

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0242

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DYLAN MIKKEL OHL,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Jason Marks, Presiding

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STATEMENT OF THE ISSUES

1. Whether the district court correctly denied Ohl's motion to dismiss for insufficient evidence¹ because it was premised on an incorrect legal interpretation of the escape statute and evidence at trial was sufficient to show that Ohl was in state custody following sentencing, he knew he was to report to probation to be taken to the jail, he was advised failure to report would be an escape, he never reported, and he was arrested months later.

2. Whether the district court abused its discretion when it refused Ohl's unopposed instruction that criminal contempt is a lesser-included offense of escape because criminal contempt contains different and additional elements not included in escape.

STATEMENT OF THE CASE

In May 2019, the State petitioned to revoke Appellant Dylan Mikkel Ohl's suspended sentence in case number DC 12-485 due to numerous violations.

(Doc. 1 at 2.) Ohl entered separate admissions to each of the violations, and the

¹ At trial, Ohl referred to his motion as a motion for a directed verdict. On appeal, he refers to it as a motion to dismiss for insufficient evidence. This Court has previously explained that, however termed, the motions are functionally the same. The proper term is a motion to dismiss for insufficient evidence. *State v. McWilliams*, 2008 MT 59, ¶ 36, 341 Mont. 517, 178 P.3d 121. Therefore, the State refers to Ohl's motion as a motion to dismiss for insufficient evidence throughout its brief regardless of terminology used in the record.

district court held a dispositional hearing on June 17, 2020. (*Id.*) The district court permitted Ohl to appear by video for the dispositional hearing due to health and safety concerns during the COVID-19 pandemic. (Tr. at 196.)²

The district court revoked Ohl's suspended sentence and imposed two years with the Department of Corrections (DOC). (Trial Ex. 1 at 24.) DOC instructed Ohl to report to probation and parole by 5:30 p.m. to be taken to the detention center where he would remain until he could be placed into a DOC treatment facility. (*Id.* at 28-29.) Ohl did not report. (Tr. at 223.)

The State charged Ohl by Information with felony escape on June 18, 2020. (Doc. 4.) On February 9, 2021, a jury found Ohl guilty of escape. (Doc. 43.) Ohl was sentenced to six years in the Montana State Prison, all suspended. (Doc. 49.)

STATEMENT OF THE FACTS

On May 2, 2019, the State filed a second Petition to Revoke Ohl's suspended sentence in DC 12-485. (Doc. 1.) The State subsequently filed ten supplemental petitions to revoke. (*Id.*) Ohl entered separate admissions to each of

² The single transcript for this case contains pretrial hearings and a pretrial conference held on January 12, 19, 26, and February 3, 2021, jury selection and trial held February 5, 8-9, 2021, and Ohl's sentencing hearing on March 12, 2021. The pages of the transcript are numbered consecutively, beginning with the January 12, 2021 hearing and ending with the March 12, 2021 sentencing.

the violations listed in the second Petition to Revoke and ten supplemental petitions. (*Id.* at 2.)

The district court held a dispositional hearing on the petitions to revoke on June 17, 2020. (*Id.* at 2.) At the time, the court was permitting video appearances in order to address health concerns raised by the COVID-19 pandemic. (Tr. at 196.) At a prior hearing on June 4, 2020, the district court had given Ohl permission to elect whether he would prefer to appear for the dispositional hearing in person or by video. (*Id.* at 213.) Ohl appeared for the June 17, 2020 dispositional hearing by video from a vehicle. (*Id.* at 198, 221, 273-74.)

During the hearing, the district court revoked Ohl's suspended sentence and imposed two years with the DOC, with a recommendation for placement at the Nexus Treatment Center. (Trial Ex. 1 at 24.) The court reasoned that it had "attempted to give [Ohl] as many opportunities as, kind of, humanly possible to try to address his addiction and inability to comply with probation while in the community." (Doc. 21 at 30.)

Initially, because Ohl was not physically in the courtroom to be remanded into custody, the district court instructed Ohl to report to the detention center by noon on Friday, June 19, 2020. (Tr. at 213; Trial Ex. 1 at 27.) The State asked the court to clarify, expressing concern given that Ohl's sentence would begin immediately yet he would not be in physical custody for two more days. (Tr. at

202; Trial Ex. 1 at 27.) The court agreed that the sentence began immediately and determined that the decision about when to report should be answered by DOC because the court had committed Ohl to DOC and the court no longer had jurisdiction over the matter. (Tr. at 202; Trial Ex. 1 at 27-29.) DOC probation officer Justin Bradley (Bradley) was present for the hearing and asked the court to have Ohl report to Bradley's office by 5:30 p.m. that evening, Wednesday, June 17. (*Id.*) When Ohl expressed that he would rather report on Friday, the court explained that the court "d[id not] have any control over you anymore because you're now in the custody of the Department of Corrections." (*Id.*) Ohl was again instructed to report to the probation office by 5:30 p.m. that day, with the understanding that he would be taken to the detention center until DOC placed him in a treatment facility. (*Id.* at 28-29.) During Ohl's trial on the escape charge, Bradley testified that Ohl had previously been sentenced to DOC and had gone through the process before, indicating Ohl knew how the process worked. (*Id.* at 233.)

Ohl had been the last name on the court's docket the afternoon of his revocation dispositional hearing, and, at the jury trial on the escape charge, the Honorable Leslie Halligan (Judge Halligan) testified she believed the dispositional hearing ended roughly around 4:30 p.m. (Tr. at 203.) Around 5:20 p.m., Bradley texted Ohl, telling him where he could park when he reported to Bradley's office.

