

ORIGINAL

Supreme Court No. 840831

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FILED
JUL 05 2010
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,

v.

MAURICE TERRELL BROWN
Petitioner.

PETITION FOR REVIEW OF THE COURT OF APPEALS,
DIVISION III
NO. 267407

ANSWER TO THE PETITION FOR REVIEW

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FILED
2010 JUL -6 AM 8:08
BY RONALD R. CARPENTER
CLERK
SUPREME COURT
STATE OF WASHINGTON

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

 1. Nature of the Case 1

 2. Course of the Proceedings 1

 3. Counter Statement of the Facts 2

ISSUES 3

 1. Was the language in the charging document sufficient to provide the defendant with notice of the nature and cause of the charge against him? 3

ARGUMENT 3

 1. The language in the charging document was sufficient to provide the defendant with notice of the nature and cause of the charge against him. 3

CONCLUSION 10

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Hicks,
102 Wn.2d 182, 683 P.2d 186 (1984) 5, 6

State v. Kitchen,
61 Wn. App. 915, 812 P.2d 888 (1991) 7, 8

State v. Kjorsvik,
117 Wn.2d 93, 812 P.2d 86 (1991) *passim*

State v. Krajewski,
104 Wn. App. 377, 16 P.3d 69 (2001) 6, 7

State v. Mendoza-Solorio,
108 Wn. App. 823, 33 P.3d 411 (2001) 3

State v. Sutherland,
104 Wn. App. 122, 15 P.3d 1051 (2001) 8

WASHINGTON STATUTES

RCW 9A.56.190 5

RCW 9A.76.120 8, 9

RCW 9A.76.120(1)(b) 4

RCW 10.37.050(6) 4

STATEMENT OF THE CASE

1. Nature of the Case

The defendant, Maurice Terrell Brown, brought this action challenging the sufficiency of the charging document and the sufficiency of the evidence to support his conviction for Escape in the Second Degree. The Court of Appeals of Washington, Division III, affirmed on November 1, 2009. The defendant now petitions for review by the Supreme Court of the State of Washington.

2. Course of the Proceedings

The defendant was charged with Escape in the Second Degree on April 10, 2007. (CP 95-96). On October 22, 2007, the defendant filed a motion to dismiss the charge based on the Benton County Jail's alleged disposal of his legal paperwork after he activated the jail's sprinkler system and caused his cell to flood. (RP 10/22/07, 9, 11; RP 10/31/07, 82-84). The court found that the actions of the jail staff did not prejudice the defendant, and the motion was denied. (RP 10/31/07, 127). At no time prior to appeal did the defendant allege any insufficiencies in the charging document.

A bench trial was held on October 29 and 31, 2007, after the defendant waived his right to a jury trial. (RP 10/29/07, 47-48, 61, RP

10/31/07, 128). The defendant was found guilty of Escape in the Second Degree. (RP 10/31/07, 139-140).

3. Counter Statement of the Facts

On March 28, 2007, the defendant appeared with counsel before the court on a criminal docket requesting a furlough to attend appointments related to State funding of drug addiction treatment. (RP 10/29/07, 64-65; Ex. 1). The defendant was being held on two (2) counts of Possession of Methamphetamine and one count of Bail Jumping. (RP 10/29/07, 64). The court granted the defendant's motion, and ordered that he be released between the hours of 8:00 a.m. and 10:00 a.m. on March 29, 2007. (Ex. 1). He was to remain in the custody of his father at all times and return to the jail no later than seventy-two (72) hours after his release. (Ex. 1).

On April 1, 2007, Benton County Corrections Corpora Tim Dunn noted that the defendant had not returned to the jail as ordered within seventy-two (72) hours of his release. (RP 10/31/07, 130, 134). Corporal Dunn contacted the defendant's father to give him the opportunity to locate the defendant and return him to the jail. (RP 10/31/07, 13). The defendant did not return to the jail until June 12, 2007, which was over two (2) months after he had been ordered to do so. (RP 10/31/07, 131).

ISSUES

1. **Was the language in the charging document sufficient to provide the defendant with notice of the nature and cause of the charge against him?**

ARGUMENT

1. **The language in the charging document was sufficient to provide the defendant with notice of the nature and cause of the charge against him.**

The defendant argues that the language in the charging document is statutorily insufficient because it does not set forth all the elements of the crime of Escape in the Second Degree. The defendant may challenge the sufficiency of a charging document for the first time on appeal. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86, 90-91 (1991). However, a challenge that is not made until after the defendant has been convicted, as in the instant matter, “will be more liberally construed in favor of validity than those challenged before or during trial.” *Id.* at 102, 812 P.2d at 90. To do otherwise would encourage defendants to sandbag the prosecution, waiting until it is no longer possible for the State to revise the information. *State v. Mendoza-Solorio*, 108 Wn. App. 823, 33 P.3d 411, 416 (2001).

Additionally, the standard of review requires a two-prong analysis: First, that there be “at least some language in the information giving notice of the allegedly missing element(s),” and second, if such language is

present, that it cause actual prejudice to the defendant. *Kjorsvik* at 106, 812 P.2d at 92.

To be statutorily sufficient, an Information must describe the crime charged “clearly and distinctly...in ordinary and concise language... in such a manner as to enable a person of common understanding to know what is intended...”. RCW 10.37.050(6). “[A]ll essential elements of an alleged crime must be included in the charging document in order to afford the accused notice of the nature of the allegations so that a defense can be properly prepared.” *Kjorsvik*, 117 Wn.2d at 101-2, 812 P.2d at 90.

The defendant was charged with Escape in the Second Degree. RCW 9A.76.120(1)(b) states that, “A person is guilty of escape in the second degree if... having been charged with a felony or an equivalent juvenile offense, he or she knowingly escapes from custody...”. The charging document read as follows:

That the said MAURICE TERRELL BROWN in the County of Benton, State of Washington, on or about the 1st day of April, 2007, in violation of RCW 9A.76.120 (1) (b), after having been charged with Possession of a Controlled Substance, a felony, did escape from the custody of Benton County Jail, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Washington.

(CP 95-96). While the word “knowingly” does not appear in the charging language, the phrase, “contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of

Washington,” adequately apprises the defendant that the State was charging him with knowingly escaping from jail.

Regarding the first prong of analysis, it is not dispositive that the word “knowingly” is not included in the charging language. In *Kjorsvik*, the defendant was charged with a document that read, in part:

, ..., Prosecuting Attorney for King County ... accuse Nicholas Jay Kjorsvik and Michael Marcelouse, and each of them, of the crime of robbery in the first degree, committed as follows:

That the defendants, Nicholas Jay Kjorsvik and Michael Marcelouse, and each of them, in King County, Washington, on or about July 1, 1988 did unlawfully take personal property, to-wit: lawful United States currency from the person and in the presence of Chris V. Balls, against his will, by the use or threatened use of immediate force, violence and fear of injury to such person or his property and in the commission of and in immediate flight therefrom the defendants were armed with and displayed what appeared to be a deadly weapon, to-wit: a knife;

Contrary to RCW 9A.56.200(1)(a)(b) and 9A.56.190, and against the peace and dignity of the state of Washington.

And I, ..., Prosecuting Attorney for King County, ... further do accuse the defendant at said time of being armed with a deadly weapon, to-wit: a knife, under the authority of RCW 9.94A.125.

Kjorsvik, 117 Wn.2d at 96, 812 P.2d at 87. The statutory language of RCW 9A.56.190 gave no mention of any element comparable to mens rea, but the Court had added it via the common law. *State v. Hicks*, 102

Wn.2d 182, 184, 683 P.2d 186 (1984). The charging document included no mention of “knowingly.” The court, however, held the word “unlawfully” was sufficient to inform *Kjorsvik* of the non-statutory element of “intent to steal” implied by RCW 9A.56.190 given the circumstances of the crime and the words of the charging document. *Kjorsvik*, 117 Wn.2d at 110, 812 P.2d at 94-95.

Explaining its holding, the *Kjorsvik* court noted that “it has never been necessary to use the exact words of a statute in a charging document; it is sufficient if words conveying the same meaning and import are used.” *Kjorsvik*, 117 Wn.2d at 108, 812 P.2d at 93. When the exact words of the statute are not used, the reviewing court must determine whether the words that are used “would reasonably apprise an accused of the elements of the crime charged.” *Id.* at 109, 812 P.2d at 94.

