

No. 35292-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Richard Brooks,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
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BY MISTRY

Clallam County Superior Court

Cause No. 06-1-00226-1

The Honorable Judge Kenneth D. Williams

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by giving Instruction No. 11, which reads as follows:

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime, whether or not the person is aware that the result is a crime.
Instruction No. 11, Supp. CP.

2. Instruction No. 11 impermissibly relieved the state of its burden of establishing an element of the offense by proof beyond a reasonable doubt.
3. The trial court erred by instructing the jury with an erroneous definition of knowledge.
4. The trial court erred by giving Instruction No. 12, which reads as follows:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts, or circumstances or result described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.
Instruction 12, Supp. CP.

5. Instruction No. 12 contained an improper mandatory presumption.
6. Instruction No. 12 impermissibly relieved the state of its burden of establishing an element of the offense by proof beyond a reasonable doubt.
7. Defense counsel was ineffective for failing to object to Instruction No. 11.

8. Defense counsel was ineffective for failing to object to Instruction No. 12.
9. The trial court erred by failing to define the term “arrest.”
10. The trial court abused its discretion by failing to define a technical term as requested by Mr. Brooks.
11. The trial court abused its discretion by failing to define a technical term as requested by the jury.
12. Defense counsel was ineffective for failing to propose a proper instruction defining the term “arrest.”
13. The trial court erred by giving Instruction No. 10, which reads as follows:

An arrest is lawful if made pursuant to an arrest warrant.
Instruction No. 10, Supp. CP.
14. Instruction No. 10 misstated the law.
15. Instruction No. 10 was an unconstitutional comment on the evidence.
16. Instruction No. 10 was tantamount to a directed verdict on the lawfulness of Mr. Brooks’ arrest.
17. The trial court erred by removing the lawfulness of Mr. Brooks’ arrest from the jury’s determination.
18. Mr. Brooks’ conviction was based on insufficient evidence as a matter of law.
19. Mr. Brooks was not in custody when he fled because he was not restrained pursuant to a lawful arrest.
20. Mr. Brooks was not lawfully arrested because DOC failed to properly issue an arrest warrant.
21. The trial court abused its discretion by denying Mr. Brooks’ motion for a mistrial.

22. Mr. Brooks was denied a fair trial when the state's main witness violated the trial court's order *in limine*.

23. The trial court erred by failing to suppress evidence derived from an illegal seizure.

24. Defense counsel was ineffective for failing to formally move for suppression of evidence derived from an illegal seizure.

25. If any issues are waived on appeal, Mr. Brooks was denied the effective assistance of counsel.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Richard Brooks was charged with Escape in the First Degree. The state was required to prove that he escaped from custody, knowing that his actions would result in leaving custody without permission. The court's instructions allowed the jury to presume that Mr. Brooks acted with knowledge (that his actions would result in leaving custody without permission) if he acted intentionally (by fleeing the deputy who was attempting to arrest him). The instructions also explicitly permitted conviction absent proof of knowledge. Defense counsel did not object to the erroneous instructions.

1. Did the trial court's instructions create an impermissible mandatory presumption? Assignments of Error Nos. 1-6.

2. Did the trial court's instructions misstate the law and mislead the jury by conflating two *mens rea* elements? Assignments of Error Nos. 1-6.

3. Did the trial court's instructions relieve the state of its burden to establish every element of the offense by proof beyond a reasonable doubt? Assignments of Error Nos. 1-6.

4. Did the trial court's instructions explicitly permit conviction even in the absence of proof that Mr. Brooks acted with knowledge that his actions would result in leaving custody without permission? Assignments of Error Nos. 1-6.

5. Was Mr. Brooks denied the effective assistance of counsel when his lawyer failed to object to Instructions Nos. 11 and 12? Assignments of Error Nos. 7, 8.

In order to prove that Mr. Brooks escaped from custody, the state was required to show that he was restrained pursuant to a lawful arrest. The court found that Mr. Brooks was unlawfully detained for a warrant check, prior to the deputy's attempt to arrest him. In addition, there was a factual question as to whether or not Mr. Brooks was actually arrested, because he was never physically seized or handcuffed, and did not submit to the deputy's authority.

Defense counsel asked the court to define the term "arrest," but did not offer an instruction defining the term. The trial judge decided he could not define "arrest." During deliberations, the jury asked the court to provide further guidance as to when an arrest occurs, but the court refused.

Over Mr. Brooks' objection, the court instructed the jury that an arrest is lawful if made pursuant to an arrest warrant. The court did not permit the jury to consider the unlawfulness of the initial detention. Nor did the court examine (or permit the jury to consider) whether the arrest warrant was lawfully issued.

6. Is the term "arrest" a technical term requiring definition under the facts and the law of this case? Assignments of Error Nos. 9-12.

7. Did the trial court abuse its discretion by refusing to define the term "arrest" upon Mr. Brooks' request? Assignments of Error Nos. 9-12.

8. Did the trial court abuse its discretion by refusing to define the term "arrest" upon the jury's request? Assignments of Error Nos. 9-12.

9. Was Mr. Brooks denied the effective assistance of counsel by his attorney's failure to propose a proper instruction defining the term "arrest"? Assignments of Error Nos. 9-12.

10. Did the trial court misstate the law by instructing the jury that an arrest is lawful if made pursuant to an arrest warrant? Assignments of Error Nos. 13-17.

11. Did the trial court unconstitutionally comment on the evidence by instructing the jury that an arrest is lawful if made pursuant to an arrest warrant? Assignments of Error Nos. 13-17.

12. Was Instruction No. 10 tantamount to a directed verdict on the lawfulness of Mr. Brooks' arrest? Assignments of Error Nos. 13-17.

13. Did the trial court violate Mr. Brooks' constitutional right to due process by removing the issue of "lawfulness" from the jury's consideration? Assignments of Error Nos. 13-17.

To convict Mr. Brooks of Escape in the First Degree, the state was required to prove that he was restrained pursuant to a lawful arrest. The arrest in this case was based on a DOC warrant. Under standard DOC procedure, no warrant is generated-- either electronically or in hardcopy-- when an offender violates community placement/custody. Furthermore, the secretary of DOC is not involved in the warrant procedure.

14. Was Mr. Brooks' conviction based on insufficient evidence as a matter of law? Assignments of Error Nos. 18-20.

15. Did the state fail, as a matter of law, to prove that Mr. Brooks was restrained pursuant to a lawful arrest? Assignments of Error Nos. 18-20.