(*Id.* at 218; Trial Ex. 2 at 1.) Ohl responded that he wanted more time “to deal with getting [his] stuff in order.” (Tr. at 219; Trial Ex. 2 at 2.) Bradley warned him that if he did not report it could be a new “charge of escape because you are a doc inmate [sic].” (Tr. Ex. 2 at 1.) Bradley encouraged Ohl to report so he could go to treatment and told Ohl he knew he could do it. (*Id.*) Ohl responded, “It’s just treatment? It’s just another 2 years out of my life that is being taken from me,” and again asked Bradley to change when he needed to report, claiming he needed time to get a ride. (*Id.* at 1-2.) Bradley reminded Ohl that he had appeared by video from “a car during the [dispositional] hearing.” (*Id.* at 3.) Bradley told Ohl that he had spoken with the prosecutor and that he would be charged with escape if he did not report. (*Id.* at 1, 4.) The text exchange continued in the same fashion, with Bradley reiterating that Ohl needed to report by 5:30 p.m. and Ohl rejecting the reporting time, claiming he would “turn [himself] into the jail. Within an hour.” (*Id.* at 2-6.)

At the trial on the escape charge, Bradley stated Ohl had already received an accommodation that most inmates do not receive following sentencing when he was given roughly an hour until he had to report. (Tr. at 220.) During typical, non-pandemic times, Ohl “would have been taken directly from the courthouse to jail.” (*Id.*) Bradley testified that once Ohl was sentenced “he bec[ame] an inmate” and therefore Bradley was no longer “his probation officer[.]” (*Id.* at 229.) Bradley explained that he “only supervise[s] people that are active in the community.” (*Id.*)

Nonetheless, Bradley attempted, unsuccessfully, to contact Ohl and convince him to report to DOC. (*Id.*) Bradley testified that Ohl never reported, never turned himself in to the jail, and was not located until he was arrested several months later in September. (*Id.* at 223.)

Following the court's denial of Ohl's motion to dismiss for insufficient evidence, Ohl testified. Ohl confirmed that he had appeared by video from his partner's vehicle at the disposition hearing and that Bradley's office was only a few minutes away from where he was parked during the hearing. (*Id.* at 278-79.) Ohl testified that he had wanted more time before reporting to wait until his partner was off work. (*Id.* at 280-81.) Ohl admitted he did not report by 5:30 p.m. as ordered, nor did he report an hour later as he requested, nor on Friday as originally proposed. (*Id.* at 281.) The State questioned Ohl regarding his understanding of what he was supposed to do following his sentencing, and the following exchange occurred:

Q. So your issue in this case is that you just didn't think you would be in that much trouble, right?

A. Yes.

Q. So there's no doubt that you knew you were supposed to go to Justin Bradley's office?

A. Yes.

Q. And you knew there would be consequences?

A. Yes.

Q. He specifically told you you were going to be charged with escape?

A. Yes.

(*Id.* at 282.)

I. Motion to dismiss for insufficient evidence

In the Omnibus Memorandum filed November 10, 2020, Ohl notified the court and the State of his intention to file a motion to dismiss for lack of probable cause. (Doc. 12.) Ohl never filed the motion. (Tr. at 247.) Ohl explained that defense had contemplated a pretrial motion, but never filed one because defense believed it was a factual issue as applied to the definition of escape. (*Id.* at 247.)

At trial, after the State rested, and outside of the presence of the jury, Ohl moved the court to dismiss for insufficient evidence. (Tr. at 235.) Ohl argued that because his status remained that of a DOC inmate, and because it was impossible for him to remove himself from that status, he never escaped. (*Id.*) The court challenged Ohl's proposed reading of the escape statute, noting that if an inmate tunneled out of a prison, "[t]hey would still be an inmate." (*Id.* at 236-37.) The court pointed to several cases that have come before this Court and noted that under Ohl's theory those would not have been escapes either. (*Id.*)

The State posited that under Ohl's interpretation of the escape statute there is "no circumstance where th[e] statute could be applied." (*Id.* at 238.) The State expressed concern, stating "there's an issue here, not only with what [Ohl is] apparently intending to argue in close. But I think it's a misstatement of the law, not supported, and would cause dramatic confusion to the jury." (*Id.*) The court advised that it would take the matter under advisement over lunch recess but warned Ohl it was not "going to invalidate the entire escape statute." (*Id.* at 241.)

Following the lunch recess, the parties appeared in court outside the presence of the jury and again addressed Ohl's argument regarding the interpretation of the escape statute. Ohl theorized that the only way he could have possibly committed an escape as a DOC inmate, was "if he left [t]he State's jurisdiction," for example, "if he had gone to Washington[.]" (*Id.* at 244.)

The court reasoned that part of the issue in interpreting the escape was "what does eluded mean within the statute and unfortunately it does not define [it] within itself." (*Id.* at 245.) Ohl interjected that the definition of eluded does not matter because he was sentenced to DOC and his status as a DOC inmate remained, "no matter what his behavior even [was], legally speaking[.]" (*Id.*) Again highlighting the need for an instruction on what eluded means, the court explained:

I think this needs to have the term eluded defined. In order—because the statute has to make some sort of logical sense. I mean, it is criminalizing conduct. And I cannot see how your interpretation criminalizes any conduct other than actually perhaps the prerelease

walkaway, but even then there's still an inmate. So the *Romannose* case make[s] reference to somebody being subject to official detention. The difference between being subject to and being in official detention, I'm not entirely clear on. I was trying to figure out what—because obviously no one has raised [] the definition of eluding in an escape case before, that I can find. So I'm looking at what eluding means elsewhere in the statute or in the Montana law. And essentially it's avoiding being taken into physical custody. That's the eluding peace officer statute, it's in the commissioner comments to the obstructing justice statute about why they are criminalizing helping somebody elude when they are a fugitive. So I feel that that is an implied element here that we need to look at. I'm not wanting to make legal determinations off the cuff over a lunch hour and I certainly wish this had been raised before, but I mean, this is where we are.

