FILED
MAY 3 1 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed May 31, 1983
vs.)
ALAN W. REINERT,) 3-75/68216
Defendant-Appellant.)

Appeal from Scott District Court - J. Hobart Darbyshire, Judge.

Defendant appeals from his conviction of felony escape, see Iowa Code § 719.4(1) (1981); assault without intent to inflict serious injury, see Iowa Code § 708.2(2) (1981) as amended by 1982 Iowa Acts ch. 204, § 3; criminal mischief in the third degree, see Iowa Code § 716.5 (1981); and criminal mischief in the fourth degree, see Iowa Code § 716.6 (1981). Defendant escaped from a Davenport work release center by walking out the front door. AFFIRMED.

Robert E. Weinberg, Davenport, for defendant-appellant.

Thomas J. Miller, Attorney General, and Michael K. Jordan, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ. Hayden, J. takes no part.

PER CURIAM

The section of the statute under which defendant was prosecuted, 719.4(1), by its terms applies to a work release center to which a convicted person has been properly committed. See Iowa Code § 719.4(1) (1981) ("A person . . . who intentionally escapes from any detention facility or institution to which the person has been committed by reason of such conviction . . . commits a class "D" felony.") Defendant argues that the work release center was not a "detention facility"; however, it was clearly an "institution," and it is undisputed that defendant was committed there by reason of an earlier conviction. State v. Burtlow, 299 N.W.2d 665 (Iowa 1980), which is heavily relied upon by defendant, turned upon a distinction between escape "by failure to return" and escape by "departure from custody," not upon the distinction between kinds of institutions urged by defendant. Id. at 669. Assuming, without deciding, that error was preserved on this issue, we hold that it was proper to charge defendant with violation of section 719.4(1) for escape from the work release center.

Without deciding whether misdemeanor escape, Iowa Code § 719.4(3) (1981), meets the legal test for a lesser included offense of felony escape, Iowa Code § 719.4(1) (1981), there was no evidence that he "failed to return" to custody when absent from it with permission, an element of section 719.4(3). See State v. Burtlow, 299 N.W.2d 665, 669 (Iowa 1980). Therefore, defendant did not meet the factual test for a lesser

included offense instruction on misdemeanor escape in this particular case. See State v. Morgan, 322 N.W.2d 68, 70 (Iowa 1982).

Defendant asserts that the jury should have been allowed to decide whether the work release center is a "detention facility" of the sort from which escape is punishable under section 719.4(1). As pointed out above, section 719.4(1) also applies to escapes from an "institution to which [defendant] has been committed by reason of . . . conviction. . . ." Iowa Code § 719.4(1) (1981). There is no dispute that the work release center is such an institution, so the court did not err by instructing the jury in a way which implied the work release center came within section 719.4(1).

Section 708.2(2) of the 1981 code, as amended by the legislature in 1982, 1982 Iowa Acts ch. 204, § 3, refers to assault which causes "bodily injury or disabling mental illness . . . ." Id. By its terms, the statute is applicable to a mental illness resulting from an assault only when it is "disabling," but in cases of bodily injury it is applicable without the "disabling" limitation. Defendant has supplied us with no reason to believe this distinction was not intended by the legislature, or for reading the "disabling" requirement into the bodily injury alternative. We reject defendant's contention that to support a prosecution for assault without intent to inflict serious injury the injury must be disabling.

AFFIRMED.