

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

 DEPUTY

No. 38383-7-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BEAU E. NUGENT,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon, Trial Court Judge
Cause No. 08-1-00143-1

BRIEF OF RESPONDENT

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 (a) ROBERT McINTOSH, A COMMUNITY
 CORRECTIONS OFFICER, TESTIFIED THAT HE
 WAS NUGENT’S CCO AND SUPERVISED HIM
 FOR A MASON COUNTY SUPERIOR COURT
 CAUSE NUMBER;

 (b) NUGENT ACKNOWLEDGED THAT HE HAD
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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence supports appellant's conviction for escape from community custody.
2. Insufficient evidence supports appellant's conviction for first degree escape.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by not taking count one, escape from community custody, from the jury for sufficiency of the evidence when:
 - (a) Robert McIntosh, a Community Corrections Officer, testified that he was Nugent's CCO and supervised him for a Mason County Superior Court cause number;
 - (b) Nugent acknowledged that he had been directed to report to his CCO on a regular basis; and
 - (c) that he had missed more than one report date?
2. Did the trial court err by not taking count two, escape in the first degree, from the jury for lack of sufficient evidence after the State proved that Nugent was on community custody when he knowingly escaped?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP."

The Clerk's Papers shall be referred to as "CP." The Appellant's Brief shall be referred to as "AB."

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Nugent's recitation of the procedural history and facts and adds the following: During a preliminary motion, Nugent's attorney acknowledged that at the time of his client's arrest, Nugent "had been out of jail for some six years and was on community custody." RP 7: 22-24.

3. Summary of Argument

The trial court did not err by not taking count one, escape from community custody, from the jury for lack of sufficient evidence because: (a) Robert McIntosh, a Community Corrections Officer, testified that he was Nugent's CCO and supervised him for a Mason County Superior Court cause number; (b) Nugent acknowledged that he had been directed to report to his CCO on a regular basis; and (c) that he had missed more than one report date. Based on this testimony, a rational juror could have found that Nugent was subject to community custody pursuant to his conviction of a felony.

Under RCW 9.94A.030(5), "Community custody" means that portion of an offender's sentence of confinement in lieu of earned release time or imposed...[citations omitted]...served in the community subject to controls placed on the offender's movement and activities by the

department. “Community placement,” conversely, may consist of entirely community custody, entirely postrelease supervision, or a combination of the two. RCW 9.9A.030(7). A “Community corrections officer” is defined as an employee of the department who is responsible for carrying out specific duties in supervision of sentenced offenders and monitoring of sentence conditions. RCW 9.94A.030(4). The “Department” is defined as “the department of corrections.” RCW 9.94A.030(20).

Because statutes are given a sensible construction and interpreted in a way that best advances the legislative intent, Nugent’s argument that the State failed to prove that he was on community custody when he admitted he was being supervised by CCO McIntosh and had missed more than one report date is without merit. See: State v. Tejada, 93 Wash.App. 907, 911-912, 971 P.2d 79 (1999). Nugent’s argument on count two, escape in the first degree, likewise fails using this same rationale. The judgement and sentence of the trial court is complete, correct and should be affirmed.

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY NOT TAKING COUNT ONE, ESCAPE FROM COMMUNITY CUSTODY, FROM THE JURY FOR SUFFICIENCY OF THE EVIDENCE BECAUSE:
 - (a) ROBERT McINTOSH, A COMMUNITY CORRECTIONS OFFICER, TESTIFIED THAT HE WAS NUGENT'S CCO AND SUPERVISED HIM FOR A MASON COUNTY SUPERIOR COURT CAUSE NUMBER;
 - (b) NUGENT ACKNOWLEDGED THAT HE HAD BEEN DIRECTED TO REPORT TO HIS CCO ON A REGULAR BASIS; AND
 - (c) THAT HE MISSED MORE THAN ONE REPORT DATE.

The trial court did not err by not taking count one, escape from community custody, from the jury for sufficiency of the evidence because:

(a) Robert McIntosh, a Community Corrections Officer, testified that he was Nugent's CCO and supervised him for a Mason County Superior Court cause number; (b) Nugent acknowledged that he had been directed to report to his CCO on a regular basis; and (c) that he missed more than one report date.

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In a criminal case the State must,

beyond a reasonable doubt, prove each element of the alleged offense.

State v. Alvarez, 128 Wash.2d 1, 13, 904 P.2d 754 (1995).

A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wn.2d at 201. Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient. State v. O'Neal, 159 Wash.2d 500, 506, 150 P.3d 1121 (2007).

Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, deference is given to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. State v. Walton, 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992).

Statutes are given sensible construction. State v. Tejada, 93 Wash.App. 907, 911-912, 971 P.2d 79 (1999). Statutes should be interpreted in a way that best advances the legislative intent and avoids a strained and unrealistic interpretation. Tejada, 93 Wash.App. at 911.