16. Was Mr. Brooks' arrest unlawful as a matter of law because DOC failed to properly issue the arrest warrant upon which the arrest was based? Assignments of Error Nos. 18-20.

Mr. Brooks moved *in limine* for an order prohibiting the state's witnesses from testifying to any legal conclusions as to whether Mr. Brooks was arrested or in custody at the time he fled the deputy. Despite this, Deputy Ley testified that Mr. Brooks was under arrest. The court sustained Mr. Brooks' objection and instructed the jury to disregard the testimony, but denied a motion for a mistrial.

17. Was Mr. Brooks denied a fair trial when the state's main witness violated the trial court's order *in limine* and testified to a legal conclusion? Assignments of Error Nos. 21-22.

18. Did the trial court abuse its discretion by denying Mr. Brooks' motion for a mistrial? Assignments of Error Nos. 21-22.

Deputy Ley saw Mr. Brooks, whom he recognized. Mr. Brooks said he had to leave, but Deputy Ley instructed him to remain for a warrant check. Deputy Ley had no suspicion relating to Mr. Brooks, and did not have any reason to believe a warrant was outstanding.

Defense counsel did not file a written motion to suppress or dismiss, because he was unaware of the circumstances leading up to the arrest. When these facts came out during trial, Mr. Brooks moved to suppress the evidence and to dismiss the case. The trial court agreed that the initial detention was unlawful, but refused to suppress the evidence or dismiss the case.

19. Does Washington's exclusionary rule require suppression of all evidence derived from an illegal seizure, including intangible evidence? Assignments of Error Nos. 23-24.

20. Does Washington's exclusionary rule require suppression of "new crime" evidence derived from an illegal seizure, where the new crime is not an assault? Assignments of Error Nos. 23-24.

21. Did the trial court err as a matter of law by refusing to suppress evidence derived from Deputy Ley's illegal seizure of Mr. Brooks? Assignments of Error Nos. 23-24.

22. If the suppression issue is not preserved for review, was Mr. Brooks denied the effective assistance of counsel? Assignments of Error Nos. 23-24.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On May 23, 2006, Deputy Ley of the Clallam County Sheriff's Department was observing a parking lot where there had been prowling complaints. RP (8/15/06) 90-91. He saw a car with two occupants, who said they had run out of gas. RP (8/15/06) 92. Another car arrived, and its passenger got out with a gas can. RP (8/15/06) 93-96.

The deputy recognized Richard Brooks as the driver and said "Hey Rich." RP (8/15/06) 100, 136. Mr. Brooks responded that he had to go, and the deputy said "Hold on, Rich, I'm running a check." RP (8/15/06) 136. Mr. Brooks waited, and the deputy said to Mr. Brooks "You had a DOC escapee warrant, we're gonna go for a drive." RP (8/15/06) 102.

Mr. Brooks finished his cigarette, sat in the driver's seat with his feet outside of the car, and held his hands out. The deputy approached, but as he was about to handcuff Mr. Brooks, Mr. Brooks ran away. RP (8/15/06) 108-110. The deputy chased and tazed Mr. Brooks, eventually handcuffing him and placing him in his patrol car. RP (8/15/06) 110-127.

Mr. Brooks was charged with Escape in the First Degree. CP 18. At trial, he asserted that he was not in custody at the time of the arrest.

The defense challenged the validity of the arrest warrant. A DOC officer testified that Mr. Brooks was not reporting as required under the

terms of his community custody for a felony conviction. RP (8/15/06) 54-60. The DOC officer emailed the records division of the DOC with a "Wanted Person Entry Request." RP (8/15/06) 13-14, 71-72, 73-75. Under such circumstances, no written or electronic warrant is generated or signed. Instead, someone from the records division enters information into the DOC database indicating that an arrest warrant has issued. RP (8/15/06) 74-75, 78. This standard procedure was followed in this case. RP (8/15/06) 72-88.

Defense counsel moved to suppress the evidence and dismiss the case based on the illegality of the initial seizure (when the deputy told Mr. Brooks to wait while he ran a check). RP (8/15/06) 148-162. The defense attorney explained that he had not filed a written motion for suppression prior to trial because this information was not in the police reports. RP (8/15/06) 154-162. The court agreed that the detention was illegal, but denied the motion to suppress because any later arrest would have been legal and because there was no evidence to suppress. RP (8/16/06) 5-8, 14. During discussions on Mr. Brooks' motion, the judge indicated that the legality of the arrest was an element of the charge, but that it would not be an issue for the jury to decide. RP (8/15/06) 155.

Prior to trial, Mr. Brooks moved for an order *in limine* prohibiting witnesses from using the legal terms arrest, custody, and escape. RP

(8/15/06) 21-23. The court ordered that the deputy could say that “there was a warrant so I arrested him,” but otherwise limited the use of the words. RP (8/15/06) 24. Despite this, the prosecutor asked and Deputy Ley testified that the defendant was “under arrest.” RP (8/15/06) 103. Mr. Brooks objected and moved for a mistrial. The court sustained the objection, noted that the fact of arrest was an issue for the jury, but denied the motion for a mistrial. RP (8/15/06) 105-106. The court cautioned the jury to “Disregard the last statement made by the deputy when he said the defendant was under arrest. You are to disregard that and not to consider it as evidence. One of the issues for you are to decide in this case is whether or not an arrest took place and whether or not the Defendant was in custody pursuant to that arrest. And I will define-- for purposes of the first degree escape charge I will define what arrest and custody means.” RP (8/15/06) 106, 107.

The prosecutor did not file proposed instructions until the last day of trial. RP (8/16/06) 18-19. The state’s proposed instructions defined “custody” as “restraint pursuant to a lawful arrest,” but did not define the term “arrest.” Prosecutor’s Proposed Instructions, Supp. CP. Defense counsel objected to the omission, and asked the court to define arrest. RP (8/16/06) 19-27. The court declined. RP (8/16/06) 22-27.

Instead, the court instructed the jury (in part) as follows:

To convict the Defendant of the crime of ESCAPE IN THE FIRST DEGREE, each of the following elements of the crime must be proved beyond a reasonable doubt.

- (1) That on or about the 23rd day of May, 2006, the Defendant escaped from custody;
- (2) That the Defendant was being detained pursuant to a conviction of Possession with Intent to Deliver a Controlled Substance;
- (3) That such offense is a felony;
- (4) That the Defendant knew that his actions would result in leaving custody without permission; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. 7, Supp. CP.

