IN THE COURT OF APPEALS OF IOWA

No. 2-995 / 11-2087
Filed January 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID LEE MILLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, Mary Ann Brown, Judge.

David Miller appeals from his conviction, judgment, and sentence for escape. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Vidhya Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl Soich, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Tyron Rogers, Assistant County Attorney, for appellee.

Heard by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

EISENHAUER, C.J.

David Miller appeals from his conviction, judgment, and sentence for escape, contending the court erred in not instructing the jury on the lesser-included offense of voluntary absence, and also contending his trial attorney was ineffective. We affirm.

I. Background

David Miller was convicted of a felony in March 2010. After serving some time in jail and in prison, he was sent to the Burlington Residential Correctional Facility in May 2011. On July 18, Miller was checking back into the facility around 5:00 p.m. after attending afternoon Workforce Development classes. A dispute arose with a residential officer about whether Miller would be allowed to leave again for a planned evening furlough at his girlfriend's house. Miller became frustrated, said "screw it," and left the facility. At the next hourly check of residents at the facility, Miller was marked as "on escape." He was arrested more than two weeks later at a local convenience store.

The State charged Miller with escape from custody in violation of Iowa Code section 719.4(1) (2011). The facility manager, the residential officer who conducted hourly checks on July 18, the city police officer who arrested Miller, and Miller all testified in the subsequent jury trial. The court refused Miller's attorney's request to instruct the jury on voluntary absence under section 719.4(3), as a lesser-included offense of escape. The jury found Miller guilty. The court sentenced Miller to an indeterminate term not to exceed five years, to be served consecutively to his sentence on the previous felony conviction.

II. Scope and Standards of Review

We review the submission of or refusal to submit jury instructions for correction of errors at law. Iowa R. App. P. 6.907; *State v. Rains*, 574 N.W.2d 904, 915 (Iowa 1998). As long as a requested instruction correctly states the law, is applicable to the case, and is not stated elsewhere in the instructions, the court must give the instruction. *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996). Even if the court erred in refusing an instruction, no reversal is required unless the complaining party was prejudiced by the omission. *State v. Negrete*, 486 N.W.2d 297, 299 (Iowa 1992).

We review claims a trial attorney was ineffective de novo. *State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012). To succeed on an ineffective-assistance claim, a defendant must show by a preponderance of the evidence the trial attorney failed to perform an essential duty and prejudice resulted. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). We can affirm if either element is absent. *Id.*

III. Discussion

A. Lesser-Included Offense. Miller contends the trial court erred in refusing to instruct the jury on the lesser-included offense of voluntary absence. *See* Iowa Code § 719.4(3). He acknowledges our supreme court has held voluntary absence is not a lesser-included offense of escape. *State v. Beeson*, 577 N.W.2d 107, 112 (Iowa 1997) ("The crimes of escape and voluntary absence are distinct from each other and contain different elements. Therefore, voluntary absence is not a lesser-included offense of escape."). He argues, however, the holding in *Beeson* was based on a "faulty rationale" and we "should now depart

from the faulty rationale adopted in *Beeson.*" He invites us to adopt the rationale set forth in the special concurrence to one of our unpublished decisions. *See State v. Campbell*, No. 10-0161, 2010 WL 3662176, at *3 (Iowa Ct. App. Sept. 22, 2010) (Mansfield, J., concurring specially). Then Judge Mansfield wrote:

> If I were free to do so, I would hold that voluntary absence is a lesser-included offense of escape. Once a person has escaped from a correctional facility, he or she is clearly absent from a place where he or she is required to be. Thus I do not believe it is possible to commit the offense of escape as defined in Iowa Code section 719.4(1) without also committing the offense of voluntary absence as set forth in section 719.4(3).

Id. We are not free to disregard controlling authority from our supreme court. We conclude the district court did not err in refusing Miller's request to instruct the jury voluntary absence is a lesser-included offense of escape.

