IN THE COURT OF APPEALS OF IOWA

No. 3-298 / 12-1156
Filed May 30, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TAYLOR BRADLEY DENNEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, Cynthia H. Danielson, Judge.

Taylor Bradley Denney appeals his conviction for escape, claiming his trial counsel was ineffective in not objecting to certain evidence. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Lisa Schaefer, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

TABOR, J.

A jury convicted Taylor Bradley Denney of escape, in violation of Iowa Code section 719.4(1) (2011). On appeal, he alleges his trial counsel should have objected to evidence that he admitted his escape in a disciplinary proceeding and that a residential officer saw him in possession of a "green, leafy substance."

Finding the disputed evidence admissible, we reject Denney's claims his trial counsel breached an essential duty in failing to object. Even if counsel had objected, we cannot foresee the outcome of trial would have been different given the strength of the State's case against Denney. Because Denney's ineffective-assistance-of-counsel claims fail, we affirm.

I. Background Facts and Proceedings.

Following a felony conviction in February 2010, Denney was committed to the Burlington Residential Correction Facility. The residential facility—also known as a halfway house—is designed to provide offenders transitional housing between prison and their return to society. The facility also offers more structure to individuals convicted of crimes but not sentenced to prison. Residents do not have permission to leave the facility at will; they must check in and out at the control desk for work, earned recreational time, or religious furloughs.

On March 7, 2012, Nicholas Baker, an officer at the Burlington facility, performed a head count of the residents shortly after 5 p.m. Baker found Denney sitting, fully clothed, on a toilet in the bathroom. Denney was rolling "a green, leafy substance" into toilet paper. Baker instructed Denney to follow him to the

control desk, approximately fifty feet away. Baker set the leafy substance on the counter. When asked by another officer where Baker had obtained the substance, Baker replied he had found it on Denney in the bathroom. Denney then left the facility without permission. Surveillance video shows Denney slipping out an emergency exit, jogging across a basketball court, and hiking up a hill behind the facility. The staff reported Denney's departure to local law enforcement, and he was apprehended the following day.

The officer wrote a formal report concerning Denney's alleged escape. Corrections officials held a disciplinary hearing to determine whether Denney had violated the facility's rules. At the disciplinary hearing, an officer read Denney his *Miranda* rights, and he "pled guilty to the report of escape."

The county attorney charged Denney with escape, in violation of Iowa Code section 719.4(1), in a trial information filed on March 15, 2012. The court held a jury trial on May 8, 2012. The jury heard from two witnesses for the State. After deliberating for half an hour, the jury returned a guilty verdict. The court sentenced Denney to an indeterminate five-year prison term, to be served consecutive to his current sentence, and imposed a fine of $750. Denney filed a timely notice of appeal.

II. Scope and Standard of Review.

On appeal, Denney asserts his trial counsel violated his right to counsel under the Sixth Amendment of the United States Constitution and article I section 10 of the Iowa Constitution. Because Denney does not advocate for interpreting the Iowa Constitution differently from its federal counterpart, we will apply the

general principles as outlined by the United States Supreme Court in addressing his ineffective-assistance-of-counsel claim under both constitutions. *See State v. Bruegger*, 773 N.W.2d 862, 883 (Iowa 2009).

Ineffective-assistance-of-counsel claims are an exception to the error-preservation rule. *State v. Palmer*, 791 N.W.2d 840, 850 (Iowa 2010). While such claims are normally considered in postconviction relief proceedings, we will consider a claim on direct appeal if the record is sufficient to address it. *State v. Vance*, 790 N.W.2d 775, 785 (Iowa 2010). Our review is de novo. *State v. Henderson*, 804 N.W.2d 723, 725 (Iowa 2011).

III. Analysis.

To prevail on his claims of ineffective assistance of counsel, Denney must show his trial counsel failed to perform an essential duty and he was prejudiced as a result. *See State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Unless he proves both elements, we cannot find his conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *See id.*

On the duty prong, we measure counsel's performance against that of a reasonably competent practitioner. *State v. Clay*, 824 N.W.2d 488, 495 (Iowa 2012). We presume competence. *Id.* Denney can rebut this presumption by showing by a preponderance of the evidence that his lawyer failed to perform an essential duty. *See id.* Such a breach occurs when the trial attorney commits such grave errors that he ceases to function as the counsel guaranteed by the state and federal constitutions. *Id.*

On the prejudice prong, Denney must show "a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *See State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998). To determine whether Denney demonstrated actual prejudice, "we must consider the totality of the evidence, what factual findings would have been affected by counsel's errors, and whether the effect was pervasive or isolated and trivial." *See Clay*, 824 N.W.2d at 498.

A. Evidence of Denney's admission at a disciplinary hearing.

Denney alleges his trial counsel was ineffective in failing to object to testimony regarding his disciplinary hearing. At trial, Officer Baker testified without objection as follows:

> Q. Was there any sort of disciplinary action that you did within the facility regarding Mr. Denney? A. Yes. Any time an offender breaks any rule we write what is called a formal report, and it's—I would—I would compare it to like a ticket on a street—standard—where it basically states you broke this rule, and then it states a narrative of what happened, and then we go through a whole procedure where we'll have a hearing to decide whether this particular offender was guilty or not guilty of a report.
>
> Q. And did you have a hearing with regard to the report of Mr. Denney's escape from the facility? A. Yes, there was a disciplinary hearing held.
>
> Q. And did Mr. Denney participate? A. He did.
>
> Q. What did he state regarding his escape? A. Offender Denney pled guilty to the report of escape from our facility, and he was read rights before he pled guilty, stating anything he said during that disciplinary hearing could be used in court.