Id. at 246-47.

Ohl proposed using the Webster's dictionary definition, which defines elude as escape. (*Id.* at 247.) The court pointed out that defining elude as escape would be “unhelpful when you're using it in an escape statute.” (*Id.*) The State pointed to the Ninth Circuit, noting that it has defined elude as “to avoid slyly by artifice, stratagem or dexterity.” (*Id.* at 248.) The State also addressed the history of the escape statute, explaining:

I do want to highlight briefly since we were discussing it before our break, that there has been a change in the Montana statute. And I feel in some ways that we're moving back in time. Because at one point in 1997 the Montana statute for escape said, [“]A person subject to official detention commits the offense of escape if he knowingly or purposely removes himself from official detention, or fails to return to official detention.[”] It seems like [Ohl] is now arguing back to that

old version of the statute [T]here is no requirement in Montana that somebody removes themselves from detention.

(Id. at 248-49.)

The court explained it was considering defining eluding as “someone either removing themselves from physical custody or taking steps to avoid being placed in physical custody while being subject to official detention.” *(Id. at 250.)* The court excused the jury for the day so the court and both parties could further research the issue and address remaining issues. *(Id. at 250-52.)* Prior to releasing the parties to further research the remaining issues, the court explained that, while it would be inclined to grant Ohl’s motion if the court “were to read the escape statute the way [Ohl was] reading it,” Ohl’s interpretation “doesn’t make sense from the statute having any meaning[.]” *(Id. at 254.)*

Both parties filed additional briefing to address the court’s proposed eluding instruction. (Docs. 38, 39.) Ohl argued the court’s definition of elude would change the object of elude from “official detention” to “physical custody.” (Doc. 39.) The State argued Ohl’s interpretation would mean “that if someone has been sentenced to DOC, there is no set of facts under which they could be found guilty of Escape because you cannot escape from a sentence.” (Doc. 38 at 4.) The State argued that “official detention,” by the plain language of the statute, includes “placement of a person,” and that placement includes the person’s physical location. *(Id. at 3-4.)*

The State pointed to several of this Court's previous cases in which this Court upheld escape convictions when offenders who were serving sentences while living in the community left the locations where they were supposed to be, even though their legal status never changed. (*Id.* at 5-8.) The State requested, in addition to an instruction on eluding, that Ohl be prohibited from arguing in closing that a person with the legal status of an inmate cannot be charged with escape for eluding physical custody. (*Id.* at 11.) The State specifically pointed to an email from Ohl to the court in which he asserted:

Eluding official detention as the result of a conviction, may be a logical impossibility and certainly is in this case. [Ohl] cannot escape or elude the legal custody of the State, because you cannot escape a DOC sentence (unless perhaps you left its jurisdiction but no evidence was presented of that).

(*Id.*)

The court emailed both parties its initial take on the issues, and the following morning, on the record, the court denied Ohl's motion and granted the State's request for the eluding instruction. (Tr. at 258-71.) The court explained that it did not believe Ohl's interpretation was correct because that would mean no one could ever escape under the statute because they retained the legal status of an inmate, rendering the whole statute meaningless. (*Id.* at 266-69.) The court also pointed out that should the court adopt Ohl's interpretation of the statute and grant the

motion—raised for the first-time mid-trial— “the State can’t appeal that, as they could a motion to dismiss pretrial.” (*Id.* at 266.)

II. Refusal of jury instruction for criminal contempt as a lesser-included offense of escape

Prior to trial, Ohl filed a motion for a lesser-included offense instruction, claiming that “in this case, criminal contempt is a lesser[-]included offense of escape.” (Doc. 18 at 4.) Ohl argued that “[t]he charges of criminal contempt can be proven by applying the same facts as the facts applied to escape, except the State would not need to prove official detention.” (*Id.*) Ohl posited that he could be acquitted of escape but still convicted of criminal contempt, “[s]pecifically, if the jury believes that [Ohl] was not subject to official detention, but he was mandated by the Court to report to probation[.]” (*Id.* at 5.)

During the pretrial conference, the State indicated it was “not going to challenge the lesser[-]included instruction, assuming that when we get to that point in jury instructions [the court] feel[s] that it’s still appropriate or the evidence has been presented for that.” (Tr. at 10.) At a subsequent pretrial hearing, the court informed Ohl that, while it understood the State had not challenged the lesser-included instruction, the court had “an independent obligation to correctly instruct the jury on the law[.]” and it was “not convinced that criminal contempt is a lesser[-]included of escape.” (Tr. at 47-48.) The court noted that criminal

contempt has an extra element of refusing to obey a court mandate that “is not contained in escape.” (*Id.*)

After the State rested, the court returned to Ohl’s proposed lesser-included offense instruction and stated it would be denying the requested instruction. (*Id.* at 253.) The court explained that, while the court could see “the kind of common sense attractiveness of [Ohl’s] position[,]” criminal contempt does not meet the legal requirements to be a lesser-included offense of escape. (*Id.*)

SUMMARY OF THE ARGUMENT

The district court correctly denied Ohl’s motion to dismiss for insufficient evidence. Ohl’s motion was premised on an incorrect legal interpretation of the escape statute. Under Ohl’s theory, no one could ever be convicted of an escape because they would retain the legal status of an inmate regardless of their conduct, even if they left the physical confines of a detention facility. Testimony and exhibits admitted at trial established that Ohl was sentenced to an active DOC sentence and was thus no longer on probation. Evidence also established Ohl understood that, in accordance with his sentence, he was to report to his former probation officer by 5:30 that evening to be taken into physical custody. Ohl did not report that evening or any other day. Instead, Ohl was arrested several months later. Viewing the evidence in the light most favorable to the State, the evidence

was sufficient for a rational jury to find Ohl guilty of escape beyond a reasonable doubt.

