

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

NO. 35292-3-II

STATE OF WASHINGTON,

Respondent,

vs.

RICHARD EDGAR BROOKS,

Appellant.

A handwritten signature in black ink, appearing to be 'RM', is written over a faint, circular stamp. The stamp contains some illegible text, possibly a date or a reference number.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLALLAM COUNTY  
CAUSE NO. 06-1-00226-1

---

**BRIEF OF RESPONDENT**

LAUREN M. ERICKSON    WBA #19395  
Deputy Prosecuting Attorney  
for Clallam County

Clallam County Courthouse  
223 East Fourth Street, Suite 11  
Port Angeles, WA 98362-3015  
(360) 417-2297 or 417-2301

Attorney for Respondent

TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES .....	ii
I. STATEMENT OF THE CASE .....	1
II. ARGUMENT .....	1
1. The Court’s Instructions Did Not Create a Mandatory Presumption that Relieved the State of its Burden to Prove All Elements of the Crime .....	1
2. The Trial Court Did Not Abuse Its Discretion When it Did Not Define the Term Arrest .....	3
3. The Trial Judge Did Not Misstate the Law, Nor Did it Improperly Comment on the Evidence by Giving Instruction No. 10. ....	4
4. The Department of Corrections Warrant Was Valid and the Defendant Was in Custody When he Fled .....	6
5. The Trial Court Did Not Abuse Its Discretion When it Denied the Motion for a Mistrial Based Upon Deputy Ley’s Use of the Word “Arrest” .....	7
6. The Trial Court Did Not Err When it Did Not Suppress Evidence Derived After the Defendant was Stopped .....	8
7. Mr. Brooks Was Not Denied Effective Assistance of Counsel for Failing to Object to Two Jury Instructions and Not Filing Written Motion to Suppress .....	11
III. CONCLUSION .....	12

## TABLE OF AUTHORITIES

<b>Cases</b> .....	<b>Page(s)</b>
<i>State v. Boyd</i> , ____ Wn.App. ____, ____ P.3d ____ (2007) .....	1
<i>State v. Brown</i> , 132 Wn.2d 529 at 612, 940 P.2d 546 (1997), <i>reversed on other grounds by Brown v. Lambert</i> , 451 F.3d 946 (9th Cir. 206), <i>U.S. cert. granted by Uttecht v. Brown</i> , 127 S.Ct. 1055 (2007) .....	3
<i>State v. Demery</i> , 144 Wn.2d 753, 30 P.3d 1278 (2001) .....	4
<i>State v. Gerdis</i> , ____ Wn.App. ____, 150 P.3d 627 (2007) .....	1
<i>State v. J.P.</i> , 149 Wn.2d 444, 69 P.3d 318 (2003) .....	7
<i>State v. Jackman</i> , 125 Wn.App. 552, 104 P.3d 686 (2004) .....	5
<i>State v. Olmedo</i> , 112 Wn.App. 525 49 P.3d 960 (2002) .....	3
<i>State v. Poling</i> , 128 Wn.App. 659, 116 P.3d 1054 (2005) .....	3
<i>State v. Primrose</i> , 32 Wn.App. 1, 645 P.2d 714 (1982) .....	5
<i>State v. Rothenberger</i> , 73 Wn.2d 596, 440 P.2d 184 (1968) .....	8, 9
<i>State v. Saunders</i> , 91 Wn.App. 575, 958 P.2d 364 (1998) .....	11
<i>State v. Spring</i> , 128 Wn.App. 398, 115 P.3d 1052 (2005) .....	10
 <b>Statutes</b>	
RCW 9.94A.740(1).....	6

## I. STATEMENT OF THE CASE

For the purposes of this appeal, the State agrees with the facts as set forth by the Appellant in his brief.

