

FILED
JUL 23 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

28797-1-III

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OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LARRY G. GATEWOOD, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The court erred in declining to give defendant's proposed instruction limiting the purpose for which the jury may consider evidence of the defendant's prior conviction and incarceration.
2. The court erred in entering judgment on the verdict of guilty of escape from community custody.

B. ISSUES

1. When a person is charged with escape from community custody, an essential element of which is that the person has been confined as an inmate, defined to include "persons residing in a correctional institution or facility [and] persons released from such facility," does the court err in refusing to instruct the jury that the defendant's status as an inmate may only be considered with respect to the element of being an inmate for purposes of determining the element of the offense and not for any other purpose?
2. When the only evidence that an individual was an inmate on community custody is the testimony of a community corrections officer that his job is to supervise such inmates,

that he was assigned to supervise the individual, met with him on numerous occasions, and that more than a year later he made an appointment to meet with the individual, is the evidence sufficient to establish that the individual was an inmate on community custody at the time of the alleged appointment?

C. STATEMENT OF THE CASE

A computer notified Community Custody Officer Jim Durkin of his appointment to supervise Larry Gatewood. (RP 45) (RP 45) Officer Durkin spoke with Mr. Gatewood by telephone and told him to meet with him at his office on February 1. (RP 45) Thereafter, the two men met on numerous occasions from 2007 to 2008. (RP 48) At each meeting, including one on August 5, 2008, Officer Durkin gave Mr. Gatewood a business card, which Mr. Gatewood always took. (RP 50) At the August 5 meeting the two men discussed Mr. Gatewood's employment problems and Officer Durkin suggested some ideas of where to look for work. (RP 49)

Mr. Gatewood did not appear at Officer Durkin's office on September 11, 2008. (RP 50) Officer Durkin then made various efforts to locate Mr. Gatewood. (RP 50-51) On September 17, Mr. Gatewood

called officer Durkin and said he knew he was wanted but declined to tell the officer where he was. (RP 51-52) He said he planned to turn himself in on September 22. On October 9, Officer Durkin again spoke with Mr. Gatewood who said it was not in his nature to turn himself in. (RP 54) Officer Durkin had no further contact with Mr. Gatewood. (RP 55)

In June 2009, the State charged Mr. Gatewood with one count of escape from community custody on September 11, 2009. (CP 1) The charge was tried to a jury.

Officer Durkin told the jury, "I'm a community corrections officer. I supervise individuals who have been to superior court and sentenced to a term of community custody." (RP 43) He further explained: "A community custody inmate is an individual who was sentenced in superior court, and part of their sentence is prison and supervision to follow." (RP 44) He testified that he and Mr. Gatewood had "telephonic meetings prior to Mr. Gatewood's release." (RP 45)

Defense counsel argued that in light of Officer Durkin's testimony, the fact of being on community custody implies a prior criminal conviction and the jury should be instructed not to speculate about such a conviction. (RP 63) The court declined to give the instruction. (RP 66)

The court instructed the jury that:

To convict the defendant of the crime of escape from community custody, each of the following elements of the crime must be proved beyond a reasonable doubt:

- 1, That on or about the 11th day of September, 2008 the defendant was an inmate in community custody;
- 2, That on or about that date the defendant did willfully discontinue making himself available to the Department of Corrections by failing to maintain contact as directed by his community corrections officer; And,
- 3, that the acts occurred in the State of Washington.

(RP 77) The court defined the term “inmate:”

Inmate means a person committed to the custody of the department, including but not limited to persons residing in a correctional institution or facility, persons released from such facility on furlough, work release or community custody, and persons received from another state, state agency, county or federal jurisdiction.

(RP 77-78)

Defense asked the court to give the following jury instruction:

Certain evidence has been admitted in this case for only a limited purpose. The evidence that the defendant is on community custody may be considered by you only for the purpose of establishing that particular element of the charge. You may not consider it for any other purpose. Any discussion of this evidence during your deliberations must be consistent with this limitation.

(CP 12; RP 62-66)

The court refused to give the requested instruction. (RP 66) The jury found Mr. Gatewood guilty as charged.

D. ARGUMENT

1. THE COURT ERRED IN REFUSING TO LIMIT THE PURPOSES FOR WHICH THE JURY COULD CONSIDER THAT MR. GATEWOOD WAS AN INMATE ON COMMUNITY CUSTODY.

Under ER 404(b), “prior misconduct is not admissible to show that a defendant is a ‘criminal type’, and is thus likely to have committed the crime for which he or she is presently charged.” *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995); *see State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009). The prejudicial effect of such evidence is well recognized. *See State v. Wade*, 98 Wn. App. 328, 989 P.2d 576 (1999) (evidence of two prior instances of drug dealing demonstrated intent only through an inference of propensity); *State v. Bacotgarcia*, 59 Wn. App. 815, 822, 801 P.2d 993 (1990) (jurors naturally inclined to reason that having previously committed a crime, the accused is likely to have reoffended).

ER 404(b) does allow evidence of prior misconduct that has “some additional relevancy beyond mere propensity.” *State v. Holmes*, 43 Wn. App. 397, 400-01, 717 P.2d 766 (1986). Where evidence of such a prior bad act is admissible to prove an element of the charged offense, the defendant is entitled to an instruction limiting the purpose for which such evidence is admitted. *State v. Foxhoven*, 161 Wn.2d 168,

163 P.3d 786 (2007) (trial court must give limiting instruction when admitting prior bad acts as evidence to prevent unfair prejudice) (*citing State v. Lough*, 125 Wn.2d at 864).

The State had to prove Mr. Gatewood was directed to contact Officer Durkin on September 11, that he failed to do so, and that his failure was willful. The only evidence that Mr. Gatewood had been directed to meet with Officer Durkin on September 11 was the officer's uncorroborated testimony that he had given Mr. Gatewood a card with that date on it. The only evidence Mr. Gatewood failed to appear was the officer's testimony. The only evidence such failure was willful was the defendant's alleged statements to the officer in later phone calls.

Where the outcome of a case hinges on the credibility of a single prosecution witness, the risk that the jury will be improperly influenced by evidence that the defendant had a prior conviction and likely spent time in prison is substantial.

The court erred in denying the defendant's request for a limiting instruction, and under the facts of this case the error was prejudicial.

2. THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ESSENTIAL ELEMENTS OF ESCAPE FROM COMMUNITY CUSTODY.

A challenge to the sufficiency of the evidence admits the truth of the State's evidence, and all reasonable inferences therefrom are drawn in the light most favorable to the State. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant's guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Mr. Gatewood's status as an inmate on community custody at the time of the offense is an essential element of the crime. The evidence that he was at any time an inmate was Officer Durkin's testimony that a computer notified him that he had been assigned to supervise Mr. Gatewood, and his description of his job as the supervision of persons on community custody. It may be doubted that, even viewed in the light most favorable to the State, such testimony is sufficient to prove Mr. Gatewood was "a person committed to the custody of the department [of corrections]." The State presented no evidence as to the term of Mr. Gatewood's commitment or that such term of commitment continued from February 2007 through September 11, 2008. Officer Durkin's testimony

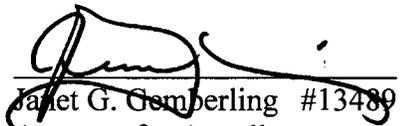
that he in effect instructed Mr. Gatewood to meet with him on September 11, 2008, without more, is insufficient to permit a rational trier of fact to find Mr. Gatewood remained an “inmate in community custody” on that date.

E. CONCLUSION

Mr. Gatewood’s conviction should be reversed.

Dated this 23rd day of July, 2010.

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