

IOWA COURT OF APPEALS

No. 1-711 / 01-419

Filed February 6, 2002

STATE OF IOWA,

Plaintiff-Appellee,

vs.

TERRY WAYNE WASHINGTON,

Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Gary L. McMinimee (Trial) and Joel Swanson (Sentencing).

On appeal from his conviction for escape, Terry Washington contends the court erred in overruling his motion for judgment of acquittal. He also asserts trial counsel was ineffective in failing to make timely objections to both the trial information and to jury selection. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Theresa R. Wilson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, and Derk Schwieger, County Attorney, for appellee.

Heard by Huitink, P.J., and Vogel and Eisenhauer, JJ.

**EISENHAUER, J.**

Terry Washington appeals his conviction and sentence for escape in violation of Iowa Code section 719.4 (1997). Washington argues: (1) the trial court erred in overruling his motion for judgment of acquittal since there was no evidence indicating he was "in custody" for purposes of section 719.4; and (2) trial counsel was ineffective in failing to make timely objections to the trial information and jury selection. We affirm.

***I. Background Facts and Proceedings.*** On March 1, 1999, Washington appeared in court and was sentenced to incarceration following his convictions on several felony and misdemeanor charges. Washington became agitated and requested to withdraw his guilty pleas or, in the alternative, ten days before the issuance of mittimus so he could take care of personal business. The court denied these requests and committed him to the Department of Corrections, with the Webster County Sheriff's Office to have temporary custody for purposes of transport. The court ordered Washington to remain in the courtroom until a deputy could be summoned to escort him to jail. Because no deputy was present at the courthouse, Washington and his attorney waited in another room for transport. The attorney went to the judge's chambers to discuss the issue of appeal bond, and Washington walked out of the courthouse. The assistant county attorney informed the sheriff's office they had a "runner" and a warrant was issued for his arrest. Several months later, Washington was located in Arizona and transported back to Iowa.

The State charged Washington with escape, in violation of section 719.4. The trial information alleged he had either (1) escaped from the custody of the Webster County Sheriff's Office or (2) escaped to avoid prosecution of other crimes. Prior to trial, trial counsel filed a motion to dismiss arguing that Washington was not in custody at the time of his alleged escape and that the trial information failed to allege that he fled to avoid prosecution. The district court denied the motions. Trial counsel subsequently filed a motion in limine, seeking to exclude evidence regarding Washington's character and prior criminal record. The district court sustained the majority of the requests, but concluded the State could make reference to pending charges that formed the basis of the flight from prosecution theory.

During trial, Washington filed motions for judgment of acquittal and for a directed verdict, on which the court reserved judgment but later denied. The State agreed to dismiss its theory of flight to avoid prosecution, and the jury found Washington guilty of escape pursuant to section 719.4(1). The district court sentenced him to an indeterminate term of imprisonment not to exceed five years, to be served consecutively to the sentence for a previous conviction. Washington has appealed.

**II. Sufficiency of the Evidence.** Washington first argues the district court erred in overruling his motion for judgment of acquittal, since there was insufficient evidence in the record to support his conviction for escape pursuant to section 719.4(1). We disagree.

Because a jury verdict is binding on us when supported by substantial evidence, our scope of review is limited to the correction of errors at law. *State v. Speicher*, 625 N.W.2d 738, 740 (Iowa 2001). Evidence is substantial if it could convince a rational jury of a defendant's guilt beyond a reasonable doubt. *State v. Hoffer*, 383 N.W.2d 543, 545 (Iowa 1986). We view the evidence in a light most favorable to the State, and we must consider all the evidence in the record, not just the evidence supporting the verdict. *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998). The State has the ultimate burden to prove every fact necessary to constitute the crime with which the defendant is charged. *State v. Nuezil*, 589 N.W.2d 708, 711 (Iowa 1999). Although direct and circumstantial evidence are equally probative, the evidence presented must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture. *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992).