## II. ARGUMENT

### 1. **The Court's Instructions Did Not Create a Mandatory Presumption that Relieved the State of its Burden to Prove All Elements of the Crime.**

In the case herein, the State was required to prove that the Defendant was being detained pursuant to a felony offense, that the Defendant escaped from that detention (custody) and that the Defendant knew that his actions would result in leaving custody without permission.

The jury was given instructions defining both “intentionally” and “knowingly.” The “intentionally” instruction was not applicable here and was unnecessary. However, the fact that it was given did not affect the case and did not conflate two mental states. *State v. Gerdis*, \_\_\_\_ Wn.App. \_\_\_\_, 150 P.3d 627 (2007).

The conflation of mental states is only an issue where the State must prove two mens rea elements. *State v. Boyd*, \_\_\_\_ Wn.App. \_\_\_\_, \_\_\_\_ P.3d \_\_\_\_ (2007). Mr. Boyd was convicted of voyeurism for photographing the intimate parts of a young girl. Boyd argued that the “knowingly” instruction which said “acting knowing or with knowledge is also established if a person acts intentionally” created a mandatory presumption that if the defendant intentionally took a photograph that he knowingly photographed the victims intimate parts. The court rejected this argument, stating that unless the State has more than one mental

state to prove, that there is no mandatory presumption or conflation of mental states.

Here, the Defendant makes the same argument; i.e., that if the Defendant intentionally escaped from custody that he did so knowing that his actions would result in leaving custody without permission. Just as in *Gerdis* and *Boyd*, the State had only one *mens rea* to prove, and therefore there was no conflation of mental states.

Here, in addition to the language in “knowingly” instruction which addressed “intentionally,” the court also included an actual “intentionally” instruction. This, however, does not change the argument.

The Defendant argues that because of the inclusion of this “intentionally” instruction, that this makes this case more akin to what happened in the *Goble* case.<sup>1</sup> This is not correct. In *Goble*, in addition to the instruction on “intentionally,” the “to convict” instruction incorrectly required that the State prove that the Defendant knew that when he assaulted the victim, that the victim was a law enforcement officer. *Goble*, at 200.

In this case, although the court unnecessarily included the “intentionally” instruction, the “to convict” instruction did not require that the Defendant must intentionally escape from custody.

There was no conflation of mental states and the State was not relieved of its burden to prove all the elements of the crime.

---

<sup>1</sup> *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005).

## **2. The Trial Court Did Not Abuse Its Discretion When it Did Not Define the Term Arrest.**

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. 206), *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.

“Arrest” is not a technical term, and its legal definition does not differ from the common understanding of the word. The trial court did not abuse its discretion when it did not define the word “arrest” for the jury.

Here, although the Defendant’s arrest is the basis for the Defendant being in custody, the arrest is really simply part of the *res gestae* of this Defendant’s actions. The real issue is whether or not the Defendant was in custody when he escaped.

Mr. Brooks was arrested pursuant to a Department of Corrections warrant. The fact of the arrest was not in dispute; there was, however, a dispute over whether the arrest was lawful. Under the facts of this case, defining the word arrest was unnecessary and would have been superfluous.

Contrary to the Defendant's argument, the question asked by the jury shows that they were not having problems understanding the word "arrest," but wanted to know if there were specific actions or declarations that needed to be made for an arrest to have been effectuated. The suggestion proffered by the defendant in his brief for a definition of "arrest" – a person is arrested when she or he is deprived of his [or her] liberty by an officer who intends to arrest – would not have answered the question proffered by the jury.

A court abuses its discretion only if no reasonable person would adopt the view espoused by the trial court – where reasonable people could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. *State v. Demery*, 144 Wn.2d 753, 753, 30 P.3d 1278 (2001).

This is not a situation where no reasonable person would adopt the view of the trial court. The court did not abuse its discretion.

**3. The Trial Judge Did Not Misstate the Law, Nor Did it Improperly Comment on the Evidence by Giving Instruction No. 10.**

"An arrest is lawful if made pursuant to an arrest warrant." This instruction does not misstate the law, nor is it an improper comment on the evidence.

