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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,)

Plaintiff-Appellee,) Filed April 27, 1982

vs.)

STEPHEN WHITE,) 2-67/66885

Defendant-Appellant.)

Appeal from Jones District Court - Thomas M. Horan, Judge.

Defendant appeals from the judgment entered upon his conviction of escape from custody under section 719.4(1), The Code 1979. Defendant contends that: (1) in closing argument the prosecutor improperly commented upon defendant's failure to testify about matters raised by other defense witnesses; and (2) the court should have instructed on escape under section 719.4(3) as a lesser included offense of escape under section 719.4(1). AFFIRMED.

Michael A. Bowman and Nancy J. Shimanek of Shimanek, Shimanek & Bowman, Monticello, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Roxann M. Ryan, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Defendant appeals from the judgment entered upon his conviction of escape from custody under section 719.4(1), The Code 1979. Defendant contends that: (1) in closing argument the prosecutor improperly commented upon defendant's failure to testify about matters raised by other defense witnesses; and (2) the court should have instructed on escape under section 719.4(3) as a lesser included offense of escape under section 719.4(1). We affirm.

Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4.

I.

Defendant was committed to the Anamosa Men's Reformatory for burglary. Defendant walked away from a supervised construction project outside of the reformatory walls. Defendant was recaptured several hours later and charged with escape from custody in violation of section 719.4(1), The Code 1979.

At trial, defendant's witnesses testified that defendant had been in danger in the institution, however, when defendant took the stand he did not mention the alleged danger. During closing argument the prosecutor allegedly commented on defendant's failure to testify about being in danger. Closing arguments were not reported, thus the only record is in a brief and conclusory bill of exceptions prepared by defendant. It appears the trial judge initially signed the bill of exceptions, but then changed his mind and crossed out his signature. The bill of exceptions does not show that defendant objected to the alleged misconduct, or what the court's ruling on such an objection might have been. Defendant, however, alleges in his briefs that it is obvious from the circumstances that he did object and that the objection was overruled.

II.

Defendant asserts he was denied his right to due process and a fair trial

when during closing arguments the prosecutor allegedly committed misconduct by referring to defendant's failure to produce further evidence and questioning defendant's reasons for not producing further evidence. The state asserts that defendant failed to preserve error on this issue.

Error as to final arguments must be preserved on the trial court record, even when the alleged error is of constitutional dimensions. State v. Johnson, 272 N.W.2d 480, 484 (Iowa 1978); State v. Smith, 228 N.W.2d 111, 112 (Iowa 1975). Error may be preserved by objecting immediately when the allegedly improper statements are made, at the close of the state's argument, or by motion for a mistrial. State v. Johnson, 272 N.W.2d at 484. When, as here, closing arguments are not reported, the allegedly objectionable argument may be set forth in a bill of exceptions. State v. Horsey, 180 N.W.2d 459, 460 (Iowa 1970).

The record in this case is devoid of any objection to the closing argument, any ruling on the issue presented in this appeal, or any request for such a ruling. Defendant made no objection to the prosecutor's argument at the time the allegedly improper comments were made, he made no record of an objection following closing arguments, and he made no record of a motion for a mistrial based on prosecutorial misconduct. Furthermore, defendant's bill of exceptions failed to comply with Iowa R. Crim. P. 23.1(4)-(5) because it was neither signed by the trial judge, nor in the alternative "signed by two or more attorneys or officers of the court or bystanders." Therefore, we find defendant has failed to preserve error on this issue and affirm the trial court.

III.

Defendant argues that the trial court erred in refusing to submit an additional instruction on escape under section 719.4(3) as a lesser included offense of escape under section 719.4(1), The Code 1979. We disagree.

A two-step process is used to determine whether or not an offense is a lesser

included offense: first, the legal or element test must be satisfied, and second, the factual test must be met. Under the legal or element test, the lesser included offense "must be composed solely of some but not all elements of the greater crime." State v. Sangster, 299 N.W.2d 661, 663 (Iowa 1980) (emphasis in original), citing State v. Furnald, 263 N.W.2d 751, 752 (Iowa 1978). In addition, the lesser included offense must satisfy the factual test, that is, it must be shown "there is a factual basis in the record for submitting the included offense to the jury." 299 N.W.2d at 663.

In the case at bar, defendant was charged with Escape by a Felon in violation of section 719.4(1), The Code 1979, which consists of three elements: (1) that the defendant had been previously charged with a felony; (2) that the defendant was either committed to an institution or was entrusted to the custody of a public officer or employee; and (3) that while in custody the defendant either escaped from the custody of the public officer or employee or intentionally left the institution or detention facility without consent or authority. See II Uniform Jury Instructions, No. 1907 (1981).

Defendant requested jury instructions on the offense of Voluntary Absence from a Facility, in violation of section 719.4(3), as a lesser included offense. That offense consists of four elements: (1) that a defendant was previously committed to an institution; (2) that the institution is either an institution under the control of the Department of Adult Corrections or a jail or correctional institution; (3) that while in custody the defendant was required to be at a particular place; and (4) that the defendant knowingly and voluntarily absented himself from such place. See II Uniform Jury Instructions, No. 1909 (1981).

In applying the principles of lesser included offense analysis, it is clear that the offense set forth in section 719.4(3) (Voluntary Absence from a Facility) is not a lesser included offense of section 719.4(1) (Escape by a Felon) because the legal

or elements test is not satisfied. The two crimes do not require proof of the same elements, and a defendant does not necessarily violate section 719.4(3) when he or she violates section 719.4(1). Additionally, section 719.4(3) is not "composed solely of some but not all elements of the greater crime." State v. Sangster, 299 N.W.2d at 663. We therefore affirm defendant's conviction.

AFFIRMED.