Custody means restraint pursuant to a lawful arrest or an order of a court, or any period of service on a work crew.

Instruction No. 9, Supp. CP.

An arrest is lawful if made pursuant to an arrest warrant.

Instruction No. 10, Supp. CP.

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime, whether or not the person is aware that the result is a crime.

Instruction No. 11, Supp. CP.

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts or circumstances or result described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are

described by law as being a crime, the jury is permitted by not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.
Instruction No. 12, Supp. CP.

Defense counsel objected to Instruction No. 10, but not to the other instructions. RP (8/16/06) 15-29.

During deliberations, the jury asked the following question: “Under Washington State Code, are specific declarations or actions required of an officer of the law for an arrest to have occurred? If so, what are they?” RP (8/16/06) 66; Supp. CP. The court declined to further instruct the jury. RP (8/16/06) 67.

Mr. Brooks was convicted as charged and sentenced. CP 6-17.

This timely appeal followed. CP 5.

ARGUMENT

I. THE COURT’S INSTRUCTIONS CREATED A MANDATORY PRESUMPTION AND RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT MR. BROOKS KNEW HIS ACTIONS WOULD RESULT IN LEAVING CUSTODY WITHOUT PERMISSION.

An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67 at 76, 941 P.2d 661 (1997). A jury instruction which misstates an element of an

offense is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002).

Furthermore, due process prohibits the use of conclusive presumptions in jury instructions. Such presumptions conflict with the presumption of innocence and invade the factfinding function of the jury. *State v. Savage*, 94 Wn.2d 569 at 573, 618 P.2d 82 (1980), citing *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)) and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). A conclusive presumption is one which requires the jury to find the existence of an elemental fact upon proof of the predicate fact(s). *Seattle v. Gellein*, 112 Wn.2d 58 at 63, 768 P.2d 470 (1989). The Washington Supreme Court has “unequivocally rejected the [use of] any conclusive presumption to find an element of a crime,” because conclusive presumptions conflict with the presumption of innocence and invade the province of the jury. *State v. Mertens*, 148 Wn.2d 820 at 834, 64 P.3d 633 (2003). Furthermore, conclusive presumptions are unconstitutional, whether they are judicially created or derived from statute. *Mertens*, at 834.

Here, under the court’s instructions, the state was required to prove two mental states. First, the state was required to prove that “the

Defendant escaped from custody,” which requires evidence of an intentional act. Instruction No. 7, Supp. CP. Second, the state was required to prove that “the Defendant knew that his actions would result in leaving custody without permission.” Instruction No. 7, Supp. CP.¹ This second requirement necessarily includes proof that Mr. Brooks knew he was in custody at the time he left custody.

The court gave two instructions relating to these mental states. First, told the jury that “[a]cting knowingly or with knowledge also is established if a person acts intentionally.” Instruction No. 11, Supp. CP. Second, the court instructed the jury that “[a] person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime, whether or not the person is aware that the result is a crime.” Instruction No. 12, Supp. CP.

Under the circumstances of this case, these instructions conflated the two mental states and unconstitutionally relieved the prosecution of its burden of establishing that the defendant acted with knowledge that his actions would result in leaving custody without permission. *See State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005).

¹ From the statute, it is less clear that two distinct mental states are involved. RCW 9A.76.110. However, under the law of the case, the instructions control. *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998).

In *Goble*, the accused was charged with assaulting a person whom he knew to be a law enforcement officer.² The trial court's "knowledge" instruction included language identical to that in Instruction 12: "Acting knowingly or with knowledge also is established if a person acts intentionally." *Goble*, at 202. The Court of Appeals reversed the conviction because this language could be read to mean that an intentional assault established Mr. Goble's knowledge, regardless of whether or not he actually knew the victim's status as a police officer:

We agree that the instruction is confusing and... allowed the jury to presume Goble knew Riordan's status at the time of the incident if it found Goble had intentionally assaulted Riordan. This conflated the intent and knowledge elements required under the to-convict instruction into a single element and relieved the State of its burden of proving that Goble knew Riordan's status if it found the assault was intentional.
Goble, at 203.³

Here, as in *Goble*, Mr. Brooks was charged with an offense that included two mental states: the prosecution was required to prove an intentional act (the escape) and knowledge that he was leaving custody

² Although not an element of the charged offense, knowledge was included in the "to convict" instruction and thus became an element under the law of the case in *Goble*. *Goble* at 201.

³ In *State v. Gerds*, ___ Wn.App. ___, 150 P.3d 627 (2007), the court clarified that *Goble* applies to crimes with more than one *mens rea* element. In such cases, use of the instruction creates the possibility that a jury will conflate the mental elements, thereby relieving the state of its burden.

without permission. Instruction No. 7, Supp. CP. As in *Goble*, the inclusion of the final sentence in Instruction 12 was erroneous; it required the jury to presume that Mr. Brooks acted with knowledge (that he was leaving custody without permission), based on his intentional act in fleeing the deputy. This unconstitutionally relieved the prosecution of its burden to prove that Mr. Brooks' intentional acts were done with knowledge that he was leaving custody without permission. *Goble*.

Furthermore, Instruction No. 12 runs afoul of the rule against conclusory presumptions. *Mertens, supra*. The instruction requires the elemental fact ("Acting knowingly or with knowledge" that he was escaping from custody) to be conclusively presumed from the predicate fact ("if a person acts intentionally.") Instruction No. 12, Supp. CP.

Finally, the last clause of Instruction No. 11 creates additional problems not present in *Goble*. Under the final clause ("whether or not the person is aware that the result is a crime"), the jury was explicitly permitted to convict even absent the requisite proof of knowledge. If a juror believed Mr. Brooks intentionally fled the deputy, that juror could presume he acted with knowledge that he was leaving custody without permission (by applying Instruction No. 12, Supp. CP), even if the juror was convinced that Mr. Brooks was not "aware that the result [was] a crime." Instruction No. 11, Supp. CP.