The Defendant argues that the instruction is a misstatement of the law because "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." That

may be true; however, if the legality of the warrant was at issue, it is a legal issue that should have been addressed by the court. Whether or not a warrant may be invalid is not a question for the jury. For the purposes of this case, the instruction did not misstate the law.

The Defendant further argues that such a statement – i.e., “an arrest is lawful if made pursuant to an arrest warrant” – is an improper comment on the evidence. This is not correct either.

Whether or not an instruction constitutes an impermissible comment on the evidence depends on the facts and circumstances of the case. *State v. Jackman*, 125 Wn.App. 552, 558, 104 P.3d 686 (2004).

Here, the instruction needs to be read in conjunction with the instruction defining “custody.” In that instruction, “custody” was defined in part as “restraint pursuant to a lawful arrest.” In instructing the jury that “an arrest is lawful when made pursuant to an arrest warrant,” the Court was simply explaining a term referenced in another instruction. It is not “tantamount to directing a verdict.”

In support of his position, the Defendant used the example that it was improper for the judge to instruct the jury in a bail jumping case “that the defendant had not, as a matter of law, introduced evidence of a lawful excuse for his failure to appear.”<sup>2</sup> Such a statement is not the equivalent of the instruction given in this case. The instruction given in the bail jumping case was more than an impermissible comment on the evidence, it pretty much told the jury that the defendant had no defense

---

<sup>2</sup> *State v. Primrose*, 32 Wn.App. 1, 645 P.2d 714 (1982).

and was guilty. That instruction clearly created structural error that infected the entire process. That is not what happened here.

Here, the instruction was merely a statement on the law. The instruction does not become an impermissible comment on the evidence simply because the statement of law mirrors some of the facts of the case.

In giving Instruction No. 10, the court did not espouse a view that no reasonable person would, and therefore did not abuse its discretion.

**4. The Department of Corrections Warrant Was Valid and the Defendant Was in Custody When he Fled.**

At trial, John Laing of the Department of Corrections testified that he requested that a “secretary’s warrant” be issued for the arrest of the Defendant. According to Mr. Laing, he does that by e-mailing the information to the Records Unit which then “teletypes the information into the computer” and “generates a warrant.” RP 8/15/06 at 77.

Pursuant to RCW 9.94A.740(1), community corrections officers “may suspend the person’s community placement or community custody status and arrest or cause the arrest and detention in total confinement . . .” (emphasis added).

Clearly, the community corrections officers may cause the arrest of offenders. That is what occurred here – by sending the appropriate information to the records division, Mr. Laing caused the arrest of the Defendant as provided by statute.

Moreover, the court shall not construe a statute so as to create an absurd result. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Clearly, the Legislature did not mean that only the Secretary of the Department of Corrections could issue warrants. First of all, the statute reads “The secretary may issue warrants . . .” (emphasis added). Here, the lower case “s” was used to reflect the administrative department in general and not the specific Secretary of the Department of Corrections.

The Department of Corrections warrant was valid, and the Defendant was in custody when he fled.

**5. The Trial Court Did Not Abuse Its Discretion When it Denied the Motion for a Mistrial Based Upon Deputy Ley’s Use of the Word “Arrest.”**

Contrary to the defense lawyer’s assertion during trial that Deputy Ley had violated an order in limine when he used the word “arrest,” there was never any such order. Although defense counsel mentioned that he had concerns with usage of the words “custody, arrest and escape,” there was never any order in limine with regard to the word “arrest.” The court ruled that Deputy Ley could not say that there was an escape warrant; the court never addressed usage of the word “arrest.” RP 8/15/07 at 20-26.

The court did not abuse its discretion in denying a motion for a mistrial based upon an order in limine because there was never such an order.

Furthermore, even if there had been such an order, the court gave curative instructions to the jury telling them to disregard the statement

and that one of the issues they would have to decide was whether or not an arrest took place. RP 8/15/06 at 107.

