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NO. 26740-7-III

FILED

JUL 16 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

MAURICE T. BROWN,

Appellant.

BRIEF OF APPELLANT

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STATUTES

RCW 9A.76.020 1

ASSIGNMENT OF ERROR NO. 1

The Court erred in finding the defendant guilty as no crime had been charged in the information.

ISSUE NO. 1

Is knowledge an essential element?

ISSUE NO. 2

Does knowledge appear in the information in any form or by fair construction?

ASSIGNMENT OF ERROR NO. 2

The Court erred in entering a judgment of guilty as the evidence is insufficient to prove that the defendant knowingly escaped.

ISSUE NO. 1

Was the evidence sufficient to show that the defendant knew the terms of the order of furlough?

ISSUE NO. 2

Was the evidence sufficient to prove that the defendant knew he was to return on a specific date?

ISSUE NO. 3

Did the State prove that the defendant overstayed his 72 hour furlough?

STATEMENT OF FACTS

The Benton County Prosecutor intended to charge the defendant by information with escape in the second degree. (RCW 9A.76.020) (CP 95). A document purporting to be an information was filed on April 10, 2007. The information stated:

> COMES NOW, ANDY MILLER, Prosecuting Attorney for Benton County, State of Washington, and by this his Information accuses
>
> MAURICE TERRELL BROWN
>
> of the crime (s) of: ESCAPE IN THE SECOND DEGREE, RCW 9A.76.120(1)(b) committed as follows, to-wit:
>
> Count I
>
> That the said MAURICE TERRELL BROWN in the County of Benton, State of Washington on or about the 1st day of April, 2007, in violation of RCW 9A.76.120(1)(b), after having been charged with Possession of a Controlled Substance, a felony, did escape from the custody of Benton County Jail, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Washington. Dated at

Kennewick, Washington on April 09, 2007.

The statute RCW 9A.76.120(1)(b) states:

> **9A.76.120. Escape in the second degree**
>
> (1) A person is guilty of escape in the second degree if:
>
> IV Having been charged with a felony or an equivalent juvenile offense, he or she knowingly escapes from custody.

The statute was rewritten via Laws 2001, ch. 264 § 2 to add the element of knowingly. Prior to this charge, knowledge was an implied element.

This charge was tried to the Court without a jury on October 31, 2007. (RP 10/31/07; 72:1 and 127:25). The trial followed a hearing on the defendant's motion to dismiss (RP 10/31/074; 72:1) because jail staff threw away his legal papers. The Court found misconduct by the jail staff (RP 10/31/07; 125: 25), but also found

that the defendant's rights to a fair trial were not prejudiced by this misconduct. (RP 10/31/07; 127:12).

At the trial, the Court admitted a certified copy of an order for furlough. (Ex 1) (CP 50) and a certified copy of the clerks minutes dated March 28, 2007. (Ex 3) (CP 50) (RP 10/31/07; 135:14). The State called one witness. (RP 10/31/07; 129:14). Corporal Dunn testified he knew that the defendant was granted a furlough. (RP 10/31/07; 1302). Corporal Dunn testified that defendant was supposed to return and that the Corporal called defendant's father and asked the father to bring defendant back. (RP 10/31/07; 130:13). The father was not called as a witness. Corporal Dunn said he filed an escape report. (RP 10/8318/07; 130:21). This report was not admitted in evidence and there was no testimony as to the content of this report. Corporal Dunn said the defendant returned to the jail on June 12, 2007. (RP 10/31/07; 131:4).

Corporal Dunn didn't write the furlough order (RP 108/31/07; 1321) and did not file it. (RP 10/31/07; 132:4). Corporal Dunn testified that he didn't give a copy of the furlough

order to the defendant. (RP 10/31/07; 133:9). Corporal Dunn wasn't present to see if the defendant received a copy of the furlough order. (RP 10/31/07; 133:12). The Corporal knew by reading the order that it was a 72 hour furlough (RP 10/31/07; 133:19), but doesn't know when defendant was released. (RP 10/31/07; 134:15). Corporal Dunn testified that the order that he had said the defendant was to return on April 1, 2007 (RP 10/31/07; 134:23), but at first misread the order thinking the defendant was to return on July 1st. (RP 10/318/07; 134:20).