B. Ineffective Assistance. Miller contends his trial attorney was ineffective (1) in not objecting to the jury instructions because they did not instruct the jury on an essential element of escape—actual custody or physical restraint; (2) in not objecting to the testimony of the facility manager on hearsay grounds; and (3) in not objecting to the disclosure of the result of the facility's internal disciplinary proceedings—Miller "was guilty of having escaped from the facility."

Ineffective-assistance-of-counsel claims are normally considered in postconviction relief proceedings. *State v. Soboroff*, 798 N.W.2d 1, 8 (Iowa 2011). A primary reason for doing so is to ensure development of an adequate record to allow the attorney charged to respond to the defendant's claims. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). A defendant may raise the claim on direct appeal if there are reasonable grounds to believe the record is adequate to

address the claim on direct appeal. Iowa Code § 814.7(2). We conclude the record is adequate for us to address the first two ineffective-assistance claims—concerning the jury instructions and the testimony of the facility manager.

1. Jury Instruction. The marshaling instruction, modeled on Iowa Criminal Jury Instruction 1900.1, provided the State must prove all the following elements of escape:

> 1. The defendant had previously been convicted of a felony in Washington County, Iowa Cause Number FECR005706.
> 2. By reason of that conviction, the defendant had been placed in the custody of the Burlington Residential Correctional Facility.
> 3. On or about the 18th day of July, 2011, the defendant intentionally left the Burlington Residential Correctional Facility, without the consent or authority of the custodian.

Miller contends the instruction lacks an essential element of escape as defined in section 719.4(1)—departure from "physical restraint" or "actual custody." He contends the instructions should have defined "custody" to distinguish between "actual custody," which he asserts is essential to escape, and "mere legal or constructive custody," which he asserts does not suffice for escape as set forth in Iowa Code section 719.4(1). That subsection provides:

> A person convicted of a felony, or charged with or arrested for the commission of a felony, who intentionally escapes, or attempts to escape, from a detention facility, community-based correctional facility, or institution to which the person has been committed by reason of the conviction, charge, or arrest, or from the custody of any public officer, public employee, or any other person to whom the person has been entrusted, commits a class "D" felony.

The State responds the addition of the requested element would not have aided Miller because he "had gone back into the building before leaving it that afternoon. He was in actual custody because he was inside the residential

correctional facility, and residents were not free to leave without specific permission." Much of Miller's defense at trial was an attempt to distinguish entering the correctional facility building as far as the front desk from checking back in to the actual custody of the facility after an authorized furlough. On appeal, he cites *State v. Burtlow*, 299 N.W.2d 665, 669 (Iowa 1980), involving a defendant who "failed to return to a state work release center after a seven-day furlough." The defendant pleaded guilty to escape. The supreme court considered the nature of a prisoner furlough and concluded "the conduct alleged in the present case fits more readily under subsection three than under subsection one" because "[a] person who knowingly and voluntarily fails to return to the facility when required to do so 'absents himself or herself from (a) place where the person is required to be' within the meaning of section 719.4(3)." *Burtlow*, 299 N.W.2d at 669. In contrast, the court "believe[d] subsection one is intended to apply to *unauthorized departures from physical restraint*. In those cases a danger of injury to persons or property exists. When the offense is a mere failure to return from an authorized release, no such danger exists." *Id.* (emphasis added).

Miller cites *State v. Breitbach*, 488 N.W.2d 444 (Iowa 1992), involving a defendant's attempt to flee when police came to arrest him. The court clarified the "physical restraint" language in *Burtlow*. *Breitbach*, 488 N.W.2d at 449. "[P]hysical restraint," as that term is used in *Burtlow*, is necessarily involved whenever an individual either is or *would be* subjected to immediate physical restraint if an attempt to flee from the authorities was made. *Id.* The court then addressed *Burtlow's* "danger of injury" language. *Id.* "[T]his risk-of-injury

language highlights the legislature's categorizing escapes under subsection 1 of section 719.4—*i.e.*, those involving escape from physical restraint—as more serious than escapes under subsection 3—*i.e.*, those involving escape from constructive custody." *Id.* Miller concludes, therefore, it is "clear that Escape under Iowa Code section 719.4(1) requires a departure from 'physical restraint' or 'actual custody,' though the offense of Voluntary Absence under Iowa Code section 719.4(3) can be satisfied by an absence from *either* physical restraint *or* constructive custody." He asserts the jury instructions "failed to include any requirement that the defendant be subject to physical restraint or in actual custody at the time of the unauthorized departure." Therefore, the instructions "were insufficient to correctly convey the applicable law of Escape—namely the requirement that a defendant must be in actual (as distinct from merely legal or constructive) custody at the time of the unauthorized departure in order for such departure to establish the escape offense."