The crux of Washington's challenge to his conviction of escape centers on the question of whether he was "in custody" for purposes of section 719.4(1). That section provides:

A person convicted of a felony, or charged with or arrested for the commission of a felony, who intentionally escapes from a detention facility, community-based correction 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 or employee to whom the person has been entrusted, commits a class "D" felony.

The crime of escape therefore has three elements: (1) the defendant is "[a] person convicted of a felony"; (2) who "intentionally escapes"; and (3) "from the custody of any public officer or employee to whom the person has been entrusted." *State v. Wagner*, 596 N.W.2d 83, 86 (Iowa 1999).

The Iowa Supreme Court has previously interpreted section 719.4 regarding what actions are considered an escape and whether a person is "in custody". In *State v. Eads*, 234 N.W.2d 108, 111 (Iowa 1975), the Iowa Supreme Court opined that "custody begins when an arrest is made and continues until the defendant is lawfully discharged." In *State v. Burtlow*, 299 N.W.2d 665, 667 (Iowa 1980), the defendant failed to return to a state work release center after a furlough. The State charged the defendant with escape pursuant to section 719.4(1). *Id.* at 669. The defendant, however, argued there was no factual basis to support his escape conviction under 719.4(1). *Id.* The supreme court agreed, concluding that the defendant's conduct fit more readily under section 719.4(3), concerning failures to return from an authorized release center. *Id.* The court went on to hold:

We believe subsection one is intended to apply 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. It is reasonable to conclude the legislature intended to punish breaches of physical restraint more severely. *Id.*

In *State v. Breitbach*, 488 N.W.2d 444, 449 (Iowa 1992), the supreme court clarified its holding in *Burtlow*. In *Breitbach*, the police arrived at the defendant's home and informed him they had a warrant for his arrest and that he would have to come with them. *Breitbach*, 488 N.W.2d at 445. The defendant asked the police if they would allow him to go inside and speak to his girlfriend. *Id.* As the police attempted to reenter his apartment, the defendant bolted past the officers. *Id.* The defendant was later apprehended and charged with escape pursuant to section 719.4(1). *Id.* In affirming the defendant's conviction, the court opined:

However, we did not mean in *Burtlow* that custody for purposes of subsection 1 must involve actual physical contact with the arrestee. Instead, "physical 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 further ruled that even though a fleeing felony-arrestee poses a danger of injury to persons or property, the language in *Burtlow* does not create a requirement that the State demonstrate that an arrestee's unauthorized departure will give rise to a "danger of injury to persons or property" when seeking a conviction under Iowa Code section 719.4(1)." *Id.* at 449.

We conclude there is sufficient evidence to support Washington's conviction for escape under section 719.4(1). Washington had entered guilty pleas to two felony and three misdemeanor charges. After imposing sentence, the district court specifically ordered Washington to remain in the courtroom until a deputy sheriff from the Webster County Sheriff's Office could be found to transport him to jail. At that point, Washington knew or should have known he was in custody and would be subject to immediate restraint if he attempted to flee from the sheriff. The fact he fled the courthouse prior to the deputy sheriff's arrival does not diminish the danger posed to persons or property by his unauthorized departure from custody, and his departure was an affront to the integrity and authority of the district court. See *State v. Francois*, 577 N.W.2d 417, 421 (Iowa 1998). We find no error here.

**III. Ineffective Assistance of Counsel.** Washington next contends trial counsel was ineffective in failing to make timely objections to the trial information and jury selection. Because a claim of ineffective assistance of counsel implicates constitutional rights, our scope of review is de novo. *State v. Carter*, 602 N.W.2d 818, 820 (Iowa 1999).

To establish an ineffective assistance of counsel claim a defendant must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Wenmark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). The test of ineffective assistance of counsel focuses on whether counsel's performance was reasonably effective. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). The defendant must show that performance fell below an objective standard of reasonableness so that counsel failed to fulfill the adversarial role that the Sixth Amendment envisions. *Id.* A strong presumption exists that counsel's performance fell within the wide range of reasonable professional assistance. *Wenmark*, 602 N.W.2d at 814. The defendant has the burden of proving both elements of his ineffective assistance claim by a preponderance of the evidence. *Ledezma v. State*, 626 N.W.2d 134, 145 (Iowa 2001).