The district court did not abuse its discretion in declining to give a lesser-included offense instruction even though the State did not object because the court had a duty to correctly instruct the jury. Criminal contempt is not a lesser-included offense of escape because criminal contempt requires the State to prove a person disobeyed or refused a court order or lawful mandate, neither of which are elements under the escape statute. Additionally, a person can commit an escape if they act purposely or knowingly, while criminal contempt requires a person to act purposely. The differences between the two offenses are qualitative, not merely degrees of risk, culpability, or injury; therefore, the court did not abuse its discretion in refusing to give a lesser-included offense instruction.

Even if this Court were to conclude that criminal contempt is a lesser-included offense of escape as a matter of law, evidence admitted at trial did not support a lesser-included instruction in this case. Judge Halligan testified, and the transcript from the revocation dispositional hearing showed, that once the court sentenced Ohl to the DOC the district court lost control over Ohl. The court was not the entity that ordered Ohl to report at 5:30 p.m., it was the DOC. Therefore, it was not a court order or mandate Ohl disobeyed, it was a DOC directive regarding his immediate placement.

ARGUMENT

I. Standard of review

This Court reviews the denial of a motion to dismiss for insufficient evidence de novo. *McWilliams*, ¶ 37. A motion to dismiss for insufficient evidence is appropriate only if, viewing the evidence in the light most favorable to the prosecution, there is not sufficient evidence upon which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Criswell*, 2013 MT 177, ¶ 12, 370 Mont. 511, 305 P.3d 760 (citing *State v. Rosling*, 2008 MT 62, ¶ 35, 342 Mont. 1, 180 P.3d 1102).

This Court reviews a trial court's refusal to give an instruction on a lesser-included offense for an abuse of discretion. *State v. Denny*, 2021 MT 104, ¶ 13, 404 Mont. 116, 485 P.3d 1227. District courts are given broad discretion in formulating jury instructions as long as the instructions, as a whole, fully and fairly instruct the jury on the law applicable to a case. *Id.*

II. The district court properly denied Ohl's motion to dismiss because the motion was premised on an incorrect legal interpretation of the escape statute and the State presented sufficient evidence to support an escape conviction.

To prevail on a motion to dismiss for insufficient evidence, a defendant must demonstrate that, viewing the evidence in the light most favorable to the prosecution, there is not sufficient evidence upon which a rational trier of fact

could find the essential elements of the crime beyond a reasonable doubt.

Mont. Code Ann. § 46-16-403;³ *State v. Cybulski*, 2009 MT 70, ¶ 42, 349 Mont. 429, 204 P.3d 7. The question is whether sufficient evidence exists to support the verdict, not whether the evidence could have supported a different result. *State v. Sheehan*, 2017 MT 185, ¶ 17, 388 Mont. 220, 399 P.3d 314.

Ohl was charged with escape, in violation of Mont. Code Ann. § 45-7-306. Pursuant to Mont. Code Ann. § 45-7-306(2), “A person subject to official detention commits the offense of escape if the person knowingly or purposely eludes official detention[.]” Official detention is statutorily defined as “placement of a person in the legal custody of a municipality, a county, or the state as a result of [] a conviction for an offense or of having been charged with an offense[.]” Mont. Code Ann. § 45-7-306(1)(a). Thus, a person placed in the legal custody of the state as the result of a conviction is subject to official detention and the person commits escape if the person knowingly or purposely eludes that official detention.

Ohl does not contest that he was subject to official detention when he failed to report to DOC following his sentencing hearing, nor that there was insufficient evidence to show he acted purposely or knowingly in doing so. Ohl instead argues that one can *never* escape a DOC sentence because an inmate retains the legal

³ Unless otherwise noted, all statutory references are to the 2019 Montana Code Annotated.

status of an inmate, “regardless of [their] behavior or location.” (Appellant’s Br. at 11.) In the district court, Ohl explained why his interpretation of the statute would preclude any conviction for an escape, stating:

Eluding official detention as the result of a conviction, may be a logical impossibility and certainly is in this case. [Ohl] cannot escape or elude the legal custody of the State, because you cannot escape a DOC sentence (unless perhaps you left its jurisdiction but no evidence was presented of that).

(Doc. 38 at 11.)

Ohl argues that “legal custody” in the escape statute should be defined using the definition of “legal custody” under Mont. Code Ann. § 41-5-103(30)(a) within the Youth Court Act. (Appellant’s Br. at 15.) However, the definition of legal custody in the Youth Court Act is plainly inapplicable to the escape statute.

Montana Code Annotated § 41-5-103(30)(a) defines legal custody as:

. . . the legal status created by order of a court of competent jurisdiction that gives a person the right and duty to:

- (i) have physical custody of the youth;
- (ii) determine with whom the youth shall live and for what period;
- (iii) protect, train, and discipline the youth; and
- (iv) provide the youth with food, shelter, education, and ordinary medical care.

