MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Travis J. Rose,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

July 8, 2022

Court of Appeals Case No. 21A-CR-2349

Appeal from the Morgan Superior Court

The Honorable Peter R. Foley, Judge

Trial Court Cause No. 55D01-2103-F5-387

Crone, Judge.

Case Summary

[1] Travis J. Rose was convicted, following a jury trial, of level 5 felony escape after he absconded from a work crew as part of a Morgan County Jail inmate corrections program. Rose appeals, arguing that the trial court abused its discretion in admitting certain evidence at trial. He further contends that the trial court abused its discretion in instructing the jury. Finding no abuse of discretion, we affirm.

Facts and Procedural History

[2] In March 2021, while Rose was incarcerated in the Morgan County Jail, he participated in the facility's corrections program. Inmates' participation in the program is voluntary. The program is used as an incentive for inmates to earn extra credit time by performing community service while serving their sentence. Participants receive a "day off their sentence" for every week that they work. Tr. Vol. 2 at 200. The inmates who participate in the program are transported from the jail to "work throughout the county for nonprofit organizations." *Id*. The volunteer program is similar to a more "progressive" version of a "chain gang" from the "old days." *Id*. at 192. When an inmate is at a worksite, a site supervisor is assigned to that work crew. The supervisor is either an officer from the jail or a person who has been authorized by the sheriff's department after completing an annual training. While the inmates are working, they are not handcuffed but are "always in custody when they are off site" and are still "inmate[s] of the jail." Tr. Vol. 3 at 45-46. The inmates are required to "obey their site supervisors" and are not allowed to leave the worksite except for brief

tasks related to their work assignment or when using the restroom. Tr. Vol. 2 at 235. Each participant receives a jail corrections handbook that provides "all of the rules of the program." *Id*. at 207. [1] The handbook instructs that an inmate who commits any criminal activity while participating in the program could face possible criminal charges.

[3] Rose joined the jail corrections program on March 8. On March 16, Rose and three other inmates were assigned to work at the American Legion Post in Mooresville. Morgan County Sheriff's Department Officer William Hacker was the supervising officer at the worksite that day. He instructed Rose and one of the other inmates to "start picking up trash" on one side of a ditch and to "work [their] way back towards [him]." *Id.* at 216. Officer Hacker was on the other side of the ditch with two other inmates, but he could still see Rose "standing straddl[ing] the trash bag that he had him pick up trash in." *Id.* at 217. Officer Hacker briefly turned to talk to another inmate, and when he looked back, Rose was gone. Rose did not have "permission to leave any of the American Legion property." *Id.* at 221.

[4] During the search for Rose, Officer Sean Paris spotted him in a wooded area of a park that was located about a mile away from the American Legion. When Officer Paris saw Rose he yelled, "Sheriff's Department, stop[,]" numerous times, but Rose continued to "walk away briskly" and just "kept going." Tr.

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[1] Thus, obviating the possible defense of "[w]hat we've got here is a failure to communicate." *Cool Hand Luke* (Warner Bros. Pictures 1967).

Vol. 3 at 5-7. Rose was later found hiding by a log near railroad tracks. Some of Rose's jail issued clothing was found in a dumpster at the American Legion.

[5] The State charged Rose with level 5 felony escape and class A misdemeanor resisting law enforcement. In September 2021, prior to trial, Rose filed a notice indicating that he intended to raise a mistake-of-fact defense based upon his alleged belief that, when leaving the worksite, "he was violating a [jail] rule, not committing a crime." Appellant's App. Vol. 2 at 49. Rose also filed a pretrial motion to exclude recorded jail phone calls he made to his girlfriend that the State intended to offer into evidence. The court denied the motion to exclude the evidence in its entirety but ordered the State to redact certain portions of the calls that referenced any "prior or other pending criminal matters" and "other prior bad acts (drug use)." *Id*. at 90-91. Rose additionally tendered preliminary jury instructions on level 6 felony failure to return to lawful detention as an "included" crime in the charge of escape. *Id*. at 56-57. The trial court rejected the preliminary instructions but indicated that it would reconsider the issue for final instructions after the evidence had been completed at trial. *Id.* at 90.

[6] On the first day of trial, Rose requested further redaction of the jail phone calls. Specifically, Rose wanted portions redacted regarding his reference to the potential one-year sentence he faced for absconding from the jail work crew. Rose admitted that the referenced sentence was not accurate regarding his charged crimes but argued that the reference could mislead the jury into believing that he faced less time than he was actually facing. The State responded that the evidence was relevant to rebut Rose's defense of mistake of

fact, i.e., that he believed he was simply violating a jail rule instead of committing a crime, because he actually mentioned a potential criminal sentence. The trial court denied Rose's request for further redaction, finding that "if the issue is intent" then Rose's comment about his perceived potential punishment "is fair game." Tr. Vol. 2 at 7.