Additionally, our courts have ruled that trial strategy, miscalculated tactics, mistake or inexperience do not constitute ineffective assistance. *Id.* at 143. We may dispose of the defendant's ineffective assistance claims under either prong. *Id.* In order to prove the prejudice prong, the defendant must show a reasonable probability that but for counsel's alleged errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2068, 80 L.Ed.2d at 698.

Washington first maintains that counsel's failure to object to the trial information prejudiced his case because it permitted the State to introduce prejudicial information about pending forgery charges. We find no merit to this argument.

It is an integral feature of our criminal justice system that so long as a prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file, rests entirely within his or her discretion, so long as it is not based on improper factors. *United States v. LaBonte*, 520 U.S. 751, 763, 117 S. Ct. 1673, 1679, 137 L.Ed.2d 1001, 1012 (1997). Iowa courts have consistently held that "[w]hen two statutory provisions are reconcilable, the prosecutor has discretion to choose what charges to file." *State v. Anspach*, 627 N.W.2d 227, 233 (Iowa 2001); *State v. Caskey*, 539 N.W.2d 176, 177-78 (Iowa 1995).

In the present case, the State charged Washington with escape based on the theories of (1) flight to avoid prosecution of charges, or (2) escape from custody of the county sheriff. We have already concluded there was substantial evidence to support Washington's conviction under section 719.4(1). We likewise conclude there was substantial evidence to support the prosecution's decision to bring alternative charges under section 719.4(4).

Washington's presentence investigation report indicates he had two felony forgery charges pending at the time of sentencing. Washington fled the courthouse despite the district court's order and was ultimately apprehended in Arizona. Under these facts, the prosecution's belief that Washington fled the State in order to avoid prosecution on additional charges was well-founded. We additionally conclude that evidence of these pending charges was admissible under Iowa Rule of Evidence 404(b) to show motive or intent to escape. It was not ineffective assistance of counsel to fail to object to the trial information.

Washington lastly argues trial counsel was ineffective in raising a premature objection to the State's peremptory strikes pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986). In *Batson*, the Supreme Court ruled that under the Equal Protection Clause a prosecutor may not use peremptory strikes to challenge potential jurors based solely on the basis of their race. *Batson*, 476 U.S. at 89, 106 S. Ct. at 1719, 90 L.Ed.2d at 83. Under the three-part test set forth in *Batson*, in order to establish purposeful discrimination, a defendant must first show that he or she is a member of a cognizable racial group and that the prosecutor has used peremptory challenges to remove prospective jurors of the defendant's race. *State v. Veal*, 564 N.W.2d 797, 806 (Iowa 1997) (citing *Batson*, 476 U.S. at 96, 106 S. Ct. at 1723, 90 L.Ed.2d at 87-88.) The burden then shifts to the State to articulate race-neutral reasons for challenging the jurors. *Id.* Finally, the district court must determine whether the defendant has established purposeful discrimination. *Id.*

Washington claims that trial counsel's premature objection allowed the prosecution to mask its real purpose in striking an African-American juror by later striking two white jurors who had criminal records. We conclude that Washington has failed to show that even if trial counsel had waited to lodge his *Batson* objection until the close of voir dire, the outcome would have been different. The prosecutor provided race-neutral reasons for striking the juror, namely that he had a prior conviction for contempt of court and that contempt of court was an issue the defense might raise at trial. The fact that a prospective juror has a criminal record has been recognized as a race-neutral reason for striking a juror. *Devoil-El v. Groose*, 160 F.3d 1184, 1186-87 (8th Cir. 1998). The prosecutor later struck two potential white panelists with criminal records. The district court considered defense counsel's objections both during voir dire and at its conclusion, and ruled that the State's proffered reasons for striking the only African-American jury panelist were racially neutral. Washington has offered no evidence that the prosecutor would not have later stricken the two potential white jurors but for trial counsel's premature objection. We find no error here. We affirm Washington's conviction and sentence.

**AFFIRMED.**