The State argued that Ex 3, the clerks minutes showed that the defendant was present when the furlough was granted. (RP 10/31/07; 136:10). There was no testimony or Exhibit that stated the defendant was told or knew when or if he was to return to the jail. No transcript of the March 28, 2007 furlough hearing was presented as evidence at the trial. The Court Reporter was not called and did not testify.

The defendant, in closing argument, argued that the order of furlough contained a signature line for the defendant, but was never

signed by the defendant. (RP 10/318/07; 138:12). Defendant argues that the evidence did not show that the defendant was given a copy of the furlough order in court (RP 10/31/07; 138:14); by his lawyer (RP 10/31/07; 138:15); or by jail staff. (RP 10/31/07; 138:16). Most significantly, their was no testimony he was told of the furlough conditions by anyone. (RP 10/31/07; 138:17).

The Court found that the order was entered in open court and that the defendant was present. The Court made no finding that the furlough order conditions were read in open court in the presence of the defendant. There was no finding that the defendant was released 72 hours or less before his return on June 12, 2007. (RP 10/31/07; 139: 10-25).

ASSIGNMENT OF ERROR NO. 1

<u>The Court erred in finding the defendant guilty as no crime had been charged in the information.</u>

ISSUE NO. 1

Is knowledge an essential element?

ISSUE NO. 2

Does knowledge appear in the information in any form or by fair construction?

ARGUMENT IN SUPPORT OF ASSIGNMENT OF ERROR NO. 1

The information did not charge that the defendant knowingly escaped from a detention facility. In *State v. Anderson*, 141 Wn.2d 357 (2000), the Supreme Court changed the law in the State of Washington requiring that even the non-statutory element of knowledge is an element in the offense of felon in possession of a firearm. The Court was aware that knowledge was an element of escape from a detention facility. Both parties and the Court discussed the element of knowledge and the Court found knowledge, but the charging document was never amended to change knowledge.

Defendant argues that even though this error is alleged for the first time on appeal and even though the liberal *State v. Kjorsvik*, 117 Wn.2d 93 (1991) standard applies, that the element of

knowledge does not appear in the information in any form or by fair construction. Defendant Brown, through his not guilty plea, denied a knowing escape, but even if he knew and there was sufficient evidence of knowledge presented to the trier of fact, these are not substitutes for charging the defendant with knowing escape.

In *State v. Kajeski*, 104 Wn.App. 377 (2001), and *State v. Summers*, 107 Wn.App. 373 (2001), information's charged the defendant:

> ... "did unlawfully and feloniously own, have in his possession, or under his control a firearm..."

Both of these Court of Appeal cases found that this language, under the liberalized *Kjorsvik* standard was sufficient to substitute for the knowledge element. However, in the instant case, the relevant portions of the information do not allege either unlawfully or feloniously.

Defendant argues that the failure to include the language "unlawfully and feloniously" in the instant information distinguishes *Summers* and *Kajeski* from this information.

In fact, the inclusion of just unlawfully is not sufficient to appraise the defendant of the State's need to prove knowledge before his guilt would be established. In *State v. Marcum*, 116 Wn.App. 526 (2003), Division III of the Court of Appeals found that an information charging unlawful possession of a firearm did not charge knowingly. *State v. Marcum* stated:

> A challenge to the sufficiency of the charging document to support a criminal conviction implicates the due process requirement of notice under Washington Constitution, article I, section 22 (amendment 10) and the sixth amendment to the Constitution of the United States. *State v. Kjorsvik*, 117 Wash.2d 93, 97, 812 P.2d 86 (1991). Review is de novo. *State v. Valdobinos*, 122 Wash.2d 270, 858 P.2d 199 (1993).
>
> Mr. Marcum challenges the sufficiency of the information for the first time on appeal. We therefore construe the information more liberally in favor if its validity. *Kjorsvik*, 117 Wash.2d at 102, 812 P.2d 86. The information must nonetheless contain in some form language that can be construed as giving notice of the essential elements. And if it does not, "'the most liberal reading cannot cure

> it.'" *State v. Moavenzadeh*, 135 Wash.2d 359, 362-63, 956 P.2d 1097 (1998) (quoting *State v. Campbell*, 125 Wash.2d 797, 802 888 P.2d 1185 (1995)).
>
> To be statutorily sufficient, an information must clearly and distinctly set forth the act or omission that is alleged to constitute the crime in ordinary and concise language, so that a person of common understanding is able to understand what is intended. RCW 10.37.050(6). The act or omission charged as the crime must be stated with "such a degree of certainty as to enable the court to pronounce judgment upon a conviction according to the right of the case." RCW 10.37.050(7).