The use of a conclusive presumption in a jury instruction is harmless only if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. *State v. Deal*, 128 Wn.2d 693 at 703, 911 P.2d 996 (1996). Here, the state did not provide any independent proof of “guilty knowledge.” RP (8/15/06) 50-147. There is no way of knowing how the jury used the “knowledge” instruction, with its conclusive presumption. Accordingly, the improper instructions were prejudicial. *See, e.g., State v. Reid*, 74 Wn. App. 281 at 289, 872 P.2d 1135 (1994) (where jury may have relied solely on a permissive inference instruction to establish element of fraudulent intent, reversal is required because “[t]here is no way of knowing beyond a reasonable doubt whether the jury relied on the improper basis.”)

For all these reasons, the conviction must be reversed and the case remanded for a new trial. *Goble, supra; Mertens, supra.*

II. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DEFINE THE TERM “ARREST.”

Jury instructions are sufficient if they allow each party to argue their theory of the case, are not misleading, and properly inform the trier of fact of the applicable law. *State v. Douglas*, 128 Wn. App. 555 at 562, 116 P.3d 1012 (2005). Jury instructions must be “manifestly clear,” since juries lack the tools of statutory construction available to courts. *See, e.g.,*

State v. Harris, 122 Wn.App. 547 at 554, 90 P.3d 1133 (2004). Jurors should not have to speculate about the law, and counsel should not have to persuade the jury as to what the instructions mean or what the law is. *State v. Olmedo*, 112 Wn. App. 525 at 534-535, 49 P.3d 960 (2002).

Trial courts must define technical words and expressions used in jury instructions. *State v. Brown*, 132 Wn.2d 529 at 612, 940 P.2d 546 (1997), *reversed on other grounds by Brown v. Lambert*, 451 F.3d 946 (9th Cir. 2006), *U.S. cert. granted by Uttecht v. Brown*, 127 S. Ct. 1055 (2007). *See also State v. Poling*, 128 Wn. App. 659 at 669, 116 P.3d 1054 (2005). A term is technical if its legal definition differs from the common understanding of the word. *State v. Olmedo*, 112 Wn. App. 525 at 533-534, 49 P.3d 960 (2002). Failure to define a term upon request is reviewed for abuse of discretion. *Olmedo*, at 533-534.

After a jury begins deliberations, the court “may supplement an instruction with an explanatory instruction if the meaning of the language is unclear or if the language might mislead persons of ordinary intelligence.” *State v. Young*, 48 Wn. App. 406 at 415, 739 P.2d 1170 (1987). Words which have ordinary and accepted meanings are not subject to clarification; however, the court is required to define technical terms. *Young*, 48 Wn. App. at 415-416. A court’s refusal to answer a

jury's question with a clarifying instruction is reviewed for abuse of discretion. *State v. Ng*, 110 Wn.2d 32 at 42, 750 P.2d 632 (1988).

A person is guilty of Escape in the First Degree if "he or she knowingly escapes from custody or a detention facility while being detained pursuant to a conviction of a felony..." RCW 9A.76.110. Custody includes "restraint pursuant to a lawful arrest..." RCW 9A.76.010.

According to Division III of the Court of Appeals, a person is arrested when she or he is "deprived of his [or her] liberty by an officer who intends to arrest." *State v. Solis*, 38 Wn. App. 484 at 486, 685 P.2d 672 (1984); *see also State v. Walls*, 106 Wn. App. 792 at 795-798, 25 P.3d 1052 (2001), *relying on Soliss, supra*. In *Solis*, the officer deprived the defendant of liberty by grabbing his arm and telling him he was under arrest. In *Walls*, the officer deprived the defendant of liberty by telling him he was under arrest, escorting him to the patrol car, and trying to handcuff him.

Solis and *Walls* are consistent with Fourth Amendment cases, in which a seizure (such as an arrest) does not occur unless the arrestee actually submits to a show of authority that would cause a reasonable person to believe that he or she is not free to leave. *State v. Young*, 86 Wn. App. 194 at 200, 935 P.2d 1372 (1997), *citing (inter alia) California*

v. Hodari D., 499 U.S. 621, 628, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991) and *U.S. v. Mendenhall*, 446 U.S. 544, 553, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

Here, defense counsel asked the trial court to define “arrest.” RP (8/16/06) 19.⁴ The court refused to define arrest (“I don’t know if I can define arrest,” RP (8/16/06) 23), initially offered to define “restraint” as physical force, threat of force, or conduct implying force will be used, and finally concluded that no further instructions would be given. RP (8/16/06) 23-27.

This was error, because under the facts of this case, “arrest” is a technical legal term requiring definition. The trial court should have clarified for the jury that an arrest occurs when an officer (who intends to arrest a person) actually deprives that person of liberty. *Solis, supra; Walls, supra*. Without such an instruction, the jurors were left to speculate on the meaning of the term arrest. The failure to define arrest confused the jury, as is evident from the jury’s question on the subject. RP (8/16/06) 66; *see also* Inquiry from Jury and Court’s Response, Supp. CP.

⁴ Defense counsel did not propose a written instruction. This was apparently due to the prosecutor’s failure to file proposed instructions until the last day of trial. RP (8/16/06) 18-19.

The trial court's refusal to give an instruction defining arrest at Mr. Brooks' request was an abuse of discretion, as was its decision not to give a clarifying instruction in response to the jury's question. *Olmedo, supra*; *Ng, supra*. The conviction must be reversed and the case remanded for a new trial.

III. THE TRIAL JUDGE MISSTATED THE LAW AND IMPROPERLY COMMENTED ON THE EVIDENCE BY GIVING INSTRUCTION NO. 10.

As noted above, jury instructions may not be misleading and must properly inform the trier of fact of the applicable law. *Douglas, supra*. In addition, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. Article IV, Section 16. A jury instruction may constitute a comment on the evidence. *State v. Becker*, 132 Wn.2d 54, 935 P.2d 1321 (1997); *State v. Eaker*, 113 Wn.App. 111, 53 P.3d 37 (2002). An instruction improperly comments on the evidence if the instruction resolves an issue of fact that should have been left to the jury. *Eaker* at 118. Whether or not an instruction constitutes an impermissible comment depends on the facts and circumstances of the case. *State v. Jackman*, 125 Wn. App. 552 at 558, 104 P.3d 686 (2004).

To convict Mr. Brooks of Escape in the First Degree, the jury was required to find that he escaped from "custody," knowing that he was

“leaving custody without permission.” Instruction No. 7, Supp. CP.

