DA 16-0030

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 247N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

STUART RICHARD BROWN,

Defendant and Appellant.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DC-2014-479
Honorable John W. Larson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Moses Okeyo, Assistant Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Ryan W. Aikin, Assistant Attorney General, Helena, Montana

Kirsten Pabst, Missoula County Attorney, Missoula, Montana

Submitted on Briefs: July 18, 2018

Decided: October 9, 2018

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Defendant Stuart Richard Brown appeals from the judgment and sentence of the Fourth Judicial District Court, Missoula County, finding him guilty of felony escape. We affirm in part and reverse in part.

¶3 On August 30, 2014, Police Officer Brian Vreeland (Officer Vreeland) was on duty in downtown Missoula when he and two other officers entered a bar. Officer Vreeland recognized Brown from an earlier intelligence briefing as someone with an outstanding arrest warrant. He approached Brown, identified himself as a police officer, and escorted Brown outside. Officer Vreeland requested Brown's identification, and Brown said he did not have any. Brown stated that his name was Richard Derchief, and he provided several different birth dates. Officer Vreeland, unconvinced by Brown's answers, continued to ask for his name and date of birth. Brown continued to say, "Derchief," and gave multiple inconsistent spellings. Officer Vreeland then leaned Brown against the police car and handcuffed Brown's hands behind his back, while another officer patted Brown down for weapons and contraband. Officer Vreeland momentarily took his hands off of Brown, and Brown ran down the street, away from the officers. The officers gave chase and eventually

located and detained Brown in a parking lot a few blocks away. On November 12, 2014, the State filed an amended information charging Brown with one count of felony escape, in violation of § 45-7-306, MCA. Brown pled not guilty.

¶4 During voir dire, the State's counsel asked a series of hypothetical questions designed to elicit a definition and understanding of what constituted "custody" and what it meant to be "in custody." After the jury was empaneled, the District Court gave introductory instructions and instructions regarding the elements of escape and the applicable mental state.

¶5 On November 21, 2014, a jury trial was held. During trial, prior to Brown taking the stand, the District Court stated that it would follow its "practice" for testifying in-custody defendants—which is to station a security officer near the jury box between the defendant and "the jury and [courtroom staff] and [the judge]." The District Court stated that it utilized this practice "regardless of the charge" or other circumstances. Defense counsel objected, arguing the measure was extreme and suggested to jurors that Brown was a danger. Defense counsel suggested an alternative location where a security officer could stand to avoid "giv[ing] the wrong impression to the jury. . . ." The District Court noted counsel's objection but declined to "mak[e] any distinction between Mr. Brown and any of the other hundreds of incarcerated folks who've testified in any courtroom[]."

¶6 At trial, the jury watched police vehicle dash camera footage of Brown outside the bar being patted down by officers and then running away. Officer Vreeland testified that upon initially encountering Brown, he was immediately confident of Brown's identity, despite the false information Brown provided. Officer Vreeland testified that after leading

Brown outside the bar, he told Brown he would hold him until he had verified Brown's identity. Officer Vreeland acknowledged that he never read Brown *Miranda* warnings but claimed that he "informed [Brown] he was under arrest" when he handcuffed Brown. Officer Vreeland also testified that not all detentions are formal arrests, not everyone who is detained is "going to wind up being arrested," and that, on occasion, he will handcuff someone who is not under arrest.

¶7 Brown testified that he was uncooperative with the officers because he knew he had an outstanding arrest warrant and did not want to go to jail. Brown acknowledged he did not feel free to leave the encounter with Officer Vreeland. However, Brown did not think he was under formal arrest because Officer Vreeland told Brown he was "being detained." Brown testified that the officers did not tell him he was under arrest or read him his *Miranda* warnings before he ran. Prior to submitting the case to the jury, the District Court provided instructions on the elements of the offense of escape, § 45-7-306, MCA, but did not again instruct the jury on state of mind.

¶8 On November 21, 2014, a jury convicted Brown of escape. On November 13, 2015, the District Court sentenced Brown to twenty years in Montana State Prison, with ten years suspended. At the sentencing hearing, the District Court recommended Brown participate in one of two existing treatment programs: Nexus or Boot Camp. The District Court stated that both programs were "available to" Brown, and that the District Court "strongly recommend[ed] he get into those programs[] and [would] be happy to talk to anybody or file anything with the department . . . ." The written judgment did not include the recommendation that Brown participate in either of the treatment programs. The written

judgment did include the condition that Brown "register as a Violent Offender in compliance with [§ 46-23-504, MCA] . . . ." Brown appeals.

¶9 This Court reviews a district court's decision to restrain a criminal defendant at trial for an abuse of discretion. *State v. Herrick*, 2004 MT 323, ¶¶ 14–15, 324 Mont. 74, 101 P.3d 755. Our review of the constitutional issue of due process, a matter of law, is plenary. *In re T.W.*, 2005 MT 340, ¶ 11, 330 Mont. 84, 126 P.3d 491. Claims of ineffective assistance of counsel are mixed questions of law and fact that we review de novo. *Whitlow v. State*, 2008 MT 140, ¶ 9, 343 Mont. 90, 183 P.3d 861; *State v. Clary*, 2012 MT 26, ¶ 12, 364 Mont. 53, 270 P.3d 88.

