FILED
MAY 30 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA)
Plaintiff-Appellee,) Filed May 30, 1980
vs.)
DENNIS DAVID ADELMUND,) 0-70 / 63812
Defendant-Appellant.)

Appeal from Black Hawk District Court - Roger F. Peterson, Judge.

Defendant appeals conviction for escape in violation of section 719.4(1), The Code 1979. - AFFIRMED.

Paul T. Shinkle, of Ackerman & Shinkle, Cedar Falls, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Douglas F. Staskal, Assistant Attorney General, and David Correll, Black Hawk County Attorney, for plaintiff-appellee.

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

Defendant appeals from his conviction for escape in violation of section 719.4(1), The Code 1979. Defendant contends the trial court erred in admitting testimony beyond the minutes of testimony, in failing to instruct the jury on the offense described in section 719.4(3) which defendant asserts is a lesser included offense, in giving an instruction on intent which defendant asserts unconstitutionally shifted the burden of proof on intent to defendant, and in failing to admonish the jury or grant a new trial because of an alleged comment on defendant's assertion of his fifth amendment right not to testify at trial. We affirm.

On April 10, 1979, defendant was transferred to the State Work Release Center in Waterloo from Fort Madison where he was serving a ten-year sentence for breaking and entering. On May 7, 1979, after being informed that he was going to be transferred to the Black Hawk County Jail because of violations of work release center rules, defendant responded by stating, "You leave me no choice" and by thrice striking the worker who attempted to place him in custody. That worker then witnessed defendant struggling with another worker who was attempting to detain defendant. When another worker appeared, the worker who defendant struck instructed the worker who was struggling with defendant to "let him go," because of a fear that the worker who had just appeared on the scene and who had just returned to work after being injured in a serious motorcycle accident would be injured and that others could also be injured. After being released, defendant ran out the front door. On May 22, 1979, defendant was charged with escape in violation of section 719.4(1), The Code 1979. Trial was held on July 17, 1979, and after a jury verdict of guilty as charged defendant was sentenced to a term not to exceed five years to run consecutively with his breaking and entering sentence.

I. Defendant contends the trial court erred by allowing testimony beyond the minutes of testimony. The testimony in question related to defendant's attempted flight from authorities on May 28, 1979, when he was ultimately returned to custody after his May 7 departure from the work release center. The minutes of testimony did not expressly address the May 28 capture but primarily related to the May 7 departure. Defendant contends this variance between the testimony and the minutes of testimony

was in contradiction to the requirements of Iowa R. Crim. P. 5(3), which at the time of the filing of the trial information, required the minutes of testimony to be "sufficient to enable defendant to prepare his or her defense." Rule 5(3) now requires that the minutes of testimony provide a "full and fair statement of the witness' expected testimony."[1] That change has been interpreted to be for clarification purposes only. State v. Walker, 281 N.W.2d 612, 613 (Iowa 1979). Challenges to testimony as being beyond the minutes of testimony must be decided on a case-by-case basis. See id. at 614. The minutes of testimony must be sufficient to fully and fairly alert defendant to the source and nature of the evidence against him, but they need not detail each circumstance of the testimony. Id.

We do not think the trial court committed reversible error in admitting the testimony in question in the case at bar. The testimony in question related to defendant's flight from officers attempting to apprehend him on May 28. The essence of that testimony was devoted to defendant's intent when he originally departed from the work release center on May 7. Since intent is an essential element of a violation of section 719.4(1), defendant should have been aware that his intent was at issue. Any evidence pertaining to defendant's intent at the time of his arrest that related to his intent at the time of his departure from the work release center was merely cumulative in light of the testimony already in the record regarding defendant's intent at the time of his departure. Furthermore, defendant was made aware of the prosecutor's plan to introduce testimony relating to defendant's arrest by the prosecutor's statement to that effect during the prosecutor's opening statement. Under these circumstances, we cannot conclude that defendant was prejudiced, if at all, to the extent that a new trial is warranted.

