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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36719-3-III

*On review from the Spokane County Superior Court,
Cause no. 18-1-00981-3*

STATE OF WASHINGTON, Respondent,

v.

GARRY B. AULT, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Garry Ault was arrested by police and transported to the Spokane County Jail. Upon arrival, Ault managed to flee from the police car on foot and was later apprehended a few blocks away. Following a bench trial, he was convicted of second degree escape alleging that he knowingly escaped from custody having been charged with a felony offense. Because Ault was only under arrest and had not been charged by the State with a felony offense at the time of his escape, insufficient evidence supports the conviction. The case should be remanded to enter a judgment of conviction for escape in the third degree, and resentence Ault accordingly.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: Insufficient evidence supports the conviction for second degree escape.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether Ault was “charged with a felony” when he had been arrested on probable cause to believe he had committed a felony at the time of his escape but the prosecuting attorney did not file an information charging him with a felony until several days later?

ISSUE NO. 2: Whether the term “charged with a felony” in RCW 9A.76.120(1)(b) is ambiguous, requiring application of the rule of lenity?

IV. STATEMENT OF THE CASE

On March 2, 2018, police arrested Garry Ault for residential burglary and violating a no-contact order based on a report that he entered the protected party’s home without permission. CP 1-2. He was transported to jail in a police car and, upon arrival, the officer parked the car in front of the entrance and opened the passenger door so he could exit. CP 3. Ault had apparently slipped out of the handcuffs, however, and suddenly sprinted away from the car. CP 3. Police pursued him and re-arrested him about half an hour later. CP 3. He was then booked into jail. CP 4.

Four days later, the State charged Ault with residential burglary, violation of an order of protection, and second degree escape. CP 5-6. The escape charge alleged that Ault, “after having been charged with Residential Burglary, a felony, did knowingly escape from the custody of [a] Law Enforcement Officer.” CP 5-6. This language reflects the elements of RCW 9A.76.120(1)(b), one of three alternate means of committing second degree escape.

The State later dismissed the residential burglary and no contact order violation charges when Ault agreed to enter mental health court. CP 13, 18-19. As part of the mental health court agreement, Ault stipulated to a bench trial based upon the police reports in the event he did not successfully complete the program. CP 13. If he participated successfully for 24 months, the State agreed to dismiss the escape charge. CP 14.

Subsequently, Ault was arrested for new charges and terminated from the mental health court program. CP 21-22. The trial court reviewed the police reports and concluded that Ault was guilty of second degree escape, entering findings of fact and conclusions of law setting forth the events described above. CP 61-63. Based on an offender score of 13, the court sentenced Ault to a low-end term of 51 months in prison. CP 27-28. Ault now timely appeals. CP 39.

V. ARGUMENT

At issue in this appeal is whether Ault was “charged with a felony” when he had been arrested by police for residential burglary, but no information was filed until four days later. Ault contends that to be “charged with a felony” requires the filing of an information by the prosecuting attorney. To the extent the second degree escape statute is susceptible of multiple reasonable interpretations, under the rule of lenity,

the Court of Appeals should adopt Ault's interpretation and conclude that insufficient evidence supports the conviction for second degree escape. However, sufficient evidence supports the lesser degree offense of third degree escape, and the case should be remanded for entry of a judgment of conviction and sentence on the lesser charge.

After a bench trial, the Court of Appeals reviews the trial court's findings of fact for substantial evidence and considers whether the findings support the conclusions of law. *State v. Yallup*, 3 Wn. App. 2d 546, 552, 416 P.3d 1250, *review denied*, 191 Wn.2d 1014 (2018). The trial court's legal conclusions are reviewed *de novo*. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). The findings of fact must support the elements of the crime beyond a reasonable doubt. *State v. Alvarez*, 105 Wn. App. 215, 220, 19 P.3d 485 (2001). Here, Ault does not challenge the trial court's factual findings, only the conclusions drawn from those facts; thus, review is *de novo*.