“Custody” is defined by statute to include “restraint pursuant to a lawful arrest...” RCW 9A.76.010. *See* Instruction No. 9, Supp. CP. Under this statute, the lawfulness of the arrest is a factual issue to be determined by the jury. RCW 9A.76.010.⁵

Instead of providing proper guidance on the issue of “lawfulness,” the court told the jury that “[a]n arrest is lawful if made pursuant to an arrest warrant.” Instruction No. 10, Supp. CP. This was erroneous for two reasons. First, Instruction No. 10 is a comment on the evidence in violation of Wash. Const. Article IV, Section 16. The instruction was “tantamount to directing a verdict” on the issue of lawfulness. *Jackman, supra, at 560; see also State v. Primrose, 32 Wn. App. 1, 645 P.2d 714 (1982)* (improper for judge to instruct the jury in a bail jumping case that defendant had not, as a matter of law, introduced evidence of a lawful excuse for his failure to appear). A comment of this sort is “structural

⁵ The fact that “lawfulness” may also be examined as an issue of law is irrelevant: many crimes turn on the jury’s assessment of what is or is not lawful. *See, e.g.,* RCW 9A.16.020(4) and (allowing the use of force to detain someone who enters or remains unlawfully in a building); RCW 9A.40.060 (to convict someone of custodial interference, jury must determine who has the lawful right of custody); RCW 9A.48.060 (defendant may assert a defense to reckless burning if her or his “sole intent was to destroy or damage the property for a lawful purpose.”)

error [which] infects the entire trial process,” and is not subject to harmless error analysis. *Jackman, supra*, at 560.

Second, Instruction No. 10 is an incorrect statement of the law. *Douglas, supra*. An arrest made pursuant to a warrant may be unlawful, for example if the warrant was not based on probable cause, was issued by someone lacking authority to do so, or was executed improperly.

Furthermore, the lawfulness of any arrest was a hotly contested issue in this case. The court found that Deputy Ley illegally seized Mr. Brooks by telling him to wait while the deputy checked for a warrant. RP (8/16/06) 14. In addition, the arrest warrant was never physically issued or signed, and was not issued by the Secretary of DOC as required by statute. RP (8/15/06) 72-88. These factors relate to whether or not Mr. Brooks was lawfully arrested; however, because of Instruction No. 10, defense counsel was unable to present these theories to the jury.

The trial judge commented on the evidence, misstated the law, and prevented Mr. Brooks from presenting his theories to the jury. Because of this, the conviction must be reversed and the case remanded to the trial court for a new trial. *Jackman, supra*.

IV. MR. BROOKS WAS NOT IN CUSTODY WHEN HE FLED DEPUTY LEY, BECAUSE DOC DID NOT PROPERLY ISSUE A WARRANT FOR HIS ARREST.

Evidence is insufficient as a matter of law if undisputed facts are legally insufficient to sustain a conviction. *See, e.g., State v. Loucks*, 98 Wn.2d 563 at 564, 656 P.2d 480 (1983); *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

An arrest warrant disturbs a person in her or his private affairs. *State v. Walker*, 101 Wn. App. 1 at 5-6, 999 P.2d 1296 (2000). Because of this, an arrest warrant may not issue “without authority of law” as required by Wash. Const. Article I, Section 7. *Walker*, at 5-6. It is axiomatic that an arrest warrant may not be served unless it has been issued.

In interpreting a statute, a court must assume that the legislature means exactly what it says. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001), *cert. den. sub nom Keller v. Washington*, 534 U.S. 1130, 122 S.Ct. 1070, 151 L.Ed.2d 972 (2002). If the statute is clear on its face, its meaning is derived from the statutory language alone; an unambiguous statute is not subject to judicial interpretation. *State v. Cramm*, 114 Wn.App. 170 at 173, 56 P.3d 999 (2002); *State v. Chester*, 133 Wn.2d 15 at 21, 940 P.2d 1374 (1997). The court may not add language to a clearly worded statute, even if it believes the legislature intended more. *Chester, supra*.

A. The arrest warrant was invalid because it was not personally issued by the secretary of DOC.

Under RCW 9.94A.740 (which governs the arrest of defendants who violate community placement or community custody) the secretary of the department of corrections⁶ is empowered to issue arrest warrants:

The secretary may issue warrants for the arrest of any offender who violates a condition of community placement or community custody.

RCW 9.94A.740(1).

No other statute authorizes DOC to issue arrest warrants for offenders who violate community custody or community placement.

Under the plain language of RCW 9.94A.740, the secretary of DOC must personally issue warrants for violations of community custody/placement.

Because the language is unambiguous, this court must assume that the legislature meant exactly what it said, and may not add language to the statute, even if this court believes, as the trial court apparently did (RP (8/16/06) 21-27), that the legislature intended more. *Keller, supra*;

Chester, supra. Under RCW 9.94A.740(1), the warrant for Mr. Brooks' arrest was invalid because, as the undisputed testimony established, the

⁶ In fact, the statute refers only to "the secretary." Nowhere in RCW 9.94A is "the secretary" defined as the secretary of DOC. "The department" is defined as the department of corrections. RCW 9.94A.030.

secretary of DOC did not personally issue the warrant. RP (8/15/06) 50-88.

Even if RCW 9.94A.740(1) were considered ambiguous, the rules of statutory construction support Mr. Brooks' position. First, where the legislature specifically designates the things to which a statute applies, there is an inference that omissions were intentional. *Queets Band of Indians v. State*, 102 Wn.2d 1 at 5, 682 P.2d 909 (1984). In such cases, "the silence of the Legislature is telling." *Queets Band of Indians, supra*, at 5. This rule of statutory construction is frequently expressed by the Latin phrase *expressio unius est exclusio alterius* – specific inclusions exclude implication. *State v. Sommerville*, 111 Wn.2d 524 at 535, 760 P.2d 932 (1988). The statute authorizes "the secretary" to issue warrants; it does not empower DOC officers or other department employees to do so. This omission is clear evidence of an intent to limit the power to issue warrants to the secretary personally, without extending the power to other department employees. *Queets Band of Indians; Sommerville*.

