

28797-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LARRY G. GATEWOOD, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred by not giving the jury a limiting instruction.
2. The trial court erred in entering a judgment on a jury verdict that was not supported by sufficient evidence.

II.

ISSUES PRESENTED

- A. Did the trial court abuse its discretion by declining to give the jury a limiting instruction?
- B. Was there sufficient evidence to support the jury finding the defendant guilty of the crime of escape from community custody?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's statement of the case for purposes of this appeal only.

#### IV.

#### ARGUMENT

A. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S REQUEST FOR A LIMITING JURY INSTRUCTION BECAUSE THERE WAS NO EVIDENCE ADMITTED FOR A LIMITED PURPOSE.

The defendant claims that the trial court erred by refusing to instruct the jury that the evidence that defendant was on community custody could only be considered for a limited purpose. Defendant artfully characterizes the evidence that defendant was on community custody as being admitted pursuant to Evidence Rule ("ER") 404(b). The record reveals that the trial court faced no such circumstance.

The record reflects no objection by the defendant that the evidence that he was on community custody violated ER 404(b). The State offered no evidence that qualified for such an objection. Rather, the State carefully inquired of Department of Corrections Community Correction Officer Durkin ("CCO Durkin") so as to avoid such an objection based upon the concerns raised by both defendant and the trial court. The State agreed with the defendant's concern regarding any mention that defendant was concerned about "striking out" because it related to his prior convictions. RP 33. The State also agreed to not inquire about defendant's concern about being labeled a child beater. RP 33. In fact,

the State specifically agreed that such evidence would not become relevant absent the defendant opening the door by bringing up those topics. RP 34. Accordingly, no evidence was proffered regarding the nature of defendant's prior conviction or his incarceration, so defendant raised no ER 404(b) objection.

Whether to give a particular instruction to the jury is a matter within the discretion of the trial court. *Seattle Western Indust., Inc. v. David A. Mowat Co.*, 110 Wn.2d 1, 750 P.2d 245(1988). Hence, a trial court's refusal to give a requested instruction is reviewed for abuse of discretion. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).

Defendant's reliance upon *State v. Foxhoven*, 161 Wn.2d 168, 163 P.3d 786 (2007) is misplaced since the trial court faced no proffer of ER 404(b) evidence. Moreover, defendant failed to object to any of the evidence elicited from CCO Durkin as being in violation of ER 404(b). The trial court admitted the evidence regarding defendant's status as being ordered onto community custody by the court without any limitation. Defendant was not entitled to a limiting instruction under the circumstances, so his request was properly denied by the trial court.

The defendant did not object to the alleged ER 404(b) violation he now raises on appeal. The record from the trial court is bereft of any reference to such a violation. "A party so situated could simply lie back,

not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.” *State v. Sullivan*, 69 Wn. App. 167, 172, 847 P.2d 953 (1993). That is exactly what is happening here.

RAP 2.5(a) generally provides that issues not raised below cannot be raised for the first time on appeal. The defendant did not object below and makes no argument for why the general rule of RAP 2.5(a) should not apply. The State maintains that the defendant’s silence below should preclude him from raising such issues on appeal.

**B. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY VERDICT FINDING DEFENDANT GUILTY OF ESCAPE FROM COMMUNITY CUSTODY.**

The trial court instructed the jury that, in pertinent part:

To convict the defendant of the crime of Escape from Community Custody, each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about the 11<sup>th</sup> 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 with his community corrections officer; and
- (3) That the acts occurred in the State of Washington.

CP 23.

This instruction advised the jury that the State must prove beyond a reasonable doubt each of the elements of escape from community custody. The record from the trial court reflects that such is precisely what occurred by direct and circumstantial evidence with the reasonable inferences drawn therefrom.

The record reflects that on February 1, 2007, the defendant was ordered to report to the CCO Durkin at the Department of Corrections in Spokane, Washington. RP 45. During that intake meeting, CCO Durkin reviewed the rules and restrictions involved with defendant's term of community custody. RP 45. Defendant was advised orally and in writing of his duty to report which he acknowledged, yet refused to sign. RP 47-48. Defendant refused to sign the form because he indicated that he knew what he had to do. RP 48. Defendant was on community custody from February 1, 2007 through September 11, 2008 and thereafter. RP 48. During his community custody, defendant maintained consistent contact with CCO Durkin in person and by telephone. RP 48-49. On August 5, 2008 defendant met with CCO Durkin and was advised orally and in writing of the next mandatory meeting with CCO Durkin on September 11, 2008. RP 49-50. Nevertheless, defendant failed to appear for his scheduled meeting with CCO Durkin on September 11, 2008. RP 50. CCO Durkin initiated several attempts to contact defendant in the ensuing

days until defendant finally phoned him on September 17, 2008. RP 52. Defendant acknowledged his duty to report and knew that an arrest warrant had been issued for his failure to comply. RP 52. Defendant advised CCO Durkin that he wanted to wait until the following Monday to surrender because he did not want to be in jail on his birthday. RP 53. Defendant did not turn himself in on September 22, 2008. RP 53.

Defendant next telephoned CCO Durkin on October 6, 2008 and advised that he was consulting his Mother about surrendering. RP 53. On October 9, 2008 defendant telephoned CCO Durkin and indicated that it was not in his nature to turn himself in. RP 54. CCO Durkin had no further contact with defendant after the telephone contact on October 9, 2008. RP 54-55. CCO Durkin testified that the last time defendant physically met with him was August 5, 2008. RP 56. The evidence proved beyond a reasonable doubt that the defendant was on community custody on or about September 11, 2008 when he willfully failed to appear for a scheduled in person appointment in the State of Washington.

The elements of a crime may be established by either direct or circumstantial evidence, one type being no more valuable than the other. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The jury is the exclusive judge of the weight and credibility of the evidence. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Hence, a

jury is permitted to discount theories, prosecution or defense, which it determines are unsupported by the evidence. *Id.*, at 709.

Here, the jury could have found defendant's claim that the State had failed to satisfy its burden of proof credible, yet they were not required to accept that theory. The record reflects that the jury was provided more than sufficient evidence to support the finding that the defendant had committed the crime of escape from community custody.

The standard for adjudging the sufficiency of the evidence to support a verdict is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could find that each element of the offense has been proved beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980); *State v. Hendrickson*, 129 Wn.2d 61, 81, 917 P.2d 563 (1996). In reviewing the sufficiency of the evidence in a criminal case, the reviewing court must draw all reasonable inferences from the evidence in favor of the State and interpret those inferences most strongly against the defendant. *State v. Lopez*, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995); *State v. Hagler*, 74 Wn. App. 232, 235, 872 P.2d 85 (1994). Application of that standard requires affirmation of this conviction.

At previously noted, the testimony of CCO Durkin allowed the jury to determine that defendant was on community custody on September 11, 2008; knew that he had a duty to report for an in-person meeting with his

CCO that day; and that defendant willfully failed to appear or report. The evidence supported the verdict and was sufficient.

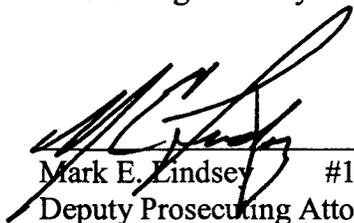
V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 19<sup>TH</sup> day of August 2010.

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