¶10 We review for legality a district court's restrictions on parole eligibility and sentencing on criminal sentences that include at least one year of incarceration. *State v. Ariegwe*, 2007 MT 204, ¶ 174, 338 Mont. 442, 167 P.3d 815; *see also State v. Ashby*, 2008 MT 83, ¶¶ 8–9, 342 Mont. 187, 179 P.3d 1164. Whether a restriction or a sentence is legal is a question of law, and our review is de novo. *Ariegwe*, ¶¶ 174–75.

¶11 *Whether Brown's right to a fair trial was violated by the presence of a security officer near the witness stand during Brown's testimony.*

¶12 A defendant's right to a fair trial is guaranteed by the United States and Montana Constitutions. U.S. Const. amends. VI, XIV; Mont. Const. art. II, §§ 17, 24. "A cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows the error was prejudicial." Section 46-20-701, MCA; *State v. Bar-Jonah*, 2004 MT 344, ¶ 89, 324 Mont. 278, 102 P.3d 1229.

¶13 This Court and the United States Supreme Court have differentiated between inherently prejudicial courtroom practices, such as shackling a defendant in front of the jury, and non-inherently prejudicial courtroom practices, such as the presence of security personnel. *See Holbrook v. Flynn*, 475 U.S. 560, 568–69, 106 S. Ct. 1340, 1345–46 (1986); *Kills on Top v. State*, 273 Mont. 32, 57, 901 P.2d 1368, 1384 (1995) ("the presence of armed officers in the courtroom is not inherently prejudicial. . . ."); *see also Deck v. Missouri*, 544 U.S. 622, 626, 628, 125 S. Ct. 2007, 2010–11 (2005). However, despite the non-inherently prejudicial nature of courtroom security, under certain circumstances the "sight of a security force within the courtroom might . . . create the impression in the minds of the jury that the defendant is dangerous or untrustworthy." *Holbrook*, 475 U.S. at 569, 106 S. Ct. at 1346 (internal citations omitted). Accordingly, "[w]here a question of prejudice due to armed officers is raised, the question must be answered on a case by case basis." *Kills on Top*, 273 Mont. at 57, 901 P.2d at 1384 (citing *Holbrook*, 475 U.S. at 569, 106 S. Ct. at 1346).

¶14 In this case, the District Court, over counsel's objection, stationed a security officer between Brown and the jury box when Brown took the stand to testify. Brown argues his right to a fair trial was violated and his defense was prejudiced by the presence of the security officer in close proximity to him while he testified, especially because Brown was facing an escape charge and was already inhibited by a physical restraint. We disagree.

¶15 The presence of a single security officer near the witness stand did not prejudice Brown's right to a fair trial. *See Kills on Top*, 273 Mont. at 57, 901 P.2d at 1384; § 46-20-701, MCA. The District Court should have analyzed the relevant circumstances

of Brown's case and not simply dismissed counsel's request because that is the District Court's practice and what it has always done. *See Kills on Top*, 273 Mont. at 57, 901 P.2d at 1384. The District Court's error notwithstanding, the positioning of the security officer near Brown did not present the jury members, who already knew Brown had fled officers previously—which he did not deny—with a situation suggesting that Brown was dangerous or untrustworthy. *See Holbrook*, 475 U.S. at 569, 106 S. Ct. at 1346. Similar to *Kills on Top*, the presence of a security officer near Brown during the trial proceedings was not prejudicial to Brown's trial or to his defense. *See Kills on Top*, 273 Mont. at 57, 901 P.2d at 1384.

¶16 *Whether Brown was denied effective assistance of counsel*

¶17 In assessing claims of ineffective assistance of counsel (IAC), we apply the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *Whitlow*, ¶ 10; *State v. Colburn*, 2018 MT 141, ¶ 21, 391 Mont. 449, 419 P.3d 1196. The first prong of the *Strickland* test requires the defendant to show that his counsel's performance was deficient. *Strickland,* 466 U.S. at 687, 104 S. Ct. at 2064. To demonstrate that counsel's performance was deficient, the defendant must prove that counsel's performance fell below an objective standard of reasonableness. *Whitlow*, ¶ 14; *Bishop v. State*, 254 Mont. 100, 103, 835 P.2d 732, 734 (1992). The second prong of the *Strickland* test requires the defendant to prove that his counsel's deficient performance prejudiced the defense. *Whitlow*, ¶ 10; *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. To show prejudice, the defendant alleging ineffective assistance of counsel must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would

have been different. *Stock v. State*, 2014 MT 46, ¶ 24, 374 Mont. 80, 318 P.3d 1053 (internal citations omitted).

