfulness” element of Escape from Community Custody as “acting intentionally and purposely, not accidentally or inadvertently.”

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. Yefremov’s right to Due Process by refusing to instruct the jury that the state was required to prove that he acted intentionally or purposely in order to convict him of Escape from Community Custody?

6. Mr. Yefremov was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
7. Mr. Yefremov’s attorney provided ineffective assistance of counsel by failing to object to extensive inadmissible, prejudicial evidence.
8. The evidence of Mr. Yefremov’s alleged multiple prior incidents of absconding from community custody was inadmissible under ER 404(b).
9. The evidence of Mr. Yefremov’s alleged multiple prior incidents of absconding from community custody was inadmissible under ER 403.

ISSUE 3: The Rules of Evidence preclude the introduction of evidence of uncharged misconduct when its only potential purpose is to encourage the jury to infer that the accused is more likely guilty based on an alleged propensity to commit a certain kind of crime. Did Mr. Yefremov’s attorney provide ineffective assistance of counsel in his trial for Escape from Community Custody by failing to object to extensive testimony that he regularly “absconded” from community custody?

10. 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. Yefremov is indigent?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Yan Yefremov was on community custody following his release from prison on a drug possession charge. RP (6/7/16) 101. He asked his Community Corrections Officer (CCO) to help him get into drug treatment multiple times. RP (6/7/16) 102. But he had significant problems arranging for treatment through the Department of Corrections (DOC). RP (6/7/16) 102-107.

One night, Mr. Yefremov overdosed on opiates and nearly died. RP (6/7/16) 107-108. Fearing for his life, he checked himself into a treatment facility the next day. RP (6/7/16) 107-108.

Mr. Yefremov chose a treatment facility that met his religious and cultural needs. RP (6/7/16) 109-110. The facility was in a different county than that in which he was serving his community custody. RP (6/7/16) 107.

Mr. Yefremov missed a scheduled meeting with his CCO while he was in treatment. RP (6/7/16) 110.

Mr. Yefremov's treatment provider tried to contact his CCO to verify where he was. RP (6/7/16) 110-111. Mr. Yefremov eventually had to leave the treatment facility to return to Spokane County for a court date.

RP (6/7/16) 110. He was later arrested and charged with Escape from Community Custody. RP (6/7/16); CP 1.

The state called only one witness at Mr. Yefremov's trial: his CCO, Jeremy Taylor.

Taylor testified that Mr. Yefremov had "absconded" from community custody at least seven times before missing the meeting that led to his escape charge. RP (6/7/16) 76, 80, 89.

Mr. Yefremov's defense attorney did not object to that testimony. RP (6/7/16) 76, 80, 89.

Taylor also testified that it was DOC policy to consider any missed community supervision appointment to be "willful," regardless of the reason that the client was unable to make it. RP (6/7/16) 82.

The jury was required to find that Mr. Yefremov had acted willfully in order to convict him of Escape from Community Custody. CP 35.

Mr. Yefremov proposed a jury instruction defining the term "willful" as "acting intentionally and purposeful, and not accidentally or inadvertently." CP 23.

The court refused to give Mr. Yefremov's proposed instruction. RP (6/8/16) 8.

Instead, the court instructed the jury that willfulness was equivalent to knowledge. CP 32.

In closing, the prosecutor argued that the jury knew that Mr. Yefremov had acted willfully because he had “absconded” from community custody so many times before. RP (6/8/16) 27-28. The prosecutor argued that failing to comply with the requirements of his community custody was “not unusual for Mr. Yefremov.” RP (6/8/16).

The jury found Mr. Yefremov guilty. RP (6/8/16) 42. This timely appeal follows. CP 76-78.

ARGUMENT

I. THE COURT VIOLATED MR. YEFREMOV’S RIGHT TO DUE PROCESS BY REFUSING TO INSTRUCT THE JURY THAT THE STATE WAS REQUIRED TO PROVE THAT HE HAD ACTED PURPOSEFULLY IN ORDER TO CONVICT HIM OF ESCAPE FROM COMMUNITY CUSTODY.

A. In order to convict Mr. Yefremov of Escape from Community Custody, the state was required to prove beyond a reasonable doubt that he committed a “purposeful act.”

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

... willfully discontinu[e] making himself ... available to the department for supervision ... 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 be 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 *State v. Danforth*, 97 Wn.2d 255, 258, 643 P.2d 882 (1982)). 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 a 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.

B. The court erred by refusing to give Mr. Yefremov's proposed instruction, informing the jury that Escape from Community Custody required proof that he acted purposely or intentionally.

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 645.¹ 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.*

¹ Jury instructions are reviewed *de novo*. *State v. Richie*, 191 Wn. App. 916, 927, 365 P.3d 770 (2015).

As outlined above, the state should have been required to prove that Mr. Yefremov 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. Yefremov'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 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. Yefremov 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. Yefremov'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, Mr. Yefremov admitted that he knew about the meeting with his CCO, but testified that he missed it because he felt his life was in danger. RP (6/7/16) 107-108. It should have been up to the jury to determine whether his overdose the night before rendered his failure to make it to the meeting inadvertent, rather than purposeful.