The trial court's findings reflect that when Ault fled from police custody, he had been arrested for residential burglary but had not been booked into the jail. CP 62. Based on this finding, it concluded that Ault "was detained as the result of a lawful arrest for Residential Burglary." CP 62. It thereafter found Ault guilty of second degree escape. CP 62.

However, the statute defining the elements of second degree escape require more than simply a detention on probable cause. RCW 9A.76.120(1)(b) states, in pertinent part, “(1) A person is guilty of escape in the second degree if: . . . (b) Having been charged with a felony or an equivalent juvenile offense, he or she knowingly escapes from custody.” Because the trial court did not conclude that Ault was “charged with a felony,” but only that he was detained as the result of a lawful arrest for a residential felony, the question is whether a police arrest and detention for a felony is sufficient to satisfy the essential element. Ault contends it is not.

Answering the question requires the court to interpret the meaning of “charged with a felony” set forth in RCW 9A.76.120(1)(b). The reviewing court’s goal in interpreting a statute is to ascertain the legislature’s intent by examining the statute’s plain language and its context in the statutory scheme. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015). If the plain language of the statute is unambiguous, the inquiry ends and the statute is enforced in accordance with its plain meaning. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Reviewing courts will not add language to an unambiguous statute when the legislature has chosen not to include it, nor delete language the

legislature has included. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

Only if the statutory language is ambiguous does the court then turn to legislative history and canons of statutory construction to discern the legislative intent. *Armendariz*, 160 Wn.2d at 110-11. One of these canons of construction is the rule of lenity, which requires the court to interpret an ambiguous penal statute in favor of the defendant. *State v. Evans*, 177 Wn.2d 186, 193, 298 P.3d 724 (2013).

Nowhere in the criminal code is the term “charge” defined. A dictionary interpretation of the term “charge” is ambiguous at best, as it could refer solely to the formal initiation of a criminal prosecution filed by a prosecuting attorney, or to a less formal accusation by a police officer. *Compare* Garner, Bryan, *Black’s Law Dictionary* (11th ed. 2019), “charge” – vb. (“To accuse [a person] of an offense”); “charge” – n. (“A formal accusation of an offense as a preliminary step to prosecution.”). However, within the context of the code as a whole, it is clear that while police have some charging authority for misdemeanor criminal offenses, felony offenses are only charged by a prosecuting attorney in a written information filed in the Superior Court.

In general, police have authority to arrest a person whom the officer has probable cause to believe has committed felony offense. RCW 10.31.100. However, arrest does not necessarily lead to charging and prosecution for a crime. Under RCW 10.37.015(1):

No person shall be held to answer in any court for an alleged crime or offense, unless upon an information filed by the prosecuting attorney, or upon an indictment by a grand jury, except in cases of misdemeanor or gross misdemeanor before a district or municipal judge.

Unlike felony charges, misdemeanor charges can be initiated by a police officer issuing a citation and notice to appear. CrRLJ 2.1(b); *see also State v. Leach*, 113 Wn.2d 679, 694, 782 P.2d 552 (1989) (“A law enforcement officer may initiate charges by citation and notice without prior approval of the prosecutor . . . Under the rules, both a complaint and a citation and notice are final charging documents.”). In the case of a felony offense, a person arrested without a warrant for a pending charge is entitled to a judicial determination of probable cause within 48 hours and release without conditions if 72 hours elapses without an information or indictment being filed. CrR 3.2.1(a), (f)(1). This structure suggests that while police may charge a person with a misdemeanor offense by citation, only a prosecuting attorney may charge a person with a felony by filing an information or indictment. *See also Payne v. Smith*, 30 Wn.2d 646, 648, 192 P.2d 964 (1948) (“It will thus be seen that a person in this state may

be charged with an infamous crime and brought to trial thereon, either upon an indictment found by a grand jury, or upon an information filed by the prosecuting attorney.”).