Second, when different words are used in the same statute to deal with related matters, a court must presume that the legislature intended those words to have different meanings. *State v. Keller, supra*. Elsewhere in RCW 9.94A, the legislature has made it clear when the secretary need not personally take action, by including language authorizing the

secretary's designee to substitute for the secretary. For example, in RCW 9.94A.685, an alien offender may be released early for deportation if "the secretary *or the secretary's designee* [finds] that such release" is in the state's best interests. RCW 9.94A.685(2), *emphasis added*. In RCW 9.94A.737 (relating to administrative hearings for violations of community custody), an offender is permitted to appeal an adverse decision "to a panel of three reviewing officers designated by the secretary *or by the secretary's designee*." RCW 9.94A.737(4)(e). Under RCW 9.94A.74502 (relating to the interstate compact for adult offender supervision), "[t]he secretary of corrections, *or an employee of the department designated by the secretary*, shall serve as the compact administrator..." RCW 9.94A.74502, *emphasis added*. Under RCW 9.94A.7701, a petition seeking mandatory wage assignment in a criminal action must be accompanied by "a sworn statement by the secretary *or designee*..." RCW 9.94A.7701, *emphasis added*. Under RCW 9.94A.637, relating to discharge of offenders upon completion of sentence, "the secretary *or the secretary's designee* shall notify the sentencing court [of the offender's completion]..." RCW 9.94A.637(1)(a), *emphasis added*. If the offender completes all nonfinancial aspects of the sentence, "*the secretary's designee* shall provide the county clerk with a notice that the offender has completed all nonfinancial requirements of the sentence." RCW

9.94A.637(1)(b), *emphasis added*. Similarly, the legislature has also shown it can leave the particular mechanism for issuance of a warrant up to the department, as in the case of alien offenders facing deportation: “Upon the release of an offender to the immigration and naturalization service, *the department shall issue a warrant for the offender’s arrest within the United States.*” RCW 9.94A.685(4), *emphasis added*. As these examples make clear, the legislature is capable of authorizing department personnel other than the secretary to take specified actions, including issuing arrest warrants. It did not do so in RCW 9.94A.740.

Because the plain language of RCW 9.94A.740 requires the secretary to personally issue an arrest warrant for violation of community custody or community placement, the arrest warrant in this case was invalid. Because the warrant was invalid, Mr. Brooks was not “restrained pursuant to a lawful arrest...,” and thus was not in custody at the time he fled Deputy Ley. RCW 9A.76.110; RCW 9A.76.010; *See* Instructions Nos. 7, 9, and 10, Supp. CP. The conviction must be reversed and the case dismissed with prejudice.

B. Mr. Brooks was not in custody because DOC never “issued” an arrest warrant.

As noted above, the secretary of DOC “may *issue* warrants for the arrest of any offender who violates a condition of community placement

or community custody.” RCW 9.94A.740(1), *emphasis added*. The term “issue” not defined in the statute; accordingly, it must be given its plain and ordinary meaning, derived from a standard dictionary if possible. *McClarty v. Totem Elec.*, 157 Wn.2d 214 at 225, 137 P.3d 844 (2006).

“Issue,” when used as a transitive verb, means “to put out; deliver for use, sale, etc... put into circulation; to mint, print, or publish for sale or distribution: to issue a new coin; to issue a new book; to distribute (food, clothing, etc.) to one or more officers or enlisted soldiers or to a military unit... to send out; discharge; emit.” *Dictionary.com, based on the Random House Unabridged Dictionary*, Random House, Inc (2006). *See also The American Heritage Dictionary of the English Language, Fourth Edition*, Houghton Mifflin (2000) (“To cause to flow out; emit...To circulate or distribute in an official capacity: *issued uniforms to the players*...To publish: *issued periodic statements*.”)

Using the plain and ordinary meaning of “issue,” RCW 9.94A.740 requires that the secretary actually generate an arrest warrant.⁷ This is confirmed by additional language in the statute, which requires that the language of the warrant “authorize any law enforcement or peace officer

⁷ Presumably, the warrant must be physically (and not merely electronically) issued, and must be signed by someone (if not by the secretary personally). In this case, no “warrant” was ever created, not even electronically.

or community corrections officer of this state or any other state where such offender may be located, to arrest the offender and place him or her in total confinement pending disposition of the alleged violation...” RCW 9.94A.740(1).

In this case, no warrant was ever generated. Instead, an anonymous clerical worker made a database entry, erroneously claiming that a warrant had been issued. RP (8/15/06) 50-88. Since no actual warrant was generated, Mr. Brooks was not lawfully arrested, and was not in custody at the time he fled Deputy Ley. RCW 9A.76.110; RCW 9A.76.010; *See* Instructions Nos. 7, 9 and 10, Supp. CP. Because of this, the conviction must be reversed and the case dismissed with prejudice.

V. MR. BROOKS WAS DENIED A FAIR TRIAL BY DEPUTY LEY’S VIOLATION OF THE COURT’S ORDER *IN LIMINE*.

When examining a trial irregularity to determine whether a mistrial is appropriate, courts should consider (1) the seriousness of the irregularity, (2) whether the statement was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark. *State v. Young*, 129 Wn. App. 468 at 472-473, 119 P.3d 870 (2005); *State v. Escalona*, 49 Wn. App. 251 at 254, 742 P.2d 190 (1987). While juries are presumed to follow a court’s instruction to disregard testimony, “no instruction can remove the

prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.” *Escalona*, at 255, *internal citations omitted*.

A witness may not testify as to the guilt of the defendant, either directly or by inference. *Olmedo*, *supra*, at 530. “Such an improper opinion undermines a jury’s independent determination of the facts, and may invade the defendant’s constitutional right to a trial by jury.”

Olmedo, *supra*, at 530.

Whether testimony constitutes an impermissible opinion on the defendant’s guilt is determined from the circumstances of each case. *Olmedo*, *supra*. Factors to consider include the type of witness, the nature of the charges, the type of defense, and the other evidence. *Olmedo*, at 531. For example, in *Olmedo*, an expert testified that a propane tank possessed by the defendant was not approved by DOT, a “core element of the charges.” *Olmedo*, at 532. The court held that he was permitted to describe what he saw, but not that the tanks were unapproved:

We view [the expert’s] testimony as giving improper legal conclusions... Here, the critical question was whether the propane tanks were approved by the DOT. This called for an improper legal conclusion because the answer requires the application of law defining a DOT approved tank to the specific facts. *Olmedo*, at 532.

In this case, Deputy Ley gave a legal conclusion that Mr. Brooks was under arrest. RP (8/15/06) 103. This testimony required the application of law (the definition of arrest) to the specific facts (informing Mr. Brooks of the warrant and approaching him to apply handcuffs). This was not only improper, but it went to the heart of Mr. Brooks' defense. Defense counsel swiftly objected and moved for a mistrial. RP (8/15/06) 103. The court sustained the objection and cautioned the jury; however, "A bell once rung cannot be unring." *State v. Easter*, 130 Wn.2d 228 at 230-239, 922 P.2d 1285 (1996), *internal citations omitted*.