[7] During trial, the State offered into evidence four phone calls Rose made to his girlfriend on March 15 and four additional calls made to her on March 16. Rose renewed his objection to the evidence, and the trial court overruled Rose's objection. Tr. Vol. 3 at 67. In the first few calls, Rose discussed with his girlfriend his plan to "go on vacation[,]" referencing his plan to abscond from the work crew and making sure that she would come get him from the location where he was working. State's Ex. 3. During those initial calls, his girlfriend asked him how much additional time he would get if caught, and Rose indicated, "It'll be like a year total." *Id.* During a later call after he had been caught, Rose surmised that his punishment would be "like 45 days being locked down" and that maybe he would get sentenced to a "a year" but serve "six months." *Id*.

[8] Following the close of evidence, the trial court reconsidered Rose's request for a jury instruction on failure to return to lawful detention as an alleged lesser included offense of escape and found that neither the charging information nor the facts presented supported the instruction. Specifically, the trial court found that the crime of failure to return to lawful detention was not a lesser included offense of escape in this case, as it requires "permissive leave … temporary

leave granted for a specified purpose or limited period" and there were no facts to indicate that Rose was on permissive leave from lawful detention when he absconded. Tr. Vol. 3 at 167. Accordingly, the trial court rejected Rose's instruction. At the conclusion of trial, the jury found Rose guilty of escape but not guilty of resisting law enforcement. The trial court sentenced Rose to five years in the Department of Correction. This appeal ensued.

Discussion and Decision

Section 1 – The trial court did not abuse its discretion in admitting certain evidence at trial.

[9] Rose argues that the trial court abused its discretion in admitting certain evidence at trial. The admission of evidence is within the sound discretion of the trial court, and we will reverse only for an abuse of that discretion. *Vanryn v. State*, 155 N.E.3d 1254, 1264 (Ind. Ct. App. 2020). An abuse of discretion occurs when the trial court's decision is "clearly against the logic and the effect of the facts and circumstances before the court or if the court has misinterpreted the law." *Id*.

[10] In general, relevant evidence is admissible at trial, and irrelevant evidence is not admissible. Ind. Evidence Rule 402. Evidence is relevant, and thus admissible, if "it has any tendency to make a fact more or less probable than it would be without the evidence; and … the fact is of consequence in determining the action." Ind. Evidence Rule 401. Here, Rose challenges the trial court's admission of his recorded jail phone calls with his girlfriend, made both before

and after his escape, during which he referenced what he believed would be the possible sentence he faced for absconding from the jail corrections program. He claims that this evidence was irrelevant and potentially misled the jury regarding the possible sentence he faced if convicted. Rose barely makes a cogent argument on this issue and simply directs us to the general rule that, "[i]nasmuch as the jury in a felony case has no sentencing function it should not be informed as to the range of sentences possible." *Wisehart v. State*, 484 N.E.2d 949, 953 (Ind. 1985), *cert. denied* (1986).

[11] However, that is not what happened here, as the jury was never informed as to the range of sentences possible for Rose's crime of escape. Rather, the jury heard Rose tell his girlfriend his inaccurate belief that he would face, at most, a one-year sentence for his behavior. The trial court determined that this evidence was relevant and admissible due to Rose's "mistake-of-fact" defense. *See* Ind. Code § 35-41-3-7 ("It is a defense that the person who engaged in the prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the culpability required for commission of the offense."). Specifically, Rose claimed that he lacked the intent to commit the crime of escape because he mistakenly believed that absconding from the work crew simply constituted a violation of program rules rather than a crime. As noted by the trial court, Rose's statements that he believed he could get up to one year of incarceration, which is clearly a criminal sentence as opposed to a rule violation punishment, was relevant to his intent. To the extent that Rose suggests that the jury may have been misled or confused by this evidence, Rose opened the door to the

admission of the evidence by arguing mistake of fact. *See Roberts v. State*, 894 N.E.2d 1018, 1027 (Ind. Ct. App. 2008) ("A party may 'open the door' to otherwise inadmissible evidence by presenting similar evidence that leaves the trier of fact with a false or misleading impression of the facts related.") (citation omitted), *trans. denied*. In short, we find no abuse of discretion, much less reversible error, in the trial court's admission of this evidence.

Section 2 – The trial court did not abuse its discretion in refusing to instruct the jury on failure to return to lawful detention as an alleged lesser included offense of escape.

[12] Rose next contends that the trial court abused its discretion when it refused to give his tendered jury instructions on failure to return to lawful detention as a lesser included offense of escape. The trial court has broad discretion in instructing the jury, and we review the trial court's decision to give or refuse a party's tendered instruction only for an abuse of discretion. *New v. State*, 135 N.E.3d 619, 622 (Ind. Ct. App. 2019).

[13] During a criminal trial, either party can request a jury instruction on a lesser included offense. *Webb v. State*, 963 N.E.2d 1103, 1108 (Ind. 2012).

> When this occurs, the court must engage in the analysis we set forth in *Wright v. State*, 658 N.E.2d 563, 566-67 (Ind. 1995). First, the court must determine whether the lesser offense is inherently or factually included in the charged offense. *Id*. If it is either, the court must then determine whether "a serious evidentiary dispute" exists between the elements that distinguish the offenses. *Id*. at 567. In other words, there must be sufficient evidence for the jury to find the defendant committed the lesser offense but

> not the charged offense. *Id*. If a dispute exists, the court must give the instruction. *Id*.

Larkin v. State, 173 N.E.3d 662, 667 (Ind. 2021). If the alleged lesser included offense is neither inherently nor factually included in the crime charged, then the trial court should not give a requested instruction on the alleged lesser included offense. *Wright*, 658 N.E.2d at 567.

[14] Here, Rose was charged with level 5 felony escape. The statute defining that crime provides that a person "who intentionally flees from lawful detention commits escape[.]" Ind. Code § 35-44.1-3-4(a). Subsection (c) of the same statute provides that a person "who knowingly or intentionally fails to return to lawful detention following temporary leave granted for a specified purpose or limited period commits failure to return to lawful detention, a Level 6 felony." Ind. Code § 35-44.1-3-4(c).[2]

[15] Based upon the statutory language, we agree with the State that failure to return to lawful detention is not an inherently included offense of escape. To determine whether an alleged lesser-included offense is inherently included in

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[2] "Lawful detention" means:

> (1) arrest;
> (2) custody following surrender in lieu of arrest;
> (3) detention in a penal facility;
> ….
> (9) *custody for purposes incident to* any of the above, including transportation, medical diagnosis or treatment, court appearances, *work*, or recreation; or
> (10) any other detention for law enforcement purposes.

Ind. Code § 35-31.5-2-186(a) (emphases added).

the crime charged, the trial court must compare the statute defining the crime charged and the statute defining the alleged lesser-included offense. *Kilgore v. State*, 922 N.E.2d 114, 118 (Ind. Ct. App. 2010), *trans. denied*. "If the alleged lesser-included offense may be established by proof of all of the same or proof of less than all of the same material elements to the crime, or if the only difference between the two statutes is that the alleged lesser-included offense requires proof of a lesser culpability, then the alleged lesser-included offense is inherently included in the crime charged." *Id*. Here, assuming without deciding that "fleeing" and "failing to return to" lawful detention are essentially the same intentional act for the purposes of this statute, the alleged lesser-included crime of failure to return to lawful detention requires additional proof that the defendant's act occurred after having been granted "temporary leave … for a specified purpose or limited period." In other words, the alleged lesser-included offense here may not be established by proof of all of the same or proof of less than all of the same material elements of the crime. Nor is the only difference between the two crimes that the alleged lesser-included offense requires proof of a lesser culpability. Accordingly, the crime of failure to return to lawful detention is not inherently included in the crime of escape.[3]

[3] Rose argues that the crime of failure to return to lawful detention "is escape" but simply a mitigated version of escape based on the fact "of being afforded leave for a specific reason or length of time." Appellant's Br. at 10. If this were indeed true, rather than defining the act of failing to return to lawful detention as its own separate crime with its own separate elements, our General Assembly could have simply defined the act of failing to return to lawful detention as a lower-level-felony escape. It did not.

[16] Moreover, failure to return to lawful detention is not a factually included offense here. To determine whether an alleged lesser-included offense is factually included in the charged crime, the trial court "must compare the statute defining the alleged lesser-included offense with the charging instrument in the case. If all of the elements of the alleged lesser-included offense are covered by the allegations in the charging instrument, then the alleged lesser-included offense is factually included in the charged crime." *Id.* at 118-19. The charging information here alleged that Rose "did intentionally flee from lawful detention." Appellant's App. Vol. 2 at 17. The information did not allege, and thus the State was not required to prove, that Rose failed to return to lawful detention "following temporary leave granted for a specified purpose or limited period." Under the circumstances, the trial court did not abuse its discretion in refusing to instruct the jury on failure to return to lawful detention. We affirm Rose's convictions.

[17] Affirmed.

Vaidik, J., and Altice, J., concur.