IN THE COURT OF APPEALS OF IOWA

No. 5-675 / 95-123

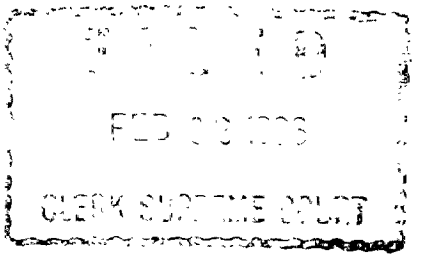
STATE OF IOWA,

Plaintiff-Appellee,

vs.

ROBERT TODD GRIFFIN,

Defendant-Appellant.



Appeal from the Iowa District Court for Muscatine County, Edward B. DeSilva, Jr., Judge.

Robert Griffin appeals his conviction and sentence for misdemeanor escape in violation of Iowa Code section 719.4(2) (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Richard R. Phillips, County Attorney, and Dana Christensen and Kerrie Snyder, Assistant County Attorneys, for appellee.

Heard by Sackett, P.J., Cady, J., and McCartney, S.J.*

* Senior judge from the Second Judicial District serving on this court by order of the Iowa Supreme Court.

SACKETT, P.J.

Defendant-appellant Robert Todd Griffin appeals from his conviction of misdemeanor escape. Defendant first contends his conviction is not supported by substantial evidence because he escaped from an illegal arrest. His second contention is his trial counsel was not effective because he failed to object to an instruction of misdemeanor escape. We affirm.

Defendant allegedly assaulted a woman. When a police officer tried to intervene, defendant assaulted the officer. Defendant was then arrested and put in the back seat of a police car. He kicked out the window of the car and fled. As a result of the incident, the State charged defendant by trial information with wilful injury, criminal trespass, possession of a controlled substance, serious interference with official acts, criminal mischief in the third degree, escape, and serious assault. The information was amended to also charge defendant as an habitual offender, and later amended dismissing one count of criminal trespass, amending the possession charge to an accommodation offense, and reducing criminal mischief from third degree to fourth degree. At no time was the information amended to charge defendant with misdemeanor escape, the charge of which he was found guilty.

The case proceeded to trial and defendant was found not guilty of interference with official acts and assault causing bodily injury. Defendant was found not guilty of felony escape, but was found guilty of misdemeanor escape. He was also found guilty of criminal mischief in the fourth degree. The trial court directed a verdict

against the State on the count of wilful injury and submitted it to the jury as assault with intent. The jury returned a verdict of guilty of the lesser-included offense of simple assault.

Defendant first contends the evidence was not sufficient to convict him of escape because he was unlawfully detained. Our review is on assigned error. Iowa R. App. P. 4. We uphold a verdict where there is substantial evidence in the record supporting the charge. *See State v. Aldape*, 307 N.W.2d 32, 39 (Iowa 1981); *State v. Lampman*, 342 N.W.2d 77, 81 (Iowa App. 1982). We review the evidence in the light most favorable to the State, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the record. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984); *State v. Hall*, 371 N.W.2d 187, 188 (Iowa App. 1985). The State advances this issue was decided against the defendant's position in *State v. Dawdy*, 533 N.W.2d 551 (Iowa 1995). We agree and affirm on this issue.

Defendant next contends his trial counsel was ineffective in failing to object to an instruction which said misdemeanor escape was a lesser-included offense of felony escape. Defendant contends he was not charged with misdemeanor escape and, therefore, the court should not have submitted it to the jury. The State does not contend misdemeanor escape is a lesser-included offense of felony escape. Rather, the State argues defense counsel had reasons for not objecting and defendant has failed to show prejudice.

Our concern in claims of ineffective assistance is with the fairness of the proceeding. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption counsel performed competently. *Id.* The burden is on defendant to prove by a preponderance of the evidence (1) his trial counsel failed to perform an essential duty and (2) prejudice resulted. *Id.* at 131-32. Generally, ineffective assistance of counsel claims are preserved for postconviction proceedings to allow trial counsel an opportunity to defend the charge. *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981); *State v. Nehringer*, 412 N.W.2d 180, 191-92 (Iowa App. 1987).

We conclude this issue is best considered on postconviction and we affirm the conviction reserving for defendant the right to pursue this issue in a postconviction proceeding.

AFFIRMED.