This is not a situation wherein the bell cannot be unring. If nothing else, the jury was certainly going to hear that the Deputy contacted him while he was sitting in a car – that the Defendant turned toward the Deputy, put both feet out of the car and on to the ground, and leaned forward with both hands, somewhat closed with his wrists together. RP 8/15/06 at 102-103. It is not as though the jury heard an inflammatory fact about the Defendant that they weren't supposed to hear. Based upon the judge's curative statements, the jury understood that the State believed that the Defendant was under arrest, that the Defendant's position was that he was not, and that it will be the jury's job to decide the issue regardless of what Deputy Ley said.

There was no order in limine prohibiting Deputy Ley from using the word arrest, and the court did not abuse its discretion when it denied the motion for a mistrial based upon a non-existent order.

**6. The Trial Court Did Not Err When it Did Not Suppress Evidence Derived After the Defendant was Stopped.**

The trial court ruled that when Mr. Brooks was initially stopped, it was an illegal seizure. Under the current state of law, the trial court is probably correct; however, the court did not err when it did not suppress "evidence" derived after the Defendant was stopped.

In making its ruling, the trial court relied upon *State v. Rothenberger*, 73 Wn.2d 596, 440 P.2d 184 (1968). Mr. Rothenberger

and his friend were traveling in Oregon where they were stopped by the Oregon State Police for “a routine check to determine if the driver was properly licensed to drive.” Mr. Rothenberger provided his name to the officer and satisfied him that Rothenberger was the owner of the car and had a license to drive. Mr. Rothenberger and his friend drove away. Shortly thereafter, the officer learned, as a result of an identification check, that Rothenberger was wanted on a felony charge in Arizona. This information was transmitted to other officers and, as a result of a road block, Rothenberger was caught and arrested. Subsequent to his arrest, Rothenberger made statements as to his involvement in a burglary in Seattle.

The court held that although the initial stop of Rothenberger was illegal and may have prevented the use of evidence seized as a result of that arrest, the identity of the person including his description, the description of his car, and the license plate number are all matters that are observable to an alert, intelligent officer. Rothenberger, at 600.

Here, the officer recognized Mr. Brooks, and said “Hold on, I’m doing a radio check.” Within approximately thirty seconds, the existence of the warrant was confirmed. RP 8/15/06 at 100-101. Deputy Ley told Mr. Brooks that there was a warrant, and let him smoke a cigarette. As he prepared to handcuff him, the Defendant lurched forward and took off. RP 8/15/06 at 108-109.

Here, as opposed to what happened in *Rothenberger*, not even the identification of the defendant came as a result of the illegal seizure. Deputy Ley already knew who he was.

As indicated by the court in *Rothenberger*, if the Defendant could not have been arrested on the warrant pursuant to the earlier illegal detention from which his identify had been obtained, it would have been a “ridiculous” result. *Rothenberger*, at 599. For example, during the first illegal detention, had word come over the radio that *Rothenberger* was wanted for a burglary in Seattle, the officer supposedly would have had no alternative but to touch his hat and say “Gentlemen, be on your way. I’m sorry to have unlawfully detained you.” *Rothenberger*, at 599.

Moreover, under the theory of inevitable discovery, the illegal seizure is irrelevant. Here, the initial seizure lasted only thirty seconds – had Mr. Brooks walked away immediately instead of waiting, Deputy Ley would have easily caught up with him and placed him under arrest.

In *State v. Spring*,<sup>3</sup> the court stated that an “unlawful entry by police does not invalidate a subsequent search warrant so long as the lawful entry did not prompt the decision to seek the warrant. *Spring*, at 400. Here, the illegal detention did not prompt the arrest warrant or even the identification of the Defendant. The warrant was outstanding regardless of the detention, and additionally, the identification of the Defendant was known to the officer independent of the illegal detention.

---

<sup>3</sup> 128 Wn.App. 398, 115 P.3d 1052 (2005).

The court did not err when it did not suppress evidence obtained after the stop.

**7. Mr. Brooks Was Not Denied Effective Assistance of Counsel for Failing to Object to Two Jury Instructions and Not Filing Written Motion to Suppress.**

The test for ineffective assistance of counsel the defendant must establish that defense counsel's performance was deficient and that there is reasonable probability that the result of the proceedings would have been different. *State v. Saunders*, 91 Wn.App. 575, 958 P.2d 364 (1998).

None of the issues raised for rise to the level of deficient performance and even if there was deficient performance, the outcome of the trial would not have been different.

There was no conflation of mental states as a legal matter<sup>4</sup> nor was there any confusion on the part of the jury.

Here the "intentionally" instruction was given unnecessarily. The term "intentionally" was not contained within any of the other instructions. The defendant has simply assumed that the "intentionally" instruction was included to address the portion of the "to convict" instruction: "That on or about the 23<sup>rd</sup> day of May, 200, the defendant escaped from custody." There is nothing in the record to support such a supposition. An even if it was, there is nothing to suggest that the jury thought that if the State proved the defendant intentionally escaped from

---

<sup>4</sup> *Boyd, supra.*

custody, that he knew that his actions would result in leaving custody without permission.

Likewise, it was also not ineffective assistance of counsel when the defense lawyer failed to file a written motion to suppress based upon "the illegality of the initial seizure." Here although there wasn't a written motion, the issue was raised and fully litigated by the trial court. RP 8/15/06 148-150, 157-161, 8/16/07 at 5-15. In fact, the court ruled in favor of the defendant finding that the seizure was illegal. Clearly filing of a written motion would not have changed the actions of the proceeding.

There was also no ineffective assistance of counsel when no instruction was given defining the term "arrest." Here the defense lawyer asked the court to include such an instruction which the court declined to do. Clearly there was no deficient performance.

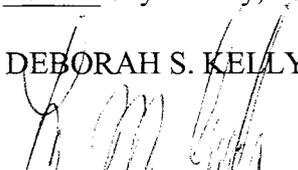
There was no ineffective assistance of counsel.

### III. CONCLUSION

None of the issues raised by the defendant have merit, and the conviction should be affirmed.

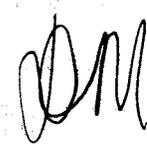
DATED this 15<sup>th</sup> day of May, 2007.

DEBORAH S. KELLY, Prosecuting Attorney

  
\_\_\_\_\_  
LAUREN M. ERICKSON  
Deputy Prosecuting Attorney  
Attorney for Respondent

WBA #19395

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

FILED  
MAY 17 2007  
BY 

STATE OF WASHINGTON,  
Respondent,

NO. 35292-3-II

vs.

AFFIDAVIT OF SERVICE BY MAIL

RICHARD EDGAR BROOKS,  
Appellant.

( )

STATE OF WASHINGTON )  
: ss.  
County of Clallam )

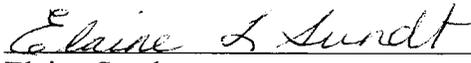
The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 15th day of May, 2007, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the Brief of Respondent, addressed as follows:

Mr. David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

Jodi R. Backlund / Manek R. Mistry  
BACKLUND & MISTRY  
Attorneys at Law  
203 East Fourth Avenue, Suite 404  
Olympia, WA 98501

Richard Edgar Brooks DOC#797079  
Washington State Penitentiary  
1313 North 13th Avenue  
Walla Walla, WA 99362

  
Elaine Sundt

SUBSCRIBED AND SWORN TO before me this 15<sup>th</sup> day of May, 2007.

  
(PRINTED NAME:) Ann Monger  
NOTARY PUBLIC in and for the State of Washington  
Residing at Port Angeles, Washington  
My commission expires: 10/21/2008