Denney argues this testimony is irrelevant because his violation of a disciplinary rule prohibiting escape has no bearing on whether he committed the criminal offense of escape. He also argues the testimony was unfairly prejudicial.

We find counsel did not breach an essential duty in failing to object to the testimony regarding Denney's acknowledgment of his violation at the disciplinary hearing. We recognize a finding by the facility's disciplinary body that Denney had "escaped" would not be probative. *See State v. Huston*, 825 N.W.2d 531, 527 (Iowa 2013) (finding no probative value to a DHS determination an abuse report was founded in a case of child endangerment). But the evidence Denney complains of here is not an administrative finding of his violation. Rather, Denney claims his attorney should have objected to Denney's own statement he violated a facility rule. Such statements are admissible under Iowa Rule of Evidence 5.801(d)(2) as an admission by a party-opponent. Although his admission to a rule violation did not directly address the question of whether Denney committed the crime of escape, it was probative of whether Denney intended to leave the facility without consent or authority—an element the State was required to prove. *See* Iowa Code § 719.4(1) (stating a class "D" felony is committed when "[a] person convicted of a felony . . . *intentionally* escapes, or attempts to escape, from a . . . community-based correctional facility . . . to which the person has been committed" (emphasis added)).

We also reject Denney's argument that the probative value of his admission was outweighed by the danger of unfair prejudice. During Baker's direct examination, the witness made clear the disciplinary hearing was separate from the criminal proceedings. Baker testified the formal report given to Denney for violating the facility's escape rule was akin to receiving a traffic ticket. Baker

also told the jury that officials informed Denney that anything he said in the disciplinary proceeding could be used against him in court.

But even if Denney's trial counsel had a duty to object to Baker's testimony regarding the disciplinary hearing, we find Denney is unable to show he was prejudiced by counsel's omission. The State presented ample evidence from which the jury could have found Denney guilty of escape. An officer discovered Denney in the bathroom rolling "a green, leafy substance" into a crude cigarette. The officer told Denney to report to the control desk, presumably to determine whether the substance was illegal. Denney leaned in the direction of the exit "like he was going to walk away" and then turned back. Another officer warned Denney not to leave, but then Denney exited the facility. The event was captured on surveillance video. Given the strength of the evidence against Denney, we cannot find the result of the trial would have been different had counsel objected.

Denney did not show his trial counsel breached an essential duty in failing to object to testimony regarding the disciplinary hearing or that he was prejudiced by the omission. Therefore, his ineffective-assistance-of-counsel claim fails.

B. Evidence regarding Denney's possession of "a green, leafy substance."

Next Denney contends his trial counsel was ineffective in failing to object to Baker's testimony that he discovered Denney holding "a green, leafy substance." Denney argues the reference should have been excluded as prior bad acts evidence.

Iowa Rule of Evidence 5.404(b) provides evidence "of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." But such evidence may be admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Iowa R. Evid. 5.404(b). Before evidence of a prior bad act can be considered admissible, the court must "(1) find the evidence is 'relevant and material to a legitimate issue in the case other than a general propensity to commit wrongful acts,' and (2) determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant." *State v. Reynolds*, 765 N.W.2d 283, 289 (Iowa 2009) (citations omitted).

We disagree with Denney's assertion the evidence of a green, leafy substance in his possession was irrelevant to any issue in the case. When Baker seized the substance and directed Denney to the control desk, Denney would have assumed Baker intended to pursue an investigation into Denney's possession of the substance. The challenged testimony helped the State explain Denney's motive and intent in leaving the facility. *See State v. Richards*, 809 N.W.2d 80, 92 (Iowa 2012) (finding evidence of defendant's alcohol use to be probative of his motive for murder).

Nor do we find the danger of unfair prejudice substantially outweighed the probative value of the evidence. "Unfair prejudice arises when the evidence would cause the jury to base its decision on something other than the proven facts and applicable law, such as sympathy for one party or a desire to punish a

party." *State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004). Denney's possession of the green, leafy substance—never actually identified as marijuana—is not the type of evidence that would provoke a jury's "instinct to punish" or otherwise lead the jury "to base its decision on something other than the established propositions in the case." *See State v. Rodriquez*, 636 N.W.2d 234, 240 (Iowa 2001).

Finally, Denney cannot show he was prejudiced by counsel's disinclination to object. As stated above, the State presented strong evidence of escape. Denney does not dispute he was a convicted felon and a resident of the facility. The surveillance video of his flight, coupled with the eyewitness testimony of Officer Baker, established Denney intentionally left the facility without consent. Given the overwhelming proof of his guilt, Denney cannot show the outcome of trial would have been different had counsel objected to Baker's reference to a green, leafy substance. Accordingly, Denney has not carried his burden to prove counsel was ineffective.

AFFIRMED.