¶18 We review IAC claims on direct appeal if the claims are based solely on the record. *State v. Cheetham*, 2016 MT 151, ¶ 14, 384 Mont. 1, 373 P.3d 45; *Hagen v. State*, 1999 MT 8, ¶ 12, 293 Mont. 60, 973 P.2d 233 (citing *State v. Bromgard*, 273 Mont. 20, 23, 901 P.2d 611, 613 (1995)). A record-based claim is a claim in which counsel's course of action—or failure to act—is fully explained by the record. *State v. White*, 2001 MT 149, ¶¶ 16, 19, 20, 306 Mont. 58, 30 P.3d 340 ("decisions regarding the timing and number of objections lie within counsel's tactical discretion, which would indicate that non-record based information explaining the tactic may be involved . . . . The failure of counsel to offer a particular jury instruction, generally, will be a non-record matter as well. . . ."); *State v. Kougl*, 2004 MT 243, ¶ 14, 323 Mont. 6, 97 P.3d 1095 (if the record on appeal explains "why," this Court will address the issue on direct appeal). If, however, the record is underdeveloped and does not demonstrate the rationale that forms the basis of the claim, the claim is better suited for a petition for postconviction relief. *Cheetham*, ¶ 14; *State v. Heavygun*, 2011 MT 111, ¶ 8, 360 Mont. 413, 253 P.2d 897.

¶19 Brown was convicted of escape, which occurs when "a person subject to official detention . . . knowingly or purposefully eludes official detention . . . ." Section 45-7-306(2), MCA; *State v. Martin*, 2001 MT 83, ¶¶ 37, 44–45, 305 Mont. 123, 23 P.3d 216. "Official detention" means "placement of a person in the legal custody of a municipality, a county, or the state as a result of . . . the actual or constructive restraint or

custody of a person by a peace officer pursuant to arrest, transport, or court order. . . ." Section 45-7-306(1), MCA.

¶20 Brown argues his counsel was ineffective when counsel (1) failed to object during voir dire to the State's questioning and description of the offense elements of escape; (2) failed to object to the District Court's pre-introduction-of-evidence reading of substantive instructions, including mens rea instructions; (3) failed to request instructions that informed the jury, to find Brown guilty of escape, the State must prove beyond a reasonable doubt that Brown was aware he was under "official detention" when Brown fled; and (4) failed to object to the State's closing argument regarding Brown's knowledge of whether he was under official detention. Brown further argues that there was no possible reason for counsel's omissions because his defense hinged on the distinction between his awareness that he was in custody for purposes of investigative detention or whether he was under arrest.

¶21 The record does not explain why Brown's counsel did not object to various statements by the State or the District Court or why Brown's counsel did not request certain instructions. *See White*, ¶¶ 19–20; *Cheetham*, ¶ 14. All of Brown's claims of IAC are potential discretionary choices of Brown's counsel for which the rationale remains unknown. *See Cheetham*, ¶ 14; *White*, ¶¶ 16, 19, 20. Accordingly, Brown's claims of IAC are better suited for a petition for postconviction relief. *See Cheetham*, ¶ 14.

¶22 *Whether the written judgment requires correction to strike the violent offender registration requirement and to include the District Court's treatment recommendation.*

¶23 Violent offender status is "determined purely by statute." *State v. Miller*, 1998 MT 177, ¶ 41, 290 Mont. 97, 966 P.2d 721; §§ 46-23-502(13), -504, MCA. A district court lacks statutory authority to require violent offender registration for a conviction not listed among the "violent offenses" that mandate registration. *State v. Rowe*, 2009 MT 225, ¶¶ 32–33, 351 Mont. 334, 217 P.3d 471. Escape, § 45-7-306, MCA, is not listed as a violent offense. *See* § 46-23-502, MCA.

¶24 Here, the District Court's judgment included a probation condition that Brown register as a violent offender. Brown argues this violent offender registration requirement was illegally imposed, and the State concedes this issue. The crime for which Brown was convicted was not included among the crimes requiring violent offender registration. *See Rowe*, ¶ 33; *Miller*, ¶ 41; §§ 46-23-502, -504, MCA. Thus, the District Court's violent offender registration requirement for Brown's escape conviction was imposed illegally and should be stricken from the written judgment. *See Rowe*, ¶ 33.

¶25 Where an oral pronouncement and a written judgment conflict, the oral pronouncement controls because the oral pronouncement is the "legally effective sentence." *State v. Hammer*, 2013 MT 203, ¶ 27, 371 Mont. 121, 305 P.3d 843 (citing *State v. Clark*, 2008 MT 317, ¶ 10, 346 Mont. 80, 193 P.3d 934); § 46-18-116(2), MCA.

¶26 During oral pronouncement of the sentence, the District Court recommended Brown participate in one of two available treatment programs. Despite a specific request from Brown's counsel during the sentencing hearing, the written judgment failed to include the

recommendation. Brown argues the treatment condition should have been included in the written judgment. The State concedes this issue and agrees the recommendation condition should be included. We also agree.

¶27 The written judgment must conform with the oral pronouncement, and the District Court incorrectly omitted the condition considering treatment program eligibility. *See* § 46-18-116 (2), MCA; *see also Hammer*, ¶ 27. Accordingly, the District Court should add the condition recommending treatment.

¶28 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. We affirm in part and reverse in part. We remand for the sole purpose of striking the condition that Brown register as a violent offender and adding the recommendation condition that Brown participate in an available treatment program.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR