

No. 35606-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Jesse Eichelberger,**

Appellant.

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COMPL. FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY  
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Grays Harbor Superior Court

Cause No. 06-1-00392-9

The Honorable Judge James Sawyer

**Appellant's Opening Brief**

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### ASSIGNMENTS OF ERROR

1. Mr. Eichelberger's conviction of Escape in the First Degree was based on a misunderstanding of the term "custody."
2. The trial court erroneously concluded that Mr. Eichelberger was in custody at the time of his alleged escape.
3. Mr. Eichelberger's conviction of Escape in the First Degree was based on a misunderstanding of the term "detained."
4. The trial court erroneously concluded that Mr. Eichelberger was detained at the time of his alleged escape.
5. Mr. Eichelberger's conviction of Escape in the First Degree was based on insufficient evidence.
6. The trial court erroneously concluded that Mr. Eichelberger knew he was in custody at the time of his alleged escape.
7. The trial court erred by entering Finding of Fact No. 3, which reads as follows:

Judge McCauley then considered and denied the defendant's request for release pending sentencing, stating that the court was "...going to have [the defendant] taken into custody." The court clerk picked up her phone to call a deputy over from the jail.

8. The trial court erred by entering Finding of Fact No. 4, which reads as follows:

The defendant pleaded with the court, but the court maintained its position. While pleading for release, the defendant used inappropriate language, and the court informed him that he was in contempt and ordered him to have a seat.

9. The trial court erred by entering Conclusion of Law 2 (1), which reads as follows:

On June 6, 2006, the defendant was in custody pursuant to his felony conviction for Unlawful Possession of a Firearm under Grays Harbor Superior Court cause number 06-1-199-3.

10. The trial court erred by entering Conclusion of Law 2 (2), which reads as follows:

The defendant knowingly escaped from custody.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Jesse Eichelberger was charged with Escape in the First Degree. He had been released on bond, and was convicted of a felony. After the verdict, the trial judge “exonerated” bond, but did not explain what that meant. After argument regarding conditions of release, the judge said “I am going to have him taken into custody.” Mr. Eichelberger continued to argue, and the judge said “Have a seat, sir.” Mr. Eichelberger continued to speak, and the judge repeated “Have a seat.” When Mr. Eichelberger persisted in his speech, the judge said “Sir, I am going to find you in contempt. Have a seat.” Mr. Eichelberger then fled the courtroom. The judge said “That’s an escape” three times as Mr. Eichelberger left.

1. Does Escape in the First Degree require proof that a person is in custody at the time of the alleged escape? Assignments of Error Nos. 1-10.

2. To prove that a person is in custody pursuant to a court order, must the prosecution introduce a written order that places restraints on that person’s liberty? Assignments of Error Nos. 1-10.

3. Did the state fail to prove that the court issued a written order that restrained Mr. Eichelberger’s liberty? Assignments of Error Nos. 1-10.

4. If proof of custody pursuant to a court order does not require a written order, must the prosecution prove that the judge issued an oral command with legal effect that clearly and unambiguously placed a person in custody? Assignments of Error Nos. 1-10.

5. Did the state fail to prove that the court issued an oral command with legal effect that placed restraints on Mr. Eichelberger's liberty sufficient to constitute custody? Assignments of Error Nos. 1-10.

6. Does Escape in the First Degree require proof that a person is both in custody and detained at the time of the alleged escape? Assignments of Error Nos. 1-10.

7. Did the prosecution fail to prove that Mr. Eichelberger was detained at the time of his alleged escape? Assignments of Error Nos. 1-10.

8. Did the prosecution fail to prove that Mr. Eichelberger knew he was in custody at the time of his alleged escape? Assignments of Error Nos. 1-10.

9. Did the trial court err by entering Findings of Fact that were not supported by the evidence? Assignments of Error Nos. 1-10.

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On June 6, 2006, Jesse Eichelberger was found guilty by a jury in Grays Harbor County Superior Court of Possession of a Firearm. After the jury was released, the parties discussed a sentencing date and Mr. Eichelberger's custody status pending sentencing. Supp. CP, Exhibit 2. During this hearing, both the judge and the prosecutor indicated that the "bond is exonerated," but neither explained what that meant. Supp. CP, Ex. 2, page 5. After argument from counsel, the court said, "I'm going to have him taken him into custody." Supp. CP, Ex. 2, page 6.

Mr. Eichelberger then personally addressed the court, reminding the judge that he had made all of his court dates, and outlining responsibilities he had to address. Supp. CP, Ex. 2, page 6. The judge responded to his comments, but Mr. Eichelberger interrupted and continued to argue. Supp. CP, Ex. 2, page 6. The court said "Have a seat, sir." RP 54; Supp. CP, Ex. 2, page 7. Mr. Eichelberger continued to address the court, and the judge repeated "Have a seat." Supp. CP, Ex. 2, page 7. When Mr. Eichelberger kept talking, the judge said "Sir, I am going to find you in contempt. Have a seat..." Supp. CP, Ex. 2, page 7.

Mr. Eichelberger then fled the courtroom. RP 12, 55. As he left, the judge said "That's an escape. That's an escape. That's an escape."

Supp. CP, Ex. 2, page 7; RP 55. The court did not enter any written orders prior to Mr. Eichelberger's exit. RP 58.

On June 21, 2006, officers went to Mr. Eichelberger's home to arrest him on the warrant. RP 33-34. They approached the front door and noticed movement at the back door. RP 34, 48. Officers ran after Mr. Eichelberger, and saw him wading in a creek. RP 36. They yelled for him to stop, and told him he was under arrest while he was in the creek. RP 36, 39. Mr. Eichelberger crawled out of the creek and was taken into custody without incident by an officer waiting there. RP 36-37, 43, 49-50.

Mr. Eichelberger was charged with Escape in the First Degree and Resisting Arrest. CP 1-2. He waived his right to a jury, and the case proceeded to a bench trial on October 12, 2006. RP 5-92. Judge McCauley testified that there was no doubt in his mind that Mr. Eichelberger knew what the court was ordering, and that he left despite this. RP 55. At the close of the state's case, the defense moved to dismiss the escape charge as there was insufficient evidence that an order had been entered, and insufficient evidence that Mr. Eichelberger knew he was in custody. RP 60-61. The court denied the motion. RP 63-65.

Mr. Eichelberger testified that he heard that his bail was exonerated, which he thought meant still guaranteed his release. RP 68. He also explained that he was bipolar and had posttraumatic stress

disorder, so when he heard the guilty verdict he had a panic attack and heard very little. RP 69-71. He testified that he did not know he was committing an escape when he left, that he did not take the court's admonishment to "sit down" as putting him into custody, and that he did not hear the judge tell him it would be an escape to leave. RP 70-71.

He was convicted of both charges. Supp. CP, Findings of Fact and Conclusions of Law. The court entered findings of fact and conclusions of law, and Mr. Eichelberger appealed. CP 11-12.

### ARGUMENT

**I. MR. EICHELBERGER'S CONVICTION WAS BASED ON A MISUNDERSTANDING OF THE WORDS "CUSTODY" AND "DETAINED" AS USED IN RCW 9A.76.110.**

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. In this case, there was insufficient evidence to establish beyond a reasonable doubt (1) that Mr. Eichelberger was in custody, (2) that Mr. Eichelberger was detained, and (3) that Mr. Eichelberger knew he was in custody.

- A. A person is in custody through the action of a court order only if the order is a written command with legal effect.

For purposes of the escape statute, custody includes “restraint pursuant to a lawful arrest or an order of a court...” RCW 9A.76.010. The term “restraint” means “an act of restraining, hindering, checking, or holding back from some activity or expression... a means, force, or agency that restrains, checks free activity, or otherwise controls.” *State v. Ammons*, 136 Wn.2d 453 at 457, 963 P.2d 812 (1998), quoting from *Webster’s Third New International Dictionary* (1986). The term “order” is not defined by the statute, and has not been clarified by court opinion.

The meaning of a statute is a question of law reviewed *de novo*. *State Owned Forests v. Sutherland*, 124 Wn. App. 400 at 409, 101 P.3d 880 (2004). The primary goal of statutory interpretation is to ascertain and give effect to the legislature’s intent and purpose. *In re Pers. Restraint of Cruz*, 157 Wn.2d 83 at 87-88, 134 P.3d 1166 (2006). The court’s inquiry “always begins with the plain language of the statute.” *State v. Christensen*, 153 Wn.2d 186 at 194, 102 P.3d 789, (2004). If the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Sutherland, supra*, at 409; see also *State v. Punsalan*, 156 Wn.2d 875, 133 P.3d 934

(2006) (“Plain language does not require construction;” *Punsalan*, at 879, *citations omitted*).

On the other hand, if a statute is ambiguous, other rules of statutory construction apply. One such rule is the rule of lenity, which requires that ambiguous statutes be construed “strictly against the state and in favor of the accused.” *State v. Michielli*, 81 Wn.App. 773 at 778, 916 P.2d 458 (1996); *Restraint of Cruz*, at 88. The policy underlying the rule of lenity is “to place the burden squarely on the Legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are.” *State v. Jackson*, 61 Wn.App. 86 at 93, 809 P.2d 221 (1991). “Due process ‘requires that citizens be given fair notice of conduct forbidden by a penal statute...’ and the rule of lenity prevents such statutes from trapping the innocent.” *State v. McGee*, 122 Wn.2d 783 at 800, 864 P.2d 912 (1993), *Justice Johnson, dissenting; citations omitted*. Because the rule of lenity is based in the due process clause of the Fourteenth Amendment, it takes precedence over other rules of construction not based in the constitution. U.S. Const. Amend. XIV.

The phrase “order of a court” can be broadly interpreted as any directive from the bench (i.e. “Mr. Smith, please answer the question”), or it can be interpreted more narrowly to mean only written commands carrying legal effect (i.e. “Mr. Smith shall serve 13 months in prison.”)

Because the phrase is capable of more than one reasonable construction, the statute is ambiguous, and the rule of lenity applies. Under the rule of lenity, the phrase "order of a court" must be narrowly interpreted to mean a written command with legal effect. *Restraint of Cruz, supra*. This is consistent with the other cases interpreting RCW 9A.76, all of which have relied upon written court orders such as the judgments and sentences in *Ammons*.

In this case, the court did not issue a written command restraining Mr. Eichelberger. RP 58. Accordingly, appellant was not in custody at the time of the alleged escape. Because of this, his conviction must be reversed and the case dismissed with prejudice.

Even if the phrase "order of a court" is interpreted more broadly, the court's oral statements from the bench do not qualify as orders restraining Mr. Eichelberger. In order to qualify as an order of a court in this context, an oral directive must clearly and unambiguously place a person in custody. In other words, an order must have legal effect (as opposed to a directive or admonishment from the bench that does not carry the force of law), and must place restraints on a person's liberty sufficient to constitute custody.

The court in this case did not make such an order. The two phrases that come closest to meeting this definition are the judge's statement "I'm

going to have him taken into custody” and the directive to “sit down.”  
Supp. CP, Ex. 2, page 6. But the former is a statement of future intent, not an order placing restraints on Mr. Eichelberger’s liberty, and the latter, while directive, does not necessarily carry the force of law, and does not impose restraints sufficient to constitute custody (otherwise every attorney admonished to sit down would be considered in custody).

Thus even if certain oral commands qualify as “order[s] of the court” within the meaning of RCW 9A.76.010, the trial judge did not issue a qualifying order. Because of this, Mr. Eichelberger’s conviction must be reversed and the case dismissed with prejudice.

B. A person is not “detained” unless there is some additional restraint on liberty beyond that in the court order placing her or him in custody.

Statutes must be interpreted and construed so that each word is given effect, with no portion rendered meaningless or superfluous. *Homeowners Association v. Ltd. Partnership*, 156 Wn.2d 696 at 699, 131 P.3d 905 (2006). RCW 9A.76.110 requires proof that the defendant knowingly escaped “from custody or a detention facility while being detained” pursuant to a conviction of a felony. The phrases “from custody or a detention facility” and “while being detained” must be given separate effect. Otherwise, a person would be guilty of Escape in the First Degree if “he or she knowingly escapes while being detained pursuant to a

conviction of a felony,” omitting the phrase “from custody or a detention facility.”

Thus a person escapes following an arrest only if the person has been “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 Solis, 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.<sup>1</sup>

Because Mr. Eichelberger was not “detained” at the time of his alleged escape (because no restraint was placed on him beyond any applied by the court’s verbal directives), the conviction must be reversed and the case dismissed with prejudice. *State v. Brown*, 137 Wn. App. 587 at 592, 131 P.3d 905 (2007).

In *State v. Breshon*, 115 Wn. App. 874, 63 P.3d 871 (2003), this court rejected the idea that escape required proof of separate “custody”

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<sup>1</sup> *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).

and “detained” elements. *Breshon*, at 880.<sup>2</sup> With all due respect, the court’s decision in *Breshon* (based on its reading of *Ammons, supra*) should be revisited. *Breshon* violates the rule of statutory interpretation that every word in a statute must be given effect. Under the *Breshon* court’s interpretation of RCW 9A.76.110, the phrase “from custody or a detention facility” is superfluous, since (if the two phrases are given the same meaning) anyone who is “detained pursuant to a felony conviction” is necessarily in custody or in a detention facility. The two phrases must have different meanings, or else the legislature would have opted for only the latter, rather than including the former as surplus verbiage.

*Homeowners Association v. Ltd. Partnership*. Because of this, *Breshon* was wrongly decided, and should not be followed.

**II. THE PROSECUTION FAILED TO ESTABLISH BEYOND A REASONABLE DOUBT THAT MR. EICHELBERGER KNEW HE WAS IN CUSTODY AT THE TIME OF HIS ALLEGED ESCAPE.**

In a criminal case, conviction requires proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). On review, evidence is not sufficient to support a conviction unless, after viewing the evidence in the light most favorable to the State,

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<sup>2</sup> The opinion was authored by Judge Armstrong, and joined by Judges Seinfeld and Bridgewater.

any rational trier of fact could find all of the elements of the crime charged beyond a reasonable doubt. *State v. DeVries*, 149 Wn.2d 842 at 849, 72 P.3d 748 (2003). The criminal law may not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. *DeVries*, at 849. The reasonable-doubt standard is indispensable, because it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue. *DeVries*, at 849.

Although a claim of insufficiency admits the truth of the state's evidence and all inferences that can reasonably be drawn from it, *DeVries*, at 849, this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. In the end, the evidence must be sufficient to convince a rational jury beyond a reasonable doubt. *DeVries*, *supra*. Since the reasonable doubt standard is the highest standard of proof, review is more stringent than in civil cases. In other words, the proof must be more than mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387 at 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wn. App. 589 at 592, 123 P.3d 891 (2005); *Northwest Pipeline Corp. v. Adams County*, 132 Wn. App. 470, 131 P.3d 958 (2006), *citing Davis v. Microsoft Corp.*, 149

Wn.2d 521 at 531, 70 P.3d 126 (2003). It also must be more than clear, cogent and convincing evidence, which is described as evidence “substantial enough to allow the [reviewing] court to conclude that the allegations are ‘highly probable.’” *In re A.V.D.*, 62 Wn.App. 562 at 568, 815 P.2d 277 (1991), *citation omitted*.

Where the evidence is insufficient to support a conviction, the Double Jeopardy Clause requires reversal and remand for dismissal with prejudice. *State v. Brown, supra*.

Here, the prosecution was required to prove that Mr. Eichelberger “knowingly” escaped from custody while being detained pursuant to a felony conviction. RCW 9A.76.110. Taking the evidence in a light most favorable to the prosecution, the evidence is insufficient to establish that Mr. Eichelberger “knowingly” escaped from custody while being detained. First, the prosecution failed to show that Mr. Eichelberger had any understanding of what it meant to have his bail “exonerated.” RP 8-59. Second, the court’s statement (that he intended to place Mr. Eichelberger in custody) did not convey the impression that Mr. Eichelberger was *already in custody*, simply by operation of the words “I’m going to have him taken into custody.” Supp. CP, Ex. 2, page 6. The state presented no evidence showing that Mr. Eichelberger was aware the court intended that statement of intent to change his status from “free” to

“in custody.” RP 8-59. Third, the prosecution failed to show that Mr. Eichelberger understood the court’s admonition to “sit down” to mean that he was already in custody. RP 8-59. A reasonable person would interpret the directive to require that he sit and stop talking while *awaiting* custody. Fourth, the court’s comments to Mr. Eichelberger (as he fled)-- “that’s an escape” notified him only that he was potentially guilty of escape, but not that he was already in custody. RP 55.

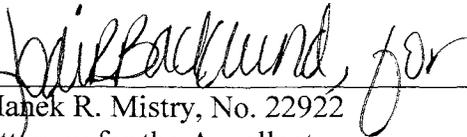
Because the evidence was insufficient to establish that Mr. Eichelberger “knowingly” escaped, the conviction must be reversed and the case dismissed with prejudice. *Brown, supra.*

**CONCLUSION**

For the foregoing reasons, the escape conviction must be reversed and the case dismissed with prejudice.

Respectfully submitted on May 29, 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 that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on May 29, 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 May 29, 2007.

  
\_\_\_\_\_  
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Attorney for the Appellant