In Nugent's case, Robert McIntosh testified that he was Nugent's CCO for the Department of Corrections for Mason County Superior Court Cause No. 98-1-00216-6. RP 26: 7-12; 27: 20-25. McIntosh positively

identified Nugent in court. RP 27: 11-15. McIntosh also testified that Nugent failed make his whereabouts known to him between November 7, 2007 and March 5, 2008. RP 28: 18-25; 29: 1-3. When Nugent failed to report as directed, McIntosh issued an order for Nugent's arrest and detention. RP 30: 1-4. During cross-examination, Nugent admitted that he had missed more than one report date with CCO McIntosh. RP 56: 8-9, 18-23.

Based on this testimony when viewed in a light most favorable to the State, a rational trier of fact could have found all of the essential elements of the crime, here escape from community custody, beyond a reasonable doubt. Through testimony, it was established that Nugent was on community custody with CCO McIntosh, who worked for the Department of Corrections. While Nugent cites to an exhibit which has a box checked for "post-release supervision," his emphasis on this document, under the rationale of Tejada, leads to an interpretation of RCW 9.94A.030 that is without merit. See: AB 14 and Appendix B; Tejada, 93 Wash.App. at 911.

The testimony of McIntosh and Nugent would lead any rationale juror to one conclusion; between November 7, 2007 and March 5, 2008, Nugent was on community custody. Through instruction No. 15, the jury was informed that:

A person who is subject to community custody pursuant to a conviction of a felony who is detained on the strength of an outstanding arrest warrant issued for violating his or her community custody conditions is detained pursuant to a felony conviction. CP 58; RP 78: 23-25; 79: 1-3.

If Nugent had not been on community custody, the reasonable inference is that he would not have been reporting to CCO McIntosh. Error did not occur when the trial court did not take this count from the jury for lack of sufficient evidence because the State proved that Nugent was on community custody at the time of his arrest.

2. THE TRIAL COURT DID NOT ERR BY NOT TAKING COUNT TWO, ESCAPE IN THE FIRST DEGREE, FROM THE JURY FOR LACK OF SUFFICIENT EVIDENCE BECAUSE THE STATE PROVED THAT NUGENT WAS ON COMMUNITY CUSTODY WHEN HE KNOWINGLY ESCAPED.

The trial court did not err by not taking count two, escape in the first degree, from the jury for lack of sufficient evidence because the State proved that Nugent was on community custody when he knowingly escaped.

Adding to the rationale outlined above, the State proved beyond a reasonable doubt that Nugent was on community custody when he knowingly escaped on or about March 5, 2008. As the face of page one of Appendix A in the Appellant's Brief reads:

NOW THEREFORE, the above Community Corrections Officer, pursuant to the authority vested by the provisions of...[citations omitted], does hereby order said offender to be arrested and detained in jail or appropriate custodial facility pending appearance before the Superior Court or Community Corrections Hearings Officer.
AB: Appendix A.

This "Order for Arrest and Detention" specifically names "Nugent, Beau" as the person to be arrested and detained. AB: Appendix A. At trial, CCO McIntosh positively identified Nugent as a person who was under his supervision for a Mason County Superior Court cause number. RP 26: 7-12; 27: 11-25. As page 2 of Nugent's Appendix B reads:

Having been convicted of an offense and placed under the jurisdiction of the Department of Corrections, by Superior Court of the [S]tate of Washington for MASON County...

WHEREAS, it now appears the above person has violated condition(s) or requirements of sentence or supervision as follows...AB Appendix B, Page 2.

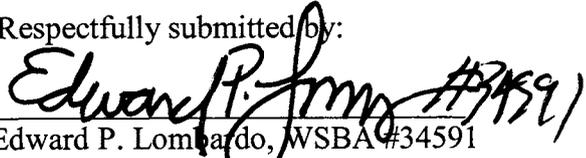
Nugent's argument that the trial court erred by not taking count two, escape in the first degree, from the jury for lack of sufficient evidence fails because the State proved that he was on community custody when he knowingly escaped. Error did not occur.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 17th day of MARCH, 2009

Respectfully submitted by:


Edward P. Lombardo, WSBA #34591
Deputy Prosecuting Attorney for Respondent
Gary P. Burleson, Prosecuting Attorney
Mason County, WA

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 BEAU E. NUGENT,)
)
 Appellant,)
 _____)

No. 38383-7-II
DECLARATION OF
FILING/MAILING
PROOF OF SERVICE

BY EDWARD P. LOMBARDO
DEPUTY
STATE OF WASHINGTON
MARCH 19 PM 1:23
COURT OF APPEALS
DIVISION II

I, EDWARD P. LOMBARDO, declare and state as follows:

On TUESDAY, MARCH 17, 2009, I deposited in the U.S. Mail,
postage properly prepaid, the documents related to the above cause number
and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Jennifer M. Winkler, Attorney at Law
Nielsen, Broman & Koch, PLLC
1908 East Madison
Seattle, WA 98122

I, EDWARD P. LOMBARDO, declare under penalty of perjury of
the laws of the State of Washington that the foregoing information is true
and correct.

Dated this 17TH day of MARCH, 2009, at Shelton, Washington.


Edward P. Lombardo, WSBA #34591