While Mont. Code Ann. § 1-2-107 instructs that “[w]henver the meaning of a word or phrase is defined in any part of th[e] code, such definition is applicable

to the same word or phrase wherever it occurs,” the same statutory provision prohibits using a definition from another section of the code “where a contrary intention plainly appears.” The definition of legal custody in the Youth Court Act refers to the legal status created by giving a *person* certain rights and duties over a *youth*. On the other hand, the escape statute refers to municipalities, counties, and states as the entities having legal custody, not persons. Additionally, the escape statute does not involve the physical custody, discipline, protection, shelter, or education of youths, nor does it involve determining with whom a youth shall live. The Youth Court Act’s statutory provision is plainly inapplicable to the escape statute.

Not only is the provision plainly inapplicable, after citing to Mont. Code Ann. § 41-5-103(30)(a) to define legal custody as legal status, Ohl then repeatedly defines legal status as legal custody. For example, Ohl states “[a] person’s physical location does not alter his status of being in legal custody,” and a “defendant’s judgement or sentence changes his legal status, so that he is in ‘legal custody’ of the State.” (Appellant’s Br. at 16-17.) This circular reasoning of defining legal custody as legal status and legal status as legal custody offers no insight into the meaning of the escape statute.

Black’s Law Dictionary adopts the definition of “custody” for “legal custody,” stating it is “[t]he care and control of a thing or person for inspection,

preservation, or security.” *Legal Custody, Custody, Black’s Law Dictionary* (11th ed. 2019). Thus, a person under the control of the state as a result of a conviction, commits an escape if the person knowingly or purposely eludes that control. This definition is consistent with prior cases decided by this Court that indicate that escape includes eluding the confines or bounds of a person’s legal custody.

For example, an inmate on live-out status at a prerelease facility commits an escape if he leaves the prerelease without permission. *State v. Romannose*, 281 Mont. 84, 931 P.2d 1304 (1996). In *Romannose*, Romannose, a prison inmate, was transferred to a prerelease facility where he could work toward probation or parole. *Id.* at 87, 931 P.2d 1306. While an inmate at the prerelease facility, Romannose “was approved for ‘live-out’ status which allowed him to maintain his own residence while still being subject to the same conditions as if he were residing” at the prerelease facility. *Id.*, 931 P.2d at 1307. Romannose was still required to check in daily and abide by the facility’s rules. *Id.* at 87-88, 931 P.2d at 1307.

Following reports that Romannose was drinking at work, the prerelease facility conducted two breathalyzer tests, which both tested positive for alcohol. *Id.* The prerelease facility immediately arranged to transport Romannose to the jail from the facility, but, before he could be transported, Romannose walked away

from the prerelease without permission. *Id.* As an inmate on live-out status, Romannose was allowed to live at his residence and be in the community with the facility's permission. Walking away from the prerelease facility was an escape because he was still subject to the control of the prerelease facility, and he eluded that control by leaving without permission.

Similar to Romannose, Ohl, who was placed in the State's custody as the result of a conviction, eluded the State's control by not reporting to Bradley to be taken to the jail. As Ohl advances in his own argument, he was in official custody the moment he was sentenced to an active DOC sentence. He was no longer a probationer living in the community. Ohl was an inmate, sentenced to an active DOC sentence, advised by DOC to report to Bradley by 5:30 p.m. to be taken into physical custody, and warned that a failure to do so would constitute an escape. Ohl did not report. Just as Romannose eluded his official detention by walking away from the prerelease without permission so he could not be taken to the jail, Ohl eluded his official detention by failing to report so that he would not be taken to the jail. Both cases involve a person subject to state custody as the result of a conviction eluding the control of the state. The State presented sufficient evidence at trial to establish that Ohl knew he was eluding the confines or limits of his official detention when he failed to report to Bradley.

The district court properly denied Ohl's motion to dismiss for insufficient evidence because the motion was premised on an incorrect legal interpretation of the escape statute. Were this Court to adopt Ohl's interpretation of the escape statute, regardless of an inmate's conduct or location, no inmate could ever be guilty of escape, even if they tunneled out of prison, walked away from a prerelease center, or otherwise eluded their official detention. Ohl's interpretation of the escape statute conflicts with virtually every escape conviction upheld by this Court.

Finally, while Ohl does not raise an independent claim that the district court improperly instructed the jury, Ohl emphasizes the court's jury instructions, faulting the court both for utilizing the State's "made-up instruction" on the elements of escape and for the eluding instruction crafted by the court.

(Appellant's Br. at 5, 9.) Given that Ohl's theory at trial and on appeal is based on the misinterpretation that a person can *never* commit an escape because they retain their legal status "regardless of [their] behavior or location," it would not have changed the outcome if the court had not instructed on eluding. (Appellant's Br. at 11.) Nonetheless, the instructions given, as a whole, fully and fairly instructed the jury on the law, and the court crafted the eluding instruction to prevent confusion raised by Ohl's mischaracterization of the escape statute.

Courts are given broad discretion in instructing juries on the law, and are not required to utilize the pattern instructions as long as the instructions as a whole fully and fairly instruct the jury. *Denny*, ¶ 13; *State v. Iverson*, 2018 MT 27, ¶ 14, 390 Mont. 260, 411 P.3d 1284. The State’s proposed instruction on the elements of escape, which the court utilized at trial, used the exact wording of the escape statute. (Doc. 42, Inst. 10.) The jury was instructed that:

To convict the Defendant of the charge of escape, the State must prove the following elements:

1. That the Defendant eluded official detention;

AND

2. That the Defendant acted purposely or knowingly.

(Doc. 42, Instr. 10.)

