COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 26740-7-III**
Respondent,	)	
v.	)	**ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDING OPINION**
MAURICE TERRELL BROWN,	)	
Appellant.	)	

THE COURT has considered appellant's motion for reconsideration, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of November 10, 2009 is hereby denied.

IT IS FURTHER ORDERED the opinion filed November 10, 2009 is amended as follows:

The sentence on lines 5-6 on page 6 that reads:

> Mr. Brown next challenges the sufficiency of the evidence to support his conviction for second degree assault.

shall be amended to read:

> Mr. Brown next challenges the sufficiency of the evidence to support his conviction for second degree escape.

DATED:

FOR THE COURT:

_____

JOHN A. SCHULTHEIS, Chief Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 26740-7-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
MAURICE TERRELL BROWN,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

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(l)(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(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*.

CP at 95 (emphasis added).

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

In *State v. Krajeski*, 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 escape. 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.