ASSIGNMENT OF ERROR NO. 2

<u>The Court erred in entering a judgment of guilty as the evidence is insufficient to prove that the defendant knowingly escaped.</u>

ISSUE NO. 1

Was the evidence sufficient to show that the defendant knew the terms of the order of furlough?

ISSUE NO. 2

Was the evidence sufficient to prove that the defendant knew he was to return on a specific date?

ISSUE NO. 3

Did the State prove that the defendant overstayed his 72 hour furlough?

ARGUMENT IN SUPPORT OF ASSIGNMENT OF ERROR NO. 2

See also, *State v. Paterson*, ___ Wn.App. ___, 2008 WL 2636568, July 7, 2008.

Evidence is insufficient only if no rational trier of fact could find that all of the elements were proven beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d. 97, 103 (1998). *Hickman* also stands for the proposition that if insufficient evidence was presented to prove a crime, reversal is required. *Hickman* stated:

> Retrial following reversal for insufficient evidence is "unequivocally prohibited" and dismissal is the remedy. *Hickman* at 103.

In the instant case, the Court concluded that since the furlough order was entered in open court and since the clerks notes say the defendant was present, the defendant had to know the conditions of the order. However, if the order was not argued, but

agreed and just signed in Court, the defendant would not have heard the conditions of the order. There is no evidence that the order was argued, discussed, or the conditions read or referred to by the State, the defense, or the Court. There is evidence that the defendant did not sign the order or acknowledge in any other way that he had received a copy. To the contrary, the only witness, Corporal Dunn testified that he didn't know if the defendant was given a copy in Court, by his attorney, or by the jail. No one testified that they told, or heard anyone else tell, the defendant when to leave, when to return, or any other conditions. No one at the March 28, 2007 furlough hearing was called to testify; not the Court Clerk whose minutes showed the defendant's presence; not the Court Reporter who could have certified the record, or read it into testimony; not the Prosecutor or Judge who were present at the hearing; not the bailiff, or Courtroom Jailer who might have handed the defendant a copy of the order.

In *State v. Carlson*, 143 Wn.App. 507 (2008), there was a bench trial on a charge of first degree escape and the defendant

claimed the evidence was insufficient to support the conviction of escape 1°. In *Carlson*, the State called three witnesses

> The State presented testimony from Tracy, Leonard Parker, and Walkup. Tracy described investigating the illegally parked van, his contract with Carlson, and Carlson's subsequent arrest. Parker testified that (1) he was Carlson's work supervisor; (2) on the day of Carlson's arrest, Carlson had contacted him and told him that he needed more time to complete a painting job in Puyallup; (3) he (Parker) contacted Walkup, who approved Thompson's overtime and additional travel time.
>
> Walkup testified that (1) on the day of the arrest, Carlson was originally due back at the work release facility by 6:30 pm; (2) at Parker's request, he (Walkup) granted Carlson an extension to 11:30 pm; (3) Parker assured him (Walkup) that Carlson would be back well before 11:30 pm, he (Walkup) investigated and discovered that Carlson had been arrested; and (5) Carlson did not return to the work release facility that night.

From this testimony, the *Carlson* Court was able to enter the following findings:

III [On July 29, 2006, the] defendant was residing at the RAP House/Lincoln Park work release facility located on South Yakima in Tacoma, Washington.

IV The defendant's Community Corrections Officer from the Department of Corrections had approved the defendant's employment at Brushworx Painting Company.

V The defendant was allowed to work from 8:00 a.m. until 4:30 p.m. daily, with 2 hours of travel time allowed on weekdays and 3 hours of travel time allowed on holidays and weekends.

VI John Walkup is a program monitor at the work release facility. He monitors the inmates as they leave and return. Mr. Walkup is allowed to approve overtime for the inmates.

VII On July 29, 2005, the defendant signed out and left the work release facility at 7:26 a.m. to go to work at Brushworx Painting Company.

VIII Leonard Parker is a crew leader at Brushworx Painting Company

and he sometimes supervises the defendant. He began work at Brushworx Painting when he was in the work release program as well.

IX On July 29, 2006, Mr. Parker called Mr. Walkup at the work release facility in order to get overtime approved for the defendant. Mr. Parker stated that the defendant would be needed to work until 9:30 p.m.

