

FILED
JAN 13 2010

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

NO. 26740-7-III

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON

84083-1

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

MAURICE T. BROWN,

Appellant.

PETITION FOR REVIEW
TO WASHINGTON STATE SUPREME COURT

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IDENTITY OF PETITIONER

Maurice Brown was the defendant in the Benton County Superior Court trial where he was convicted of Escape in the Second Degree. He was the appellate in Division III of the Court of Appeals where his conviction was affirmed. He is the petitioner now to the Supreme Court. Mr. Brown is now incarcerated at the Walla Walla State Penitentiary.

CITATION TO COURT OF APPEALS DECISION

The Court of Appeal decision is attached as an appendix and is cited as 2009 WL 3739446, Wash.App. Div. 3, November 10, 2009 (NO. 26740-7-III).

CONSIDERATIONS RE: REVIEW

Defendant contends this Court of Appeals decision is in conflict with *State v. Kjorsvik*, 117 Wn.2d 93 (1991).

ISSUE PRESENTED FOR REVIEW

ISSUE FOR REVIEW NO. 1

The Court erred in finding the defendant guilty as no crime has been charged in the information.

STATEMENT OF THE CASE

The Benton County Prosecutor intended to charge the defendant by information with Escape in the Second Degree. (RCW 9A.76.120) (CP 95). A document purporting to be an information was filed on April 10, 2007. (CP 95). The information stated:

COMES NOW, ANDY MILLER,
Prosecuting Attorney for Benton County,
State of Washington, and by this his
Information accuses

MAURICE TERRELL BROWN

of the crime(s) of: ESCAPE IN THE
SECOND DEGREE, RCW
9A.76.120(1)(b) committed as follows,
to-wit:

Count I

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. Dated at
Kennewick, Washington on April 09,
2007. (CP 95).

ARGUMENT

The statute RCW 9A.76.120(1)(b) states:

**9A.76.120. Escape in the second
degree**

(1) A person is guilty of escape in the
second degree if:

IV Having been charged with
a felony or an equivalent
juvenile offense, he or she
knowingly escapes from
custody.

The statute was rewritten via Laws 2001, ch. 264 § 2 to add
the element of knowingly. Prior to this charge, knowledge was an
implied element. This charge in this case was tried to the Court
without a jury on October 31, 2007. (RP 10/31/07; 72:1 and
127:25). The Court found the defendant guilty. (RP 10/31/07;
127:25).

The information did not charge that the defendant knowingly escaped from a detention facility. In *State v. Anderson*, 141 Wn.2d 357 (2000), the Supreme Court changed the law in the State of Washington requiring that even the non-statutory element of knowledge is an element in the offense of felon in possession of a firearm.

Defendant argues that even though this error is alleged for the first time on appeal and even though the liberal *State v. Kjorsvik*, 117 Wn.2d 93 (1991) standard applies, that the element of knowledge does not appear in the information in any form or by fair construction. Defendant Brown, through his not guilty plea, denied a knowing escape, but even if he knew and there was sufficient evidence of knowledge presented to the trier of fact, these are not substitutes for charging the defendant with knowing escape.

In *State v. Kajeski*, 104 Wn.App. 377 (2001), and *State v. Summers*, 107 Wn.App. 373 (2001), the information's charged that each of these defendants:

... “did unlawfully and feloniously own, have in his possession, or under his control a firearm...”

Both of these Court of Appeal’s cases found that this language, under the liberalized *Kjorsvik* standard, was sufficient to substitute for the knowledge element. However, in the instant case, the relevant portions of the information do not allege either unlawfully or feloniously.

Defendant argues that the failure to include the language “unlawfully and feloniously” in the instant information distinguishes *Summers* and *Kajeski* from the instant information.

In fact, the inclusion of just “unlawfully” is not sufficient to appraise the defendant of the State’s need to prove knowledge before his guilt can be established. In *State v. Marcum*, 116 Wn.App. 526 (2003), Division III of the Court of Appeals found that an information charging unlawful possession of a firearm did not charge knowingly. *State v. Marcum* stated:

A challenge to the sufficiency of the charging document to support a criminal conviction implicates the due

process requirement of notice under Washington Constitution, article I, section 22 (amendment 10) and the sixth amendment to the Constitution of the United States. *State v. Kjorsvik*, 117 Wash.2d 93, 97, 812 P.2d 86 (1991). Review is de novo. *State v. Valdobinos*, 122 Wash.2d 270, 858 P.2d 199 (1993).

Mr. Marcum challenges the sufficiency of the information for the first time on appeal. We therefore construe the information more liberally in favor of its validity. *Kjorsvik*, 117 Wash.2d at 102, 812 P.2d 86. The information must nonetheless contain in some form language that can be construed as giving notice of the essential elements. And if it does not, “the most liberal reading cannot cure it.” *State v. Moavenzadeh*, 135 Wash.2d 359, 362-63, 956 P.2d 1097 (1998) (quoting *State v. Campbell*, 125 Wash.2d 797, 802 888 P.2d 1185 (1995)).

To be statutorily sufficient, an information must clearly and distinctly set forth the act or omission that is alleged to constitute the crime in ordinary and concise language, so that a person of common understanding is able to understand what is intended. RCW 10.37.050(6). The act or omission charged as the crime must be stated with “such a degree of certainty as to enable

the court to pronounce judgment upon a conviction according to the right of the case.” RCW 10.37.050(7).

The Court of Appeals, in their opinion, found that the essential element of knowledge was missing from the information, but, nevertheless affirmed the conviction because the Court found that the defendant was not prejudiced by the failure of the prosecutor to charge this essential element. The November 12, 2009 Court of Appeals opinion in this case stated the information did not contain the element of knowledge.

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,” even under the most liberal construction, is insufficient to allege the knowledge element. Accordingly, Mr. Brown’s information was defective.

Nonetheless, Mr. Brown does not attempt to show he was prejudiced and no prejudice can be discerned from the record.

Defendant argues that he does not need to show prejudice.

State v. Kjorsvik, 117 Wn.2d 93 (1991) stands for the following rule:

(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice? *Id.*, at 105-06.

The *Kjorsvik* case stands for the proposition that all essential elements must appear on the face of the charging document. The issue of prejudice never arises until the court finds that each essential element actually appears in the charging document. The Court of Appeals found that the essential element of knowledge did not appear in any form. The Court of Appeals found that even using “fair construction” analysis the element of knowledge did not appear in the information. The second portion of the above stated *Kjorsvik* rule, therefore never comes into play. The second portion is applicable only if the element of knowledge is found in some form or by fair construction.

There is never a need for a defendant to show that he was prejudiced by the failure of the information to state an element. The failure to state an element denies an “accused notice of the nature of the allegations so that a defense can be properly prepared.” *Kjorsvik* at 102.

As recently as December 17, 2009, the State Supreme Court, in *State v. Powell*, 2009 WL 4844354 (Wash) Dec. 17, 2009 stated:

The essential elements rule was developed to ensure that the constitutional notice guaranty is fulfilled as to the underlying crime. Under this rule, the State is required to include “[a]ll essential elements of a crime, statutory or otherwise, ... in a charging document.” *State v. Kjorsvik*, 1147 Wn.2d 93, 97, 812 P.2d 86 (1991). “The primary goal of the ‘essential elements’ rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against.” *Id.* at 101. Essential elements consist of the statutory elements of the charged crime and a description of the defendant’s conduct that supports every statutory element of the offense. *Id.* at 98.

¶ 19 In addition to notice, the essential elements rule also serves to

ensure that an accused is charged with an offense. An accused “cannot be tried for an offense not charged.” *State v. Carr*, 97 Wn.2d 436, 4369, 645 P.2d 1098 (1982); accord *State v. Rhinehart*, 92 Wn.2d 923, 928, 602 P.2d 1188 (1979). The omission of any element “in the charging document is a constitutional defect which may result in dismissal of the ... charges.” *State v. Holt*, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985) (emphasis omitted). “[N]o one can legally be convicted of an offense not properly alleged.” *State v. Ackles*, 8 Wash. 462, 464, 36 P. 597 (1894).

In *State v. George*, 146 Wn.App. 906 (2008), the Court ruled:

A person may not be convicted of a crime with which he or she was not charged. *Auburn v. Brooke*, 119 Wash.2d 623, 627, 836 P.2d 212 (1992). In order to meet this requirement, all of the essential elements of the charged offense, statutory or otherwise, must be included in a charging document in order to afford to the accused the constitutional requirement of notice. *State v. Kjorsvik*, 117 Wash.2d 93, 97, 812 P.2d 86 (1991). An essential element is one whose specification is necessary to establish the very illegality of the behavior charged. *State v. Ward*, 148 Wash.2d 803, 811, 64 P.3d 640 (2003).

The *George* case also stated:

Here, the citation at issue alleges that George was guilty of “possession of drug paraphernalia.” But no Washington statute criminalizes “possession of drug paraphernalia.” *See, e.g., State v. Neeley*, 113 Wash.App. 100, 107, 52 P.3d 539 (2002).

.....

Even under the most liberal construction of the citation issued by Trooper Thompson, none of the possible circumstances under which George’s possession of the pipe could have been found to be criminal were alleged in the citation. This error alone requires reversal of George’s conviction for possession of drug paraphernalia.

In *State v. Nonog*, 145 Wn. App. 802 (2008), the Court ruled that prejudice to the defendant was only an issue if there was “actual prejudice” as a result of the inartful charging language.