Ohl proposed an instruction that used “removed” rather than “eluded.” (Doc. 27 at 8.) As the State explained in the district court, the escape statute previously stated that a person commits an escape if the person “removes himself from official detention,” but the legislature amended “removes” to “eludes” in 1997. *Cf.* Mont. Code Ann. §§ 45-7-306(2) (1995) and -306(2) (1997). Instruction 10 was not a “made-up instruction,” it was a correct statement of the law, and the court appropriately instructed the jury on the elements of escape.

Despite Ohl’s contention that the court’s eluding instruction replaced “official detention” with “physical custody,” the jury was instructed that “official

detention” means “placement of a person in the legal custody of a municipality, a county, or the state, as a result of a conviction for an offense.” (Doc. 42, Instr. 11.) In Ohl’s case, official detention meant physical custody in the jail, at least until he could be placed in a treatment facility. Ohl eluded the confines of his official detention by eluding DOC’s efforts to take him to the jail. The instructions, as a whole, fully and fairly instructed the jury.

Moreover, the court crafted the eluding instruction to prevent confusion after it became clear Ohl intended to advance a misstatement of the law in closing, which is evidenced by the anticipated closing Ohl entered into the record. (Doc. 40.) If the court denied his motion to dismiss, Ohl clearly intended to argue that because he was technically still an inmate, he could not have committed an escape. (*Id.* at 6-9.) The prepared closing also incorrectly implied Ohl was on probation following his sentencing, not an active DOC sentence. (*Id.* at 12, 15.) Not only was this an inaccurate reflection of Ohl’s legal status, it would have been particularly problematic given that the escape statute specifically excludes individuals subject to supervision on probation. *See* Mont. Code Ann. § 46-7-306(1)(b); (Doc. 42, Instr. 11.). Omitting a curative instruction on the issue would have created a risk of confusion for the jury. *See United States v. Pena*, 897 F.2d 1075, 1084-85 (11th Cir. 1990) (“[D]efense counsel’s blatant misstatement of the law” necessitated a supplementary instruction because not giving an instruction

“would have resulted in a verdict reached in contravention to the law.”). The court’s instructions, as a whole, fully and fairly instructed the jury.

III. The district court did not abuse its discretion when it denied Ohl’s proposed lesser-included offense instruction because the court had a duty to properly instruct the jury, criminal contempt is not a lesser-included offense of escape, and, even if it were, evidence in this case did not warrant the instruction.

Trial courts have a duty to fully and correctly instruct the jury on the applicable law to “guide, direct, and assist in an intelligent understanding of the legal and factual issues involved in their search for truth.” *City of Helena v. Parsons*, 2019 MT 56, ¶ 19, 395 Mont. 84, 436 P.3d 710 (internal quotations omitted). Trial courts have broad discretion in formulating jury instructions, provided that the instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case. *State v. Erickson*, 2014 MT 304, ¶ 21, 377 Mont. 84, 338 P.3d 598 (citing *State v. Bieber*, 2007 MT 262, ¶ 22, 339 Mont. 309, 170 P.3d 444; *State v. Hovey*, 2011 MT 3, ¶ 10, 359 Mont. 100, 248 P.3d 303).

In determining whether a court abused its discretion in refusing an instruction on a lesser-included offense, this Court follows the two-step approach articulated in *State v. Castle*, 285 Mont. 363, 368, 948 P.2d 688, 690-91 (1997). *Denny*, ¶ 27. First, this Court determines if the offense, as a matter of law, constitutes a lesser-included offense of the offense charged. *Id.* If it does, then this

Court determines whether there was sufficient evidence to support the lesser-included offense instruction. *Id.* This Court only reaches the secondary question of whether there was sufficient evidence to support the lesser-included offense instruction if the Court first concludes the offense is a lesser-included offense as a matter of law. *Denny*, ¶ 35.

An included offense means an offense that:

- (a) is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
- (b) consists of an attempt to commit the offense charged or to commit an offense otherwise included in the offense charged;
or
- (c) differs from the offense charged only in the respect that a less serious injury or risk to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission.

Mont. Code Ann. § 46-1-202(9).

Because Ohl does not assert criminal contempt is a lesser-included offense under Mont. Code Ann. § 46-1-202(9)(b), the State will only address subsections (a) and (c).

The relationship between a charged offense and a lesser-included offense can “be illustrated by a Venn diagram of concentric, rather than merely overlapping, circles.” *State v. Weatherell*, 2010 MT 37, ¶ 12, 355 Mont. 230, 225 P.3d 1256 (citing Wayne R. LaFave, et al., *Criminal Procedure* vol. 5,

§ 17(4)(b), 80 (3d ed., West 2007)). Even a substantial overlap in proof to establish the elements of each offense does not render an offense a lesser-included offense.

Denny, ¶ 34.

In this case, the court had a duty to fully and correctly instruct the jury even if the State did not object to the lesser-included instruction. Criminal contempt is not a lesser-included offense of escape as a matter of law because criminal contempt contains different and additional elements than escape. Therefore, no amount of evidence would have warranted a lesser-included offense instruction. However, even if it were a lesser-included offense, evidence at trial did not warrant a lesser-included offense instruction. The district court properly denied Ohl's request for a criminal contempt lesser-included offense instruction.

A. Criminal contempt requires proof of additional and different facts than escape and therefore criminal contempt is not a lesser-included offense of escape under Mont. Code Ann. § 46-1-202(9)(a).

Ohl claims criminal contempt requires proof of the same or less facts than escape because a court mandate is less than legal custody and disobeying is less egregious than eluding. However, the elements of contempt are not less than the elements of escape. The elements between the two offenses are different and criminal contempt requires proof of elements not required to prove escape.