At least one Court of Appeals decision offers some support for this interpretation. In *State v. Hendrix*, 109 Wn. App. 509, 35 P.3d 1189 (2001), *review denied*, 146 Wn.2d 1018 (2002), police contacted a young woman who was in the company of another person being arrested. *Id.* at 510. Police could not verify her identity, but she agreed to go to the station to give information about her friend. *Id.* at 510-11. At the police station, she confessed her true name and admitted there were warrants for her arrest. *Id.* at 511. Police handcuffed her to a chair while verifying that information, and then turned her over to jail staff with instructions to keep her in a juvenile holding cell area. *Id.* Without permission, she left the holding cell, ran out of the building, and was later found hiding in a nearby dumpster. *Id.*

A court convicted Hendrix of second degree escape and making false statements to a police officer, and on appeal, she challenged the sufficiency of the evidence supporting the escape conviction. *Id.* At issue was the meaning of “detention facility,” which is defined by statute to mean any place used for confining a person “arrested for, charged with or

convicted of an offense” or “charged with being or adjudicated to be a juvenile offender.” *Id.* at 512 (*citing* RCW 9A.76.010). Concluding the evidence was insufficient, the Court of Appeals rejected the State’s argument that the statute should apply because police had probable cause to arrest her for two offenses, noting that the statute did not reference “probable cause” and having probable cause is not synonymous with arresting. *Id.* at 515.

Similarly here, the trial court did not find that Ault was “charged” with a felony offense as required by the statute. It found only that he “was detained as the result of a lawful arrest for Residential Burglary.” CP 62. But being detained or being arrested is not synonymous with being charged. Ault was not charged until the State filed an information four days later. CP 5-6. Had the State not filed an information before the deadline established in CrR 3.2.1(f)(1) expired, he would have been released without conditions and, unless the prosecuting attorney chose to initiate further action by filing an information, the matter would have been closed.

Ault’s interpretation is further borne out by the structure of the escape statutes in three degrees, which “plainly demonstrates a legislative intent that escapes by persons confined after conviction should be dealt

with more severely than those occurring before conviction.” *State v. Teaford*, 31 Wn. App. 496, 499, 644 P.2d 136, *review denied*, 97 Wn.2d 1026 (1982). A person is guilty of escape in the first degree, a class B felony, if the person has been convicted of a felony or equivalent juvenile offense. RCW 9A.76.110. The escape is in the second degree, and constitutes a class C felony, if the person escapes from a detention facility, or has been charged with a felony or equivalent juvenile offense, or has been committed under chapter 10.77 RCW. RCW 9A.76.120. The lowest level offense is escape in the third degree, a misdemeanor, when a person escapes from custody or knowingly violates an electronic monitoring program’s terms. RCW 9A.76.130. The three degrees generally reflect different seriousness levels based upon whether the person is detained, charged, or convicted at the time of the escape.

Here, Ault was detained but not yet charged with a felony offense. Accordingly, his conduct satisfies only the requirements of the lowest level charge, escape in the third degree. While the State conceivably could have charged him with second degree escape under the “detention facility” prong, RCW 9A.76.120(1)(a), it did not; instead, it proceeded solely under the “charged with a felony” prong under RCW 9A.76.120(1)(b). CP 5-6. But neither the trial court’s findings, nor an unambiguous interpretation of the statutory language, supports the

conclusion that Ault was “charged with a felony” when no charging document was filed at the time of his escape and he was merely under arrest on suspicion of committing a felony.

Accordingly, the evidence is insufficient to support the conviction for second degree escape. Because the evidence would support a conviction for third degree escape, it is appropriate for this court to remand the case for resentencing on the lesser degree offense of third degree escape. *See Hendrix*, 109 Wn. App. at 515.

VI. CONCLUSION

For the foregoing reasons, Ault respectfully requests that the court REVERSE his conviction for second degree escape and REMAND the case for entry of judgment and resentencing on the lesser degree offense of escape in the third degree.

RESPECTFULLY SUBMITTED this 9 day of September,
2019.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Gary Ault, DOC # 379393
Coyote Ridge Corrections Center
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And, pursuant to prior agreement of the parties, by e-mail through the court's electronic filing portal to the following:

Larry Steinmetz
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 9 day of September, 2019 in Kennewick, Washington.



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