Reversal is required under *Escalona, supra*. First, the irregularity was serious. The state's main witness violated the court's pretrial order *in limine* prohibiting testimony that Mr. Brooks was legally under arrest at the time he fled. RP (8/15/06) 103. This inappropriate testimony went to the heart of Mr. Brooks' defense (that he was not in custody at the time he ran), and was highly prejudicial.

Second, the testimony was not cumulative, as there was no other testimony drawing a legal conclusion from the facts as they were presented in court. RP (8/15/06) 50-147.

Third, although the court did give an instruction to disregard the testimony, it is unlikely that the jury was able to ignore testimony from a law enforcement officer as to whether or not Mr. Brooks was legally under

arrest at the time he fled. This is especially so, given that the jury was poorly instructed on what constitutes an arrest (as argued elsewhere in the brief). The issue is one on which the jury focused, as evidenced by the jury note inquiring about the definition of arrest. Supp. CP.

For all these reasons, the trial court abused its discretion in refusing to grant a mistrial. The conviction must be reversed and the case remanded for a new trial. *Young*, 129 Wn. App. 468; *Escalona, supra*; *See also State v. Jungers*, 125 Wn. App. 895, 106 P.3d 827 (2005); *State v. Wilburn*, 51 Wn. App. 827, 755 P.2d 842 (1988).

VI. THE TRIAL COURT ERRED BY REFUSING TO SUPPRESS EVIDENCE DERIVED FROM DEPUTY LEY'S ILLEGAL SEIZURE OF MR. BROOKS.

Article I, Section 7 of the Washington State Constitution provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. Article I, Section 7.

The Fourth Amendment to the Federal Constitution provides

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

The Supreme Court has stated that "it is by now axiomatic that article I, section 7 provides greater protection to an individual's right of

privacy than that guaranteed by the Fourth Amendment.” *State v. Parker*, 139 Wn.2d 486 at 493, 987 P.2d 73 (1999). Under Article I, Section 7, warrantless seizures are unreasonable *per se*. *State Reichenbach*, 153 Wn.2d 126 at 131, 101 P.3d 80 (2004).

Both the Fourth Amendment and Article I, Section 7 apply to brief detentions that fall short of formal arrest. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d (1975), *State v. Crane*, 105 Wn. App. 301, 311, 19 P.3d 1100 (2001). In order to justify a brief investigative detention, the police must have a well-founded suspicion of criminal activity based on specific and articulable facts; there must be a substantial possibility that criminal conduct has occurred or is about to occur.⁸ *State v. O’Cain*, 108 Wn. App. 542, 548, 31 P.3d 733 (2001).

A seizure occurs when the person seized actually submits to a show of authority that would cause a reasonable person to believe that he or she is not free to leave. *State v. Young*, 86 Wn. App. 194 at 200, 935 P.2d 1372 (1997), *citing (inter alia) California v. Hodari D.*, 499 U.S. 621,

⁸ The standard is based on the U.S. Supreme Court’s holding in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

628, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991) and *U.S. v. Mendenhall*, 446 U.S. 544, 553, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

The U.S. Supreme Court has carved out exceptions to the Fourth Amendment exclusionary rule; these exceptions are justified when the rule would “not result in appreciable deterrence” of conduct that violates a defendant’s constitutional right to be free from unreasonable searches and seizures. *United States v. Janis*, 428 U.S. 433 at 454, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976). See also e.g., *United States v. Leon*, 468 U.S. 897 at 919-920, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (exception where searching officer executes defective search warrant in “good faith”); *Arizona v. Evans*, 514 U.S. 1 at 14, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) (exception for clerical errors by court employees); *Walder v. United States*, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954) (exception for impeachment purposes). The Fourth Amendment’s exclusionary rule does not bar evidence of a new crime that follows illegal police activity. See, e.g., *United States v. Sledge*, 460 F.3d 963 at 966 (8th Cir. 2006) (“When a defendant commits a new and distinct crime during an unlawful detention, the Fourth Amendment’s exclusionary rule does not bar evidence of the new crime”); *United States v. Mitchell*, 812 F.2d 1250 at 1254 (9th Cir. 1987) (“[E]xtending the exclusionary rule to bar prosecution of new crimes is simply unwarranted...”)

Washington's exclusionary rule "has a long history, independent from that of the federal rule... When an individual's right to privacy is violated, article I, section 7 requires the application of the exclusionary rule." *In re Personal Restraint of Maxfield*, 133 Wn.2d 332 at 343, 945 P.2d 196 (1997). Three primary objectives underlie Washington's exclusionary rule: " '[F]irst, and most important, to protect privacy interests of individuals against unreasonable governmental intrusions; second, to deter the police from acting unlawfully in obtaining evidence; and third, to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means.'" *State v. Boland*, 115 Wn.2d 571 at 581, 800 P.2d 1112 (1990), quoting *State v. Bonds*, 98 Wn.2d 1, 653 P.2d 1024 (1982), *U.S. cert. denied*, 464 U.S. 831 (1983).

In this case, Mr. Brooks was unlawfully detained. When the deputy greeted him, Mr. Brooks said "[H]ey, gotta go..." RP (8/15/06) 100. In response, the deputy said "[H]old on, Rich, I'm running a check," and Mr. Brooks remained in his car, waiting for permission to leave. RP (8/15/06) 136. The trial court determined that Mr. Brooks was illegally seized. RP (8/16/06) 14. The state has not cross-appealed this ruling.

Mr. Brooks' responses to the deputy's directives should have been suppressed under Article I, Section 7. First, he was illegally seized and

thus the deputy unreasonably invaded his privacy. Second, suppression is required to deter future police illegality: if the exclusionary rule is not applied, there will be no incentive for police to avoid illegal seizures of persons not possessing contraband (or other physical evidence). Third, the dignity of the judiciary is impacted when prosecution is predicated on illegal police behavior.

If Mr. Brooks had been allowed to leave when he said “[H]ey, gotta go,” the arrest would not have occurred in the manner outlined. Instead, Mr. Brooks would likely have been arrested at another time and place. There is no reason to suppose he would have fled under different circumstances. Indeed, the deputy’s indication that he was running a check gave Mr. Brooks time to contemplate being taken into custody, and the possibility of fleeing.