“Facts” under Mont. Code Ann. § 46-1-202(9)(a) “refers to the statutory elements of the charged offense and not to the individual facts of the case.” *State v.*

Molenda, 2010 MT 215, ¶ 7, 358 Mont. 1, 243 P.3d 387 (citing *State v. Beavers*, 1999 MT 260, ¶ 30, 296 Mont. 340, 987 P.2d 371). If the proposed offense includes additional elements not required in the charged offense, it cannot be a lesser-included offense. For example, this Court has determined that felony theft is not a lesser-included offense of robbery because felony theft has an additional element regarding the value of property. *State v. Madera*, 206 Mont. 140, 150-52, 670 P.2d 522, 557-58 (1983); *State v. Albrecht*, 242 Mont. 403, 791 P.2d 760 (1990); *State v. Greywater*, 282 Mont. 28, 34-35, 939 P.2d 975, 979 (1997). Similarly, endangering the welfare of children is not, as a matter of law, a lesser-included offense of sexual intercourse without consent because endangering the welfare of children requires proof of additional elements not included in sexual intercourse without consent, “including that the defendant be at least eighteen years of age, and assisting or encouraging a child under the age of sixteen to engage in sexual conduct.” *State v. Grindheim*, 2004 MT 311, ¶¶ 39-40, 323 Mont. 519, 101 P.3d 267.

Contrasted with those cases, driving under the influence is a lesser-included offense of vehicular homicide while under the influence because the vehicular homicide statute incorporates the driving under the influence elements into the statute, with the only addition being purposely or knowingly causing the death of another. *State v. Jay*, 2013 MT 79, 369 Mont. 332, 298 P.3d 396. In terms of a

Venn diagram, the elements of driving under the influence represent a concentric circle that fits entirely within the elements of vehicular homicide.

When the elements between the proffered charge are of a different nature than elements of the offense charged, or each requires proof of a fact the other does not, one cannot be a lesser-included offense of the other, even if there is a substantial overlap in proof. *Denny*, ¶ 34 (citing *State v. Smith*, 276 Mont. 434, 445, 916 P.2d 773, 779 (1996)). For example, although theft of lost or mislaid property and theft of stolen property are both “premised on a person obtaining control over property belonging to another, the very nature of the property at the time control is obtained is markedly different in the two offenses.” *Smith*, 276 Mont. at 444, 916 P.2d at 779. Therefore, theft of lost or mislaid property is not a lesser-included offense of theft of stolen property. *Id.*

Similarly, possession of stolen property is not a lesser-included offense of unauthorized use of a motor vehicle even if the stolen property is a vehicle. *Denny*, ¶ 33. Theft by possession of stolen property requires the subject property to be “stolen,” meaning “property over which control has been obtained by theft.” *Id.* (quoting Mont. Code Ann. § 45-2-101(72)). Further, theft by possession of stolen property requires the intent to deprive the owner of their property. *Id.* (citing Mont. Code Ann. § 45-6-301(3)(c)). Unauthorized use of a motor vehicle does not require that the automobile was obtained by theft, nor does it require an intent to deprive

the owner. *Id.* Instead, it requires that the automobile was “operate[d] ‘without the other’s consent.’” *Id.* (alteration in original). Even though both are premised upon a person obtaining control over the property of another, because they both require “proof of at least one ‘fact’ that the other does not,” they are distinct offenses. *Id.*

Here, the “facts” required to prove criminal contempt are not the same or less than the “facts” required to prove escape. The jury was instructed that to convict Ohl of escape, the State had to prove that Ohl “eluded official detention” and that he “acted purposely or knowingly.” (Doc. 42, Instr. 10.) The court instructed the jury that “official detention” “means placement of a person in the legal custody of a municipality, a county, or the state as a result of a conviction for an offense.” (*Id.*, Instr. 11.) Criminal contempt means a “person knowingly engages in . . . purposely disobeying or refusing any lawful process or other mandate of a court.” Mont. Code Ann. § 45-7-309(1).

Criminal contempt requires proof of additional elements: refusing or disobeying a lawful process or court mandate. Similar to felony theft’s additional value element that is not included in robbery, escape does not require the State to prove a court mandate or lawful process. Additionally, just as the status of the property under the unauthorized use of a motor vehicle statute is different than under the theft by possession of stolen property statute, the conduct of eluding is

different than disobeying or refusing. The only overlap at all between the two offenses is the mental state, and, even then, a person could commit an escape if they acted knowingly, even if they did not act purposely. On the other hand, a person must purposely disobey or refuse a court mandate or lawful process to be convicted of criminal contempt. Finally, criminal contempt does not require a person to be subject to official detention or a conviction. In terms of a Venn diagram, the elements of criminal contempt not only fail to fit as a concentric circle inside the elements of escape, but the elements of the two offenses hardly overlap at all.

Because criminal contempt requires proof of additional and different facts, it is not a lesser-included offense of escape under Mont. Code Ann. § 46-1-202(9)(a).

B. Criminal contempt is qualitatively different than escape because the elements differ by more than just the degree of culpability and therefore criminal contempt is not a lesser-included offense of escape under Mont. Code Ann. § 46-1-202(9)(c).

Ohl proposes that disobeying a court mandate is merely “less than” eluding official detention, analogizing the current case to this Court’s decision in *State v. Williams*, 2010 MT 58, ¶ 14, 355 Mont. 354, 228 P.3d 1127. However, unlike the offenses in *Williams*, the differences between contempt and escape are qualitative, not merely degrees of culpability.