But the court's instructions removed that question from the jury's consideration by informing the jury that willfulness was equivalent to knowledge. CP 32.

Mr. Yefremov's CCO also testified that DOC considers any missed appointment to be "willful," regardless of the reason that the offender is unable to show up. RP (6/7/16) 82. Absent Mr. Yefremov's proposed instruction, the jury likely relied on that testimony to conclude that the state had proved its case whether he had acted purposefully or not.

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

The trial court violated Mr. Yefremov's right to due process by failing to instruct the jury that the state was required to prove that he 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. Yefremov's conviction must be reversed. *Id.*

II. MR. YEFREMOV'S ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO EXTENSIVE EVIDENCE THAT WAS INADMISSIBLE UNDER ER 404(B) AND HIGHLY PREJUDICIAL TO THE DEFENSE.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*²

Counsel provides deficient performance by failing to object to inadmissible evidence absent a valid strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citing *State v. McFarland*,

² Ineffective assistance raises an issue of constitutional magnitude that the court can consider for the first time on appeal. *Kylo*, 166 Wn.2d at 862; RAP 2.5(a)(3).

127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). Reversal is required if an objection would likely have been sustained and the result of the trial would have been different without the inadmissible evidence. *Id.*

Evidence of uncharged crimes or other bad acts is not admissible “to prove the character of a person in order to show action in conformity therewith.” ER 404(b). Evidence is also inadmissible if its probative value is outweighed by the risk of unfair prejudice. ER 403.

When analyzing evidence of uncharged misconduct, a trial court must begin with the presumption that the evidence is inadmissible. *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 378 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). The burden is on the state to overcome this presumption. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014).

Before admitting misconduct evidence, the court must find by a preponderance of the evidence that the misconduct actually occurred, identify a proper purpose for the evidence, determine its relevance to prove an element of the offense, and weigh the probative value against the prejudicial effect. *Slocum*, 183 Wn. App. at 448.

All of the steps outlined above must be performed on the record, and the court must resolve doubtful cases in favor of exclusion.

McCreven, 170 Wn. App. at 458; *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Here, Mr. Yefremov's defense attorney provided ineffective assistance by failing to object to testimony that he had "absconded" from community custody seven times before.

If Mr. Yefremov's attorney had properly objected, the court would have excluded the evidence under ER 404(b) and ER 403. The evidence was not relevant to any element of Mr. Yefremov's charge.

Indeed, the only logical purpose of the testimony regarding the prior alleged "abscondings" to encourage the jury to draw an impermissible propensity inference, reasoning that Mr. Yefremov regularly failed to appear to meetings with his CCO, so he must have done so on the date for which he was charged.

Counsel had no valid tactical reason for permitting the evidence. Its admission made Mr. Yefremov appear more likely guilty. A reasonable defense attorney would have objected. Mr. Yefremov's lawyer provided deficient performance by failing to do so. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007).

Mr. Yefremov was prejudiced by his attorney's deficient performance. *Kyllo*, 166 Wn.2d at 862. Evidence of other bad acts is inadmissible precisely because the risk that the jury will draw an

impermissible propensity inference is so high. Here, the jury likely assumed that Mr. Yefremov was more likely to have willfully failed to attend the meeting with his CCO because he had allegedly done so many times before.

The prosecutor was also able to rely on the evidence in closing to argue that Mr. Yefremov's failure to report for the meeting was willful because it was his regular practice and was "not unusual for him." RP (6/8/16) 27-28.

There is a reasonable probability that counsel's unreasonable failure to object affected the outcome of Mr. Yefremov's trial. *Kyllo*, 166 Wn.2d at 862.

Mr. Yefremov's attorney provided ineffective assistance of counsel by failing to object to lengthy inadmissible evidence that encouraged the jury to draw an impermissible propensity inference. *Id.*; *Hendrickson*, 138 Wn. App. at 833. Mr. Yefremov's conviction must be reversed. *Id.*

III. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THE COURT SHOULD DECLINE TO IMPOSE APPELLATE COSTS ON MR. YEFREMOV, 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.3d 612 (2016).³

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. Yefremov indigent at the end of the proceedings in superior court. CP 83-84. That status is unlikely to change, especially with the imposition of a lengthy prison term. 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 court violated Mr. Yefremov’s right to due process by refusing to give his instruction informing the jury that the state was required to prove that he had acted purposely or intentionally in order to convict him

³ Division II’s commissioner has indicated that Division II will follow *Sinclair*.

of Escape from Community Custody. Mr. Yefremov's attorney provided ineffective assistance of counsel by failing to object to extensive, prejudicial evidence that was inadmissible under ER 404(b) and ER 403. Mr. Yefremov'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. Yefremov who is indigent.

Respectfully submitted on February 8, 2017,



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

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

Yan Yefremov DOC# 312858
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Spokane County Prosecuting Attorney
SCPAappeals@spokanecounty.org

Lise Ellner
liseellnerlaw@comcast.net

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 February 8, 2017.



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant