IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BEAU E. NUGENT, Appellant.	No. 38383-7-II UNPUBLISHED OPINION

Bridgewater, J. — Beau E. Nugent appeals his convictions for escape from community custody and first degree escape. We hold that there was not sufficient evidence to prove he was subject to community custody; both counts fail. We reverse the convictions and order dismissal of the counts.

FACTS

On January 25, 2005, Nugent was convicted of a felony[1] in Mason County Superior Court. RP at 51. Upon his release from confinement, Department of Corrections employee Robert McIntosh was assigned as Nugent's community corrections officer. McIntosh instructed

[1] Nugent's prior conviction was first degree manslaughter. For the case at bar, the parties agreed to stipulate that Nugent was convicted "in Mason County Superior Court Cause No. 98-1-216-6 of a felony." RP at 20-21, 51.

Nugent to report to him each Wednesday of every month; however, on November 7, 2007, Nugent failed to report as instructed. McIntosh made repeated, unsuccessful attempts to telephone Nugent. He also tried to locate Nugent at his reported physical address but learned that it was vacant.

On December 13, 2007, McIntosh issued an order for arrest and detention to bring Nugent into custody. Although the order contained several boxes to check, each corresponding to different types of supervision, McIntosh checked the "Post-Release Supervision" box but left open the "Community Custody" boxes.[2] Ex. 1, 1A.

On March 5, 2008, officers found Nugent and arrested him for the warrant. While handcuffed, Nugent ran away before being placed in the patrol vehicle but was ultimately taken into custody.

ANALYSIS

The State charged Nugent with and convicted him of escape from community custody (count I) and first degree escape (count II). The convictions fail because there was not sufficient evidence that he was on community custody. The relevant facts at trial were as follows:

1. Nugent had a prior felony conviction, he had to report regularly to a community correction officer, he had failed to report, and he had a warrant issued for his arrest;

2. The arresting officer and the community correction officer merely testified that the

[2] Community placement has two components: community custody and postrelease supervision. Former RCW 9.94A.030(7) (2008). Community custody is a substitute for earned early release, whereas postrelease supervision is an addition to the sentence. Former RCW 9.94A.030(5), (7), and (38). Specifically, postrelease supervision is defined as "that portion of an offender's community placement that is not community custody." Former RCW 9.94A.030(38).

arrest was based on a warrant;

3. The order for arrest and detention, which was admitted at trial, indicated that Nugent had violated postrelease supervision: it only had the box checked for "Post-Release Supervision," even though it had a box available for "Community Custody", Ex. 1, 1A;

4. Nugent admitted that he did not report as required and that he had run after being arrested;

5. There was no testimony, even from Nugent's community correction officer, that he was on community custody. And there was no testimony or instruction explaining the difference between community custody and postrelease supervision, even though the jury asked during its deliberations for the difference between the two.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of a crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

Here, there was simply no evidence, either direct or circumstantial, that Nugent was on community custody. The only mention of community custody came from Nugent on cross-examination when the prosecutor asked him about his denials, to which he responded with two sentences: (1) "I'm denying my escape from community custody," and, responding to the prosecutor's request to clarify that denial, (2) "That I escaped from my community custody, yes." RP (Sept. 3 and 4, 2008) at 55. These denials do not rise to admissions that he was on community custody but rather only state his position of a general denial of the State's charge. No other testimony gives rise to a reasonable inference that Nugent was subject to community custody, as no witness testified regarding his community placement status, including his community corrections officer, not to be confused with community "custody" officer, McIntosh. Notably, the only evidence on record regarding Nugent's type of community placement was the arrest warrant that McIntosh issued. But the warrant indicated that Nugent was subject to *post-release supervision*, not community custody.

The jury instructions for count I required that Nugent be subject to community custody. The relevant instructions pertaining to count II required that Nugent escape from custody while being "detained pursuant to a felony conviction," CP at 35, and a defining instruction explained that a person who is detained on an arrest warrant *for violating his community custody conditions* is "detained pursuant to a felony conviction." CP at 38; *cf. State v. Walls*, 106 Wn. App. 792, 797-98, 25 P.3d 1052 (2001) (holding that defendant was "detained pursuant to a conviction of a felony" when defendant was on probation for prior felonies and the warrant for his arrest was based on a "probation violation").

Because the evidence was insufficient to convict Nugent of escape from community custody and first degree escape, the proper remedy is to reverse and remand for dismissal with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).[3]

Reversed and remanded for dismissal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Houghton, J.

Van Deren, C.J.

[3] Because of our disposition we do not address the other issues raised in Nugent's statement on additional grounds.