In *State v. Laramie*, 141 Wn. App. 332 (2007), Division III of the Court of Appeal reversed an assault conviction when the State

was allowed to add an alternative means for committing Assault in the Second Degree after the State rested. The *Laramie* Court stated:

The State argues Mr. Laramie suffered no prejudice because he knew prior to trial that the evidence supported the alternative means. But this does not answer the problem that the jury was instructed on an uncharged alternative means, despite Mr. Laramie's constitutional right to be informed of the nature of the charges against him. U.S. CONST. amend. VI: WASH. CONST., art. I, § 22; *see State v. Pelkey*, 109 Wash.2d 484, 490-91, 745 P.2d 854 (1987).

CONCLUSION

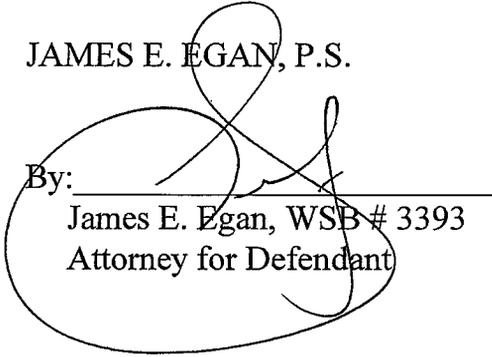
Defendant moves the Court to reverse and dismiss without prejudice, the charge of Escape in the Second Degree as the original information did not charge a crime.

APPENDIX

A copy of the Court of Appeals decision is attached hereto and by this reference made a part hereof.

Respectfully submitted this 6th day of January, 2010.

JAMES E. EGAN, P.S.

By: 

James E. Egan, WSB # 3393
Attorney for Defendant

FILED

NOV 10 2009

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MAURICE TERRELL BROWN,

Appellant.

No. 26740-7-III

Division Three

UNPUBLISHED OPINION

SCHULTHEIS, C.J. — Maurice Terrell Brown appeals his conviction for second degree escape, contending the evidence was insufficient to support the conviction. He also contends the information was insufficient to provide him with notice of the nature of the charge against him. We affirm.

FACTS

On April 10, 2007, Mr. Brown was charged with second degree escape in an information that alleged that he, “in violation of RCW 9A.76.120(l)(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.” Clerk’s Papers (CP) at 95.

Mr. Brown waived his right to a jury trial and the case was tried without a jury. The State presented evidence from a records custodian that on March 28, 2007, Mr. Brown was being held in the Benton County Jail on \$10,000 bail for two counts of possession of methamphetamine and bail jumping. The custodian also testified that Mr. Brown was present with his attorney when a motion was made for a 72-hour furlough and the motion was granted. The trial court admitted a certified copy of the order authorizing a 72-hour furlough. Corporal Tim Dunn testified that Mr. Brown was released from jail pursuant to the furlough and did not return until June 12, 2007.

The judge found Mr. Brown guilty. The court entered the following findings of fact and conclusions of law upon remand as requested.

FINDINGS OF FACT

1. On March 28, 2007, the defendant appeared in person with counsel before the Court on the criminal docket on defendant’s motion for a furlough to attend appointments related to state funding of drug-addiction treatment. The defendant was being held on two (2) counts of Possession of Methamphetamine and one (1) count of Bail Jumping. 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. The defendant was also ordered to remain in the custody of his father at all times and to return to the jail no later than seventy-two hours after his release.
2. There is a note in the file from the clerk indicating that the motion was granted for a 72-hour furlough, which gives rise to the inference that Mr. Brown, being present and having requested the furlough, was aware of the length of the furlough and the conditions thereof.

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

CONCLUSIONS OF LAW

1. On March 28, 2007, the Order for Furlough was entered in open court in the presence of the defendant, Mr. Brown. The order required Mr. Brown to return [to] the Benton County Corrections facility within seventy-two hours of his release.
2. The facts that the Order for Furlough was entered in open court, at the defendant's request, and in the defendant's presence, along with the note from the clerk indicating that the motion was granted for seventy-two (72) hours, establish beyond a reasonable doubt that Mr. Brown was aware of the length of the furlough and other requirements thereof.
3. Mr. Brown knowingly failed to return to the Benton County detention facility after being granted a furlough.
4. Mr. Brown's failure to return after being granted a furlough occurred in Benton County, Washington.
5. The Court finds Mr. Brown guilty of the crime of Escape in the Second Degree.

Clerk's Papers (CP) at 99-101.

ANALYSIS

Mr. Brown contends that the information is insufficient because it did not contain the knowledge element of second degree escape. The State responds that the information adequately apprised Mr. Brown that the State was charging him with knowingly escaping from jail.

Mr. Brown did not object to the information below. This court does not ordinarily address issues raised for the first time on appeal. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). “A challenge to the constitutional sufficiency of a charging document may be raised initially on appeal.” *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991).

When raised for the first time on appeal, a two-prong test is employed to determine the sufficiency of the information:

(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?

Id. at 105-06.

The first prong of this test requires “at least some language in the information giving notice of the allegedly missing element.” *Id.* at 106. It is sufficient if “the words used would reasonably apprise an accused of the elements of the crime charged.” *Id.* at 109. When the information is challenged after trial, this court construes it liberally in favor of validity. *Id.* at 102.

The criminal escape statute provides that “[a] person is guilty of escape in the second degree if . . . [h]aving been charged with a felony or an equivalent juvenile offense, he or she *knowingly* escapes from custody.” RCW 9A.76.120(1)(b) (emphasis added).

The information here states:

COMES NOW, ANDY MILLER, Prosecuting Attorney for Benton County, State of Washington, and by this his Information accuses

MAURICE TERRELL BROWN

of the crime(s) of: ESCAPE IN THE SECOND DEGREE, RCW 9A.76.120(1)(b) committed as follows, to-wit:

COUNT I

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 at 95 (emphasis added).

The State argues that the use of the terms emphasized above implies knowledge.

In *State v. Krajcski*, 104 Wn. App. 377, 386, 16 P.3d 69 (2001), Division Two of this court held that an information, liberally construed, sufficiently alleges knowledge by stating that the defendant "unlawfully and feloniously" committed an act. But Mr. Brown's information did not use this 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," even under the most liberal construction, is insufficient to allege the knowledge element. Accordingly, Mr. Brown's information was defective.

Nonetheless, Mr. Brown does not attempt to show he was prejudiced and no prejudice can be discerned from the record. Mr. Brown's defense was grounded in lack of knowledge, as shown by testimony he elicited that it was unclear whether Mr. Brown

received a copy of the furlough and that he did not sign the document. Defense counsel also prefaced closing arguments with the statement that, "Your Honor, the escape, to be convicted of the escape, it would have to be a knowing act." Report of Proceedings at 136-37. The information is insufficient, but there was no prejudice.

Mr. Brown next challenges the sufficiency of the evidence to support his conviction for second degree assault. A challenge to the sufficiency of the evidence presented at a bench trial requires us to review the trial court's findings of fact and conclusions of law to determine whether substantial evidence supports the challenged findings and whether the findings support the conclusions. *State v. Halstien*, 122 Wn.2d 109, 128-29, 857 P.2d 270 (1993). We review challenges to a trial court's conclusions of law de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

Mr. Brown was charged with escape in the second degree, which as charged here requires proof that "[h]aving been charged with a felony or an equivalent juvenile offense, he or she knowingly escapes from custody." RCW 9A.76.120(1)(b). Former RCW 9A.76.010(1) (2001) defines "custody" in part as "restraint pursuant to a lawful arrest or an order of a court."

The trial court found that Mr. Brown was being held in the county jail on two counts of possession of methamphetamine and one count of bail jumping, was granted a 72-hour furlough for drug treatment on March 29, 2007, and did not return until June 12, 2007. Possession of methamphetamine is a class C felony. RCW 69.50.4013(2). Escape

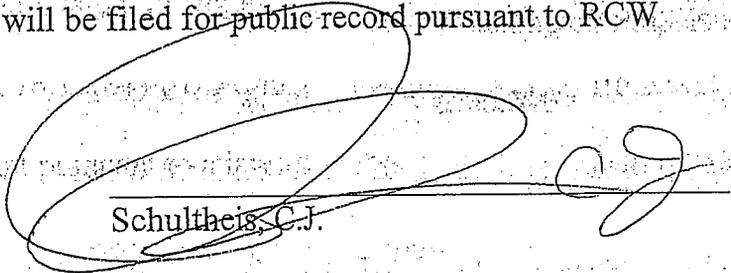
is proven by the findings, which show that Mr. Brown was under the restraint of the 72-hour furlough when he "departed from the limits of [his] custody without permission" and failed to return within the 72-hour limitation of the furlough. *State v. Kent*, 62 Wn. App. 458, 461, 814 P.2d 1195 (1991).

Mr. Brown argues that because there is no evidence that he was given a copy of the furlough order, which was agreed and not argued before the court, the evidence is insufficient to support the conclusion that he knew the length of the furlough. The trial court concluded that knowledge was proven by the fact that the furlough was at Mr. Brown's request and it was entered in open court, in Mr. Brown's presence. These facts are sufficient to support the conclusion.

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW

2.06:040.

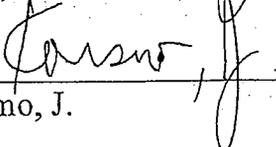


Schultheis, C.J.

WE CONCUR:



Kulik, J.



Korsmo, J.