“[I]f the only difference between [] two offenses is one of degree (be it risk, injury, culpability, or any combination thereof) then it can be a lesser[-]included offense”; however, “[i]f there are other differences between the two offenses[,]” it cannot be a lesser-included offense. *Molenda*, ¶ 16. For example, the only difference between assault and deliberate homicide is that a “‘less serious injury . . . suffices to establish’ the crime of assault.” *Castle*, 285 Mont. at 368, 948 P.2d at 691 (quoting Mont. Code Ann. § 46-1-202(8)(a) (1997))⁴ (alteration in original). A person commits assault if he “purposely or knowingly causes bodily injury to another.” *Id.* If a person “purposely or knowingly causes the death of another human being” he has committed deliberate homicide. *Id.* The only difference between the elements of the two charges is that assault involves a less serious injury. *Id.*

On the other hand, assault is not a lesser-included offense of criminal endangerment because the difference between the charges is qualitative, not merely a difference of degree of injury. *Molenda*, ¶ 22. Criminal endangerment requires proof of a risk of death or serious bodily injury while assault requires proof of bodily injury. *Id.* *Molenda* argued the only difference between the two offenses was the degree of injury. *Id.* This Court rejected *Molenda*’s interpretation, noting

⁴ Although the definition of included offense was located in different subsections of Mont. Code Ann. § 46-1-202 in 2017 and 2019, the language in the 2017 and 2019 versions of the code was identical.

that a risk element, regardless of the degree of risk, is qualitatively different from an injury element. *Id.* Because the difference between the two offenses was qualitative, this Court held that assault is not, as a matter of law, a lesser-included offense of criminal endangerment. *Id.*

Ohl analogizes criminal contempt and escape to this Court's decision in *Williams*; however, unlike in *Williams*, the differences between the two charges are qualitative, not just differences of a lesser degree of culpability. While criminal contempt may be generally viewed as a less serious offense than escape, that is not the test. Such an interpretation of a lesser degree of risk, culpability, or injury would mean virtually every minor offense would be a lesser-included offense of more serious charges, merely because they are generally seen as less serious offenses.

In *Williams*, the State charged Williams with, among other things, sexual assault and sexual intercourse without consent after he attacked his girlfriend's 13-year-old daughter. *Williams*, ¶ 6. On appeal, Williams argued his convictions for the two charges violated statutory double jeopardy protections because sexual assault is a lesser-included offense of sexual intercourse without consent. *Id.* ¶ 19. This Court noted the mental states are the same in both offenses, and then proceeded to compare the proscribed conduct of each offense. *Id.* ¶ 26.

The conduct prohibited under the sexual assault statute—sexual contact without consent—means the touching of the sexual or other intimate parts of another person in order to knowingly or purposely cause bodily injury or humiliate, or to arouse or gratify either party. *Id.* ¶ 24 (citation omitted). The conduct prohibited by the sexual intercourse without consent statute is the penetration of the vulva, anus, or mouth of one person by the penis or body member of another person, or by foreign instrument, knowingly or purposefully to cause bodily injury or arouse either party. *Id.* ¶ 25 (citation omitted). Similar to assault and deliberate homicide, where both death and bodily injury are degrees of injury, the conduct prohibited by the sexual intercourse without consent statute is a more specific and culpable type of sexual contact. Because the only difference between the two offenses is the degree of culpability of the conduct, this Court found sexual assault is a lesser-included offense of sexual intercourse without consent. *Id.* ¶ 26.

Ohl's case is dissimilar because the differences in elements under the criminal contempt and escape statutes are not just differences of varying degrees of culpability, risk, or injury. A person subject to official detention is not the same as one subject to a lawful process or other mandate of the court, nor do the elements represent a difference of degree of risk, culpability, or injury. Like a risk of injury element and an actual bodily injury element, the two are qualitatively different elements. Further, disobeying or refusing does not represent a lesser degree of

culpability than eluding. The two elements describe two different types of proscribed conduct, not degrees of culpability of the same proscribed conduct. As previously discussed, the two offenses also have different mental state requirements.

Because criminal contempt, as a matter of law, is not a lesser-included offense of escape, no amount of evidence would have warranted an instruction on the offense of criminal contempt. *Denny*, ¶ 35.

C. Even if criminal contempt were, as a matter of law, a lesser-included offense, the instruction would not have been warranted on the evidence admitted at trial.

Even if this Court were to conclude criminal contempt is a lesser-included offense of escape, the district court still reached the right result because the facts presented at trial did not support a contempt instruction. Under the second step of the *Castle* test, the lesser-included offense instruction is only given when the jury, based on the evidence presented at trial, “could be warranted in finding the defendant guilty of a lesser[-]included offense.” *Jay*, ¶ 42 (citations omitted).

Evidence at trial established that it was DOC that ordered Ohl to report at 5:30 p.m., not the court. Judge Halligan testified, and the transcript from the revocation hearing admitted at trial showed, that, after the prosecutor asked for clarification on when Ohl needed to report to be taken to the detention center, the court concluded it did not have authority over Ohl and DOC would need to decide

when Ohl should report. (Tr. at 202; Trial Ex. 1 at 27-29.) Bradley told Ohl to report at 5:30 p.m. (Tr. at 218; Trial Ex. 1 at 27-29.) Evidence established it was not a court order Ohl disobeyed but, rather, a directive from DOC. Even if criminal contempt were a lesser-included offense of escape as a matter of law, the instruction would not have been warranted under the facts of this case.

CONCLUSION

The district court did not abuse its discretion in denying Ohl's motion for a lesser-included offense instruction, and the court correctly denied Ohl's motion to dismiss for insufficient evidence. Ohl's conviction for escape should be affirmed.

Respectfully submitted this 29th day of July, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 8,532 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

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CERTIFICATE OF SERVICE

I, Christine M. Hutchison, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-29-2022:

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