Miller reads too much into the analysis in *Breitbach* because the issue was not escape from a facility, but attempt to flee from arrest. The language in subsection one provides two alternatives for escape: (1) "from a . . . community-based correctional facility," or (2) "from the custody of any public officer, public employee." Only the second alternative necessitates actual custody or physical restraint. The first alternative is satisfied if a person escapes from a facility. Because the instructions correctly state the law applicable to this case, Miller's trial attorney did not have a duty to object to the instructions. Therefore this ineffective-assistance claim fails. We also agree with the State's position Miller cannot demonstrate prejudice because he did not merely fail to return to the

facility, as the defendant did in *Burtlow.* Miller came back to the facility, but left it again without authorization after his dispute with the residential officer.

2. Hearsay Objection to the Facility Manager's Testimony. Miller contends his trial attorney should have objected on hearsay grounds to the testimony of the manager of the correctional facility. The only person from the facility to testify at trial was the manager, who was not there at the time Miller returned and who had no personal knowledge of the events. The manager reviewed the investigative reports, notes, and documentation prepared by residential officers and also a computer-generated "in-and-out summary" report. He also was the hearing officer in Miller's internal disciplinary proceeding at the facility. Miller asserts the investigative reports, notes, and documentation prepared by the residential officers were full of hearsay and his attorney should have objected to the manager's testimony on hearsay grounds.

The State responds the manager did not testify to specific out-of-court statements from the residential officers, but "merely used the facts underlying the investigation as the basis for the conclusions he had drawn." The State also argues Miller cannot demonstrate prejudice because the evidence was sufficient to convict Miller even if the facility manager's testimony had been excluded. We agree Miller cannot show prejudice. The State had to prove Miller had previously been convicted of a felony, he had been placed in the custody of the facility, and he intentionally left the facility without consent or authority. Miller and the State jointly stipulated to the first two elements. Miller's testimony provides evidence he returned to the facility after his afternoon furlough for classes, got frustrated when he was told he would not be allowed to take a planned furlough to his

girlfriend's house that evening, and "walked out the back door." Miller cannot show the result of the trial probably would have been different if his attorney had objected to the manager's testimony and it had been excluded. *See State v. Brubaker*, 805 N.W.2d 164, 174 (Iowa 2011) (explaining the prejudice element of an ineffective-assistance claim).

3. Disclosure of Internal Disciplinary Proceedings. Miller contends his attorney should have objected on relevance grounds to the facility manager's testimony concerning the result of internal disciplinary proceedings, stating Miller "was found guilty of having escaped from the facility." He argues the statement was not relevant and was prejudicial. *See* Iowa R. Evid. 5.401.

We determine the record before us is inadequate to address this claim and preserve it for possible postconviction relief proceedings. *See Coil*, 264 N.W.2d at 296.

4. Cumulative Effect. Finally, Miller contends the cumulative effect of his trial attorney's errors "undermines confidence in the outcome and establishes a reasonable probability that, but for counsel's breach of duty, the outcome of the trial would have been different." *See Strickland v. Washington*, 466 U.S. 668, 669 (1984).

Because we have preserved a claim for postconviction relief, the record is inadequate for us to address this claim also. We preserve this claim for possible postconviction relief proceedings. *See Coil*, 264 N.W.2d at 296 (preservation); *see also State v. Clay*, ___ N.W.2d ___, 2012 WL 6217017, at *9-10 (Iowa 2012) (cumulative effect).

AFFIRMED.