The trial court’s reasoning (that there was no physical evidence to suppress) is not a basis to deny suppression. An illegal seizure can yield statements, testimonial acts, or other nontangible evidence subject to suppression. Public policy may require admission of assaultive behavior despite a violation of Article I, Section 7 (*see State v. Mierz*, 72 Wn. App. 783, 866 P.2d 65 (1994), *affirmed at* 127 Wn.2d 460, 901 P.2d 286

(1995)),⁹ but there is no indication here that Mr. Brooks attempted to assault the deputy.

Because Mr. Brooks was illegally seized, his statements, testimonial acts, and response to the deputy's actions should have been suppressed under Article I, Section 7. The conviction must be reversed and the case dismissed.

VII. IF ANY ISSUES ARE WAIVED ON APPEAL, MR. BROOKS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment to the United States Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the Right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution declares that “In criminal prosecutions the accused shall have the right to

⁹ In *Mierz*, which was a Fourth Amendment case, both the Court of Appeals and the Supreme Court declined to apply the exclusionary rule to assaultive behavior for public policy reasons: “[Public] policy mandates admission of evidence of assaults against officers while they are performing their official duties and requires the citizen whose rights have been violated to seek redress through a civil action. We find the agents’ violation of Mierz’ constitutional rights extremely offensive. However, we cannot rule that suppression of assault evidence is a proper remedy for a constitutional violation preceding the assault. Such a holding would require suppression in future cases where the injury to the officer is far more serious, thus further endangering the officers charged with performing difficult and dangerous tasks as part of their official duties. The logical implication of such a holding would be suppression even where an officer is murdered.” *Mierz* 72 Wn.App. 783. See also 127 Wn.2d at 473, 475: “Officers would be subject to attack if their allegedly unlawful entry onto property or improper arrest forecloses admission of evidence of assaults upon them...Any benefit provided by exclusion of evidence in these cases comes at too high a price.” Neither court rejected the defendant’s argument on the ground that the evidence was intangible or because it resulted from the police illegality.

appear and defend in person, or by counsel...” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759 at 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

Defense counsel must employ “such skill and knowledge as will render the trial a reliable adversarial testing process.” *State v. Lopez*, 107 Wn.App. 270 at 275, 27 P.3d 237 (2001). Counsel’s performance is evaluated against the entire record. *Lopez*, at 275.

The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel’s performance was deficient, and (2) whether this deficiency prejudiced the defendant. *State v. Holm*, 91 Wn.App. 429, 957 P.2d 1278 (1998), citing *Strickland*, *supra*. The defendant must show a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *Holm*, *supra*, at 1281.

To establish deficient performance, a defendant must demonstrate that counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must

show that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.” *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d 610 (2001). A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).

If any of the errors raised in this brief are waived on appeal, then Mr. Brooks was denied the effective assistance of counsel.

A. Failure to object to Instructions Nos. 11 and 12.

Here, knowledge (that Mr. Brooks' knew his actions would result in leaving custody without permission) was an essential element of the crime. Instruction No. 7, Supp. CP. Despite this, Mr. Brooks' attorney failed to object to the court's instructions, which contained a mandatory presumption. RP (8/16/06) 15-29. This failure to object was deficient performance. A reasonably competent attorney would have been familiar with the two mental elements of the offense, and would also have been aware (from the *Goble* case) of the danger that a jury would conflate the

two elements under the instructions as given.¹⁰ *Goble, supra*. See, e.g., *State v. Thomas*, 109 Wn.2d 222 at 229, 743 P.2d 816 (1987) (“[a] reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an [appropriate] instruction.”)

Mr. Brooks was prejudiced by the error. The instructions were misleading and contained an illegal mandatory presumption. As a result, the jury would not have been able to properly interpret the “to convict” instructions, and improperly imputed knowledge to Mr. Brooks (that he was leaving custody without permission) based on his intentional act of fleeing the deputy. Defense counsel’s failure to object to the improper instructions denied Mr. Brooks the effective assistance of counsel.

Strickland. The conviction must be reversed, and the case remanded for a new trial.

B. Failure to propose an instruction defining “arrest.”

After noting the omission from the state’s proposed instructions, defense counsel asked the court to define the term “arrest.” Whether or not Mr. Brooks was lawfully arrested was critical to the determination of

¹⁰ Trial commenced on August 15, 2006, nearly seven months after *Goble* was published.

whether or not he was in custody, for purposes of Instruction No. 7, Supp. CP. If the court's failure to define "arrest" is not preserved for review, then Mr. Brooks was denied the effective assistance of counsel.

Strickland, supra.

C. Failure to file a written motion to suppress and dismiss.

Because the illegality of the initial seizure was revealed for the first time during Deputy Ley's testimony, defense counsel did not file a written motion to suppress the evidence or to dismiss the case. If the court's refusal to suppress and dismiss is not preserved for review, then Mr. Brooks was denied the effective assistance of counsel. *Strickland, supra.*

CONCLUSION

For the foregoing reasons, Mr. Brooks' conviction for Escape in the First Degree must be reversed and the case dismissed with prejudice. In the alternative, Mr. Brooks must be granted a new trial.

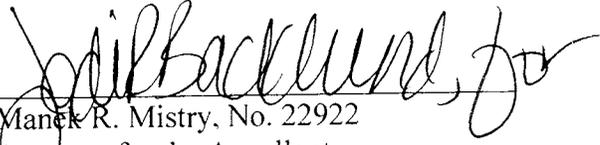
Respectfully submitted on March 6, 2007.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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and to:

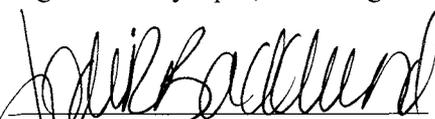
Timothy F. Davis
Clallam County Prosecutor
223 East 4th Street
Port Angeles, WA 98362-3015

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 6, 2007.

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

Signed at Olympia, Washington on March 6, 2007.



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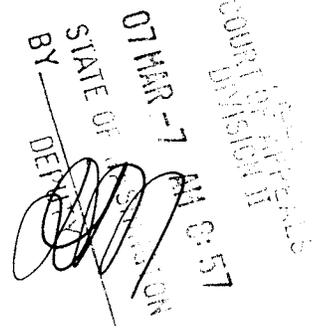
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