In *State v. Krajieski*, 104 Wn. App. 377, 380, 16 P.3d 69, 71 (2001), which cited extensively from *Kjorsvik*, the defendant’s conviction for Unlawful Possession of a Firearm was affirmed even though the charging document did not include knowledge as an element of possession. The *Krajieski* court, citing *State v. Niblas-Duarte*, 55 Wn. App. 376, 378, 380-82, 777 P.2d 583 (Div. I 1989), held that “under the first prong of the *Kjorsvik* test, the phrase “unlawfully and feloniously” used in *Krajieski*’s charging document adequately apprised *Krajieski* that

the State was charging him with knowing possession of a firearm.”
Krajieski, 104 Wn. App. at 386, 16 P.3d at 74.

The information in the instant case uses similar language. Like *Kjorsvik* and *Krajieski*, the document does not use the statutory language, but that is something that has never been required by the court. *Kjorsvik*, 117 Wn. 2d at 108, 812 P.2d at 93. The information gives the identity of the accused, the crime he was accused of committing, and the statutory basis for that claim. It further provides that Mr. Brown “did escape from the custody of Benton County Jail, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Washington.” (CP 95).

Unlike the criminal offenses in *Krajieski* and *Kjorsvik*, “knowingly” is a statutory element of the crime of Escape in the Second Degree. In cases where there is a non-statutory element of the crime, the risk of prejudice to a defendant from an imprecisely-worded information is arguably much higher. In *State v. Kitchen*, 61 Wn. App. 915, 918, 812 P.2d 888, 890 (1991), two charging documents alleging Unlawful Delivery of a Controlled Substance based on RCW 69.50.401(a) were held to be constitutionally defective. Knowledge is a non-statutory element of that offense. *Id.* at 917, 812 P.2d 889 (citing *State v. Boyer*, 91 Wn.2d 342, 344, 588 P.2d 1151 (1979)). The court, in assessing the validity of the

information, stated “Here, the statutory references in the informations are not helpful because the statute itself does not set forth the element of guilty knowledge.” *Kitchen*, 61 Wn. App. at 918, 812 P.2d at 890. This gives rise to the inference that reference to the statute could be helpful if all the elements of the crime were set out in it. In the instant case, RCW 9A.76.120 sets forth all of the elements of the crime of Escape in the Second Degree, including the “knowingly” provision at issue here. As such, the statement “contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Washington” should be found enough to have provided the defendant with notice of the statutory element of knowledge.

State v. Sutherland supports this proposition as well. 104 Wn. App. 122, 15 P.3d 1051 (2001). Citing to *Kitchen*, it affirmed the principle that references to the statute were ineffective because the requirement of knowledge was non-statutory. *Id.* at 132, 15 P.3d at 1056.

A distinction should be made between crimes wholly encompassed by their defining statute and those that have had common-law elements, such as a mens rea requirement. The primary goal of the essential elements rule is to make sure that defendants receive constitutionally prescribed notice of the crime they are accused of. *Kjorsvik*, 117 Wn.2d at 101, 812 P.2d at 90. Here, due to the clear listing of all requisite elements of the crime in

RCW 9A.76.120, there was no risk that the defendant would not receive notice of the crime, as long as the information charging him contained reference to the violated statute.

Regarding the second prong of analysis, the defendant does not allege that the State's failure to include the word "knowingly" in the charging document prejudiced him in any way. That the defendant's trial counsel was not hindered by the omission of the word "knowingly" from the charging document is demonstrated by the fact that counsel asked both of the State's witnesses a series of questions relating to whether the defendant had knowledge that he was supposed to return to jail in seventy-two (72) hours. (RP 10/29/07, 65-67; RP 10/31/07, 133-4). The trial court, in issuing its ruling, evaluated and then rejected the defendant's argument that he did not have knowledge of the furlough order:

Mr. Brown...was aware of the length of the furlough and failed to return...Mr. Brown knowingly failed to return to the detention facility after being granted a furlough.
(RP 10/31/07, 139).

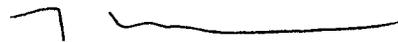
The language in the charging document was sufficient to apprise the defendant of the charges against him, including the element of knowledge.

CONCLUSION

The language in the charging document was sufficient to provide the defendant with notice of the nature and cause of the charges against him. As such, the State respectfully requests that the decision of the Court of Appeals be affirmed.

RESPECTFULLY SUBMITTED this 2nd day of July 2010.

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DECLARATION OF SERVICE

MAURICE TERRELL BROWN,

Petitioner.

I, PAMELA BRADSHAW, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the Respondent's Answer to the Petition for Review, and this Declaration of Service on July 2, 2010.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Kennewick, Washington, on July 2, 2010



PAMELA BRADSHAW