X Mr. Walkup approved the overtime and allowed two hours of travel time. He advised Mr. Parker that the defendant must be back to work release by 11:30 p.m. Mr. Parker assured Mr. Walkup that the defendant would be back in time.

XI At 9:56 p.m. that night, Puyallup Tribal Police Officer Gary Tracy was on patrol in the 2200 block of East Browning, in Pierce County, Washington.

XII At that location, Office Tracy saw a Toyota Van parked along the side of the roadway. East Browning is a back road that is poorly lit. The van was parked facing the wrong direction, on a

hill, where there is a steep bank. Officer Tracy had concerns for the safety of other drivers and any passengers inside the van.

XIII Officer Tracy pulled his patrol car behind the van and activated his takedown lights, which illuminated the inside of the Toyota Van. Officer Tracy could see two individuals in the front seats. They appeared to be pulling up their pants as Officer Tracy approached the driver's side of the van.

XIV The defendant was in the driver's seat. He was cooperative with Officer Tracy. He identified himself, and told Officer Tracy that he did not know the male in the passenger seat, because he had just picked him up on South Tacoma Way.

XV The defendant also told Officer Tracy that he was on work release and was supposed to be back to the facility by 6:00 p.m. (It was approximately 10:00 p.m. by this time.) When Officer Tracy checked the defendant's license and warrant status, he confirmed that the defendant had active

conditions with the Department of Corrections.

XVI There was no evidence that there was anything mechanically wrong with the van that the defendant was driving.

XVII Officer Tracy arrested the defendant for escape in the first degree. Officer Tracy arrested the passenger, Rene Hunt, on an outstanding warrant.

The Trial Court in the instant case could only "infer" that the defendant knew of the length of the furlough. The court stated:

> There is a note from the clerk in Exhibit 3 indicating that the motion for a 72-hour furlough was granted, which gives rise to the inference that Mr. Brown being present, was aware of the length of that furlough and he failed to return.

Defendant argues that if the clerks note said that, the Court, the State, Defense Counsel, or the defendant read aloud the motion or the order then such inference would be plausible. In so far as the Court of Appeals may consider the trial court's oral decision as a finding, the defendant objects to the finding that defendant knew the

length of the furlough as not based upon sufficient evidence. Defendant makes the same objection to the trial court's "finding" in the oral decision that the defendant failed to return. Having no evidence that this order was read or given to the defendant, such finding is not based upon sufficient evidence.

In addition, the Court had insufficient evidence to have found that the defendant did not return within the 72-hours. There is no basis in evidence for this finding as no one testified when the defendant left on furlough and for how long he was gone.

Finally, the defendant may not have been required to return until July 7, 2007. That was the initial belief of the jailer who testified in this matter.

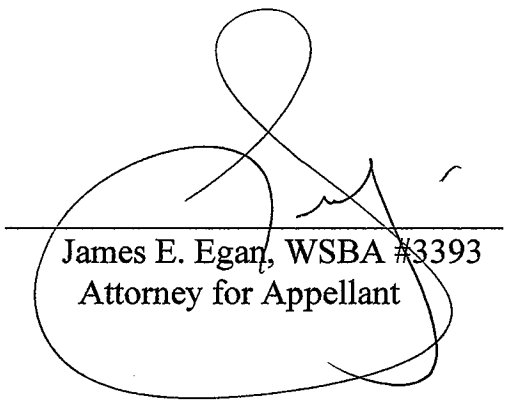
CONCLUSION

Defendant moves the Court to reverse and dismiss with prejudice as the charge of escape 2° is not supported by sufficient evidence. In the alternative, defendant moves the Court to dismiss and remand without prejudice to the State's right to charge the

defendant on these facts as the original information did not charge a crime.

Respectfully Submitted this 15th day of July, 2008.

JAMES E. EGAN, P.S.



James E. Egan, WSBA #3393
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify under penalty of perjury under the laws of the State of Washington, that a copy of the foregoing was mailed, via 1st Class Mail, to Anita Petra, DPA, Benton County Prosecutor's Office, 7122 W. Okanogan Place, Kennewick, WA 99336 and Maurice T. Brown, DOC # 854720, c/o Washington State Penitentiary, 1313 N. 13th Ave., Walla Walla, WA 99362 by depositing in the mail of the United States of America on the 15th day of July, 2008.

Jacquie Linton