II. Defendant contends that subsection three of section 719.4 is a lesser included offense of subsection one, and that the trial court erred in not granting defendant's

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[1] Rule 5(3) was amended on July 16, 1978 to provide that the minutes of testimony should correspond to the requirement of rule 4(6) which stated that the minutes should provide a full and fair statement of the witness' grand jury testimony. 1978 Session, 67th G.A., ch. 1208. The effective date of that amendment was to have been July 1, 1979, however, before that time, the rule was once again amended on May 11, 1979, to its present form which requires that the minutes contain a full and fair statement of the witness' expected testimony. 1979 Session, 68th G.A., ch. 174. That amendment, superceding the prior amendment, was effective on July 1, 1979.

request to instruct the jury on that lesser included offense. Section 719.4(1) states:

> A person convicted of a felony, or charged with the commission of a felony, who intentionally escapes from any detention facility or institution to which the person has been committed by reason of such conviction or charge, or from the custody of any public officer or employee to whom the person has been entrusted, commits a class "D" felony.

Section 719.4(3) states:

> Any person who has been committed to any institution under the control of the division of adult corrections, or to any jail or correctional institution, who knowingly and voluntarily absents himself or herself from any place where the person is required to be, commits a serious misdemeanor.

For one offense to be a lesser included offense of another so that it becomes the duty of the court to instruct on the lesser charge, Iowa R. Crim. P. 6(3), we employ a two-test process: (1) the legal test, or whether the elements of the lesser offense are an elementary part of the greater offense; and (2) the factual test, or whether a factual basis exists in the record for submitting the included offense to the jury. State v. Sanders, 280 N.W.2d 375, 377 (Iowa 1979). Since we conclude that the factual test is not met in the case at bar, we do not address the legal test.

Section 719.4(3) applies to situations such as that in the case of State v. Davis, 271 N.W.2d 693 (Iowa 1978), in which the defendant did not escape from the confines of the institution, but rather was in a place within the prison walls other than the place where he was supposed to be. Id. at 694. Similarly, that section could apply to a situation in which an individual is on a furlough from a work release center and goes to a place other than that allowed under the provisions of the furlough. In such a case, the individual may not have had any intent to escape, and thus the situation could not qualify as a violation of section 719.4(1), but could fall under section 719.4(3).

However, the situation in the case at bar is inapposite to the above described situations. The record reveals a clear intent to escape. Defendant assaulted those persons with whom his custody was entrusted and ran away from the confines of the facility in which he was institutionalized.

Defendant attempts to argue that the directive of "let him go" from one worker to the others who were struggling with defendant in an attempt to prevent his departure arguably granted him permission to leave and thus provided a factual basis for an

instruction on subsection three. However, if there was any merit to that contention, permission to leave would constitute a defense to a charge under either subsection one or subsection three, rather than grounds for an instruction on subsection three. In fact, the record shows that the statement was made for the purpose of avoiding injury to others, rather than to grant defendant permission to leave. Under these circumstances, there was no factual basis for submitting an instruction on section 719.4(3) to the jury.

III. Defendant contends the instruction on intent unconstitutionally shifted the burden of proof on intent to defendant. That issue was addressed in State v. Rinehart, 283 N.W.2d 319, 320-23 (Iowa 1979), in which the court upheld the submission of the same instruction challenged by defendant. Consequently, we hold defendant's contention on that issue is without merit.

IV. Defendant contends the prosecutor made an improper comment on defendant's exercise of his fifth amendment privilege not to testify at trial. Defendant has failed to prepare and file a bill of exceptions pursuant to Iowa R. Crim. P. 23.1. Consequently, we do not know what the exact content of the prosecutor's challenged statement was.

Nevertheless, it appears from the record that the statement dealt with defendant's intent at the time of his departure from the work release facility, and how there was no way to tell what was on defendant's mind at that time. We do not think that this was an improper comment on defendant's failure to testify in his own defense such that defendant was denied a fair trial. We do not think the trial court abused its broad discretion over matters of alleged prosecutorial misconduct in declining to admonish the jury or grant a new trial. See State v. Wright, 274 N.W.2d 307, 315 (Iowa 1979).

AFFIRMED.