COURT OF APPEALS
DECISION
DATED AND FILED

June 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1752-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GUY W. DUNWALD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Guy Dunwald asks this court to use its discretionary authority to reverse his escape conviction based on his claim that the real controversy in his case was not fully tried. He contends that the trial court did not adequately instruct the jury so that it would be able to distinguish between

escape and the submitted lesser-included charge, attempted escape. We reject his argument and affirm the judgment.

¶2 A jury convicted Dunwald of escaping from the Green Bay Correctional Institution. The escape took place on December 29, 1997, while Dunwald was lawfully incarcerated. Dunwald and a fellow inmate used a ladder-type device made out of dental floss to climb two interior walls of the institution.[1] The two were captured before they completely escaped from the physical boundaries of the institution. Dunwald climbed up one wall, ran across a roof area and was descending another wall when a prison guard saw him. Shortly after Dunwald jumped to the ground, the guard ordered him to lie down and Dunwald complied.

¶3 WISCONSIN STAT. § 946.42(3)(a)[2] provides that an escape is committed by "[a] person in custody who intentionally escapes from custody" while "sentenced for a crime." Our supreme court examined the definition of custody in ***State v. Sugden***, 143 Wis. 2d 728, 735, 422 N.W.2d 624 (1988), and explained that "escape is not from an institution, but from the custody of that institution. Thus, it is apparent that one who escapes from a form of custody imposed violates the escape statute even though the escapee does not leave the geographical premises of the institution." Dunwald does not dispute that under this definition there was sufficient evidence for the jury to find that he escaped from custody.

[1] Dunwald was tried along with the other inmate who escaped with him. The other inmate is not a party to this appeal, however.

[2] All statutory references are to the 1997-98 edition.

¶4 Dunwald's only argument is that the trial court failed to instruct the jury adequately so that it would be capable of distinguishing between escape and the submitted lesser-included charge, attempted escape. He asks this court to reverse his conviction because the jury instructions prevented the real controversy from being tried. He claims that, with proper instruction, the jury could have concluded that he was caught before he completely escaped from custody.

¶5 The trial court instructed the jury exactly as Dunwald requested.[3] Nevertheless, we have the authority under WIS. STAT. § 752.35 to reverse because of an improper jury instruction even where insufficient objection was made when either the real controversy has not been tried or there has been a miscarriage of justice. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 13-22, 456 N.W.2d 797 (1990). We will only exercise our power of discretionary reversal in exceptional cases. *See* ***id.*** at 11.

¶6 Whether a jury instruction is an accurate statement of the law presents a question of law that we review without deference to the trial court. *See* ***State v. Neumann***, 179 Wis. 2d 687, 699, 508 N.W.2d 54 (Ct. App. 1993). "[T]he proper standard for Wisconsin courts to apply when a defendant contends that the interplay of legally correct instructions impermissibly misled the jury is whether there is a reasonable likelihood that the jury applied the challenged instructions in a manner that violates the constitution." ***State v. Lohmeier***, 205 Wis. 2d 183, 193, 556 N.W.2d 90 (1996).

[3] Ironically, the language that Dunwald now suggests would have been proper, definitional language from ***State v. Sugden***, 143 Wis. 2d 728, 735, 422 N.W.2d 624 (1988), is the same language the State sought to include in the jury instructions and the same language that Dunwald objected to at the jury instruction conference. The trial court eventually agreed with Dunwald's objection that adding that language might be too prejudicial to Dunwald's theory of defense.

¶7 Relevant to Dunwald's appeal, the trial court used the following standard jury instructions that it tailored to the case: WIS JI—CRIMINAL 1774, concerning escape from prison custody; WIS JI—CRIMINAL 122, concerning lesser-included offenses; and WIS JI—CRIMINAL 580, concerning attempted escape. Pursuant to the escape instruction, the court instructed the jury that the third element of escape requires "escape from custody," which means "to leave in any manner without lawful permission or authority." *See also* WIS JI—CRIMINAL 1774. The court instructed the jury that to find Dunwald guilty of the lesser-included attempt charge, the State would have to prove that Dunwald took "acts towards the commission of the crime of escape from custody which demonstrates unequivocally under all the circumstances that [Dunwald intended] to and would have committed the crime of escape from custody except for the intervention of another person or some other extraneous factor." *See also* WIS JI—CRIMINAL 580.

¶8 We conclude that these standard instructions provided clear and accurate instructions of the law. In ***Sugden***, our supreme court wrote that under WIS. STAT. § 946.42, "to leave custody in any manner without permission constitutes an escape." ***Sugden***, 143 Wis. 2d at 735. As noted above, that explanation is properly summarized in WIS JI—CRIMINAL 1774. We reject Dunwald's argument that defining escape as "taking the first step up the wall" effectively eliminates "the offense of attempted escape from custody …." Certainly, there are possible scenarios where a prisoner could commit attempted

escape and not the completed offense. The prisoner would simply have to take steps *towards* escaping from custody *without succeeding*.[4]

¶9 Any argument that Dunwald's conduct did not constitute an escape was properly left for him to make. Indeed, counsel's entire theory of defense at closing arguments was that he only committed an attempted escape. Dunwald was caught just after he jumped down from the interior wall he had climbed. In his closing argument, counsel repeated the jury instructions for the attempted charge and argued: "So you have an officer there who actually met him as he was coming down the rope which indicated there was the element of control there." Counsel continued:

> [A]nother aspect of this is the fact that in the inside of the wall none of the guards close or anybody was in a position to yell to Mr. Dunwald, stop, come on down or whatever. The first time there was actually any contact as far as instructions or telling him what to do that was done outside the reformatory when [the guards] told Mr. Dunwald to stop. And again, while this was the way that made the most sense for these officers to restrain Mr. Dunwald it was a choice on their part. *It was a choice while they were in control of the situation or getting the situation under control they chose not to, you know, not to do anything as far as trying to tell them, you know, come on down.* They all chose to make sure they met him as they were coming out. (Emphasis added.)

¶10 The jury was entitled to rely on the contrary inference from the evidence: that Dunwald had succeeded in briefly escaping from custody and that the guards were forced to take action to capture him to regain custody. We must

[4] Dunwald cites two civil cases that are not instructive: ***Schulz v. St. Mary's Hosp.***, 81 Wis. 2d 638, 260 N.W.2d 783 (1978), and ***Hannebaum v. Direnzo & Bomier***, 162 Wis. 2d 488, 469 N.W.2d 900 (Ct. App. 1991). In both cases the trial court refused to give the requested jury instructions that would have properly identified the law. *See* ***Schulz***, 81 Wis. 2d at 653-55; ***Hannebaum***, 162 Wis. 2d at 494, 503-06.

accept a reasonable inference drawn by the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990). The jury instructions provided the full and accurate background for the jury to make its determination and the real controversy was fully tried.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.