

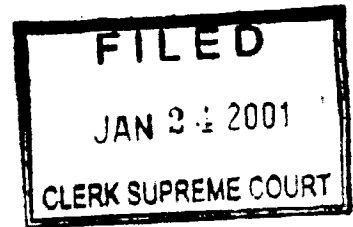
IN THE COURT OF APPEALS OF IOWA

No. 0-501 / 99-1818
Filed January 24, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID LEE TOMLINSON, JR.,
Defendant-Appellant.



Appeal from the Iowa District Court for Tama County, Lynne E. Brady,
Judge.

The defendant appeals his convictions, following a jury trial, for first- and second-degree murder and fleeing to avoid prosecution. Defendant argues the district court erred in: (1) denying his motion for mistrial made after a State's witness commented on his guilt or innocence in violation of his Fifth Amendment rights; (2) failing to suspend the trial in order to hold a competency hearing; and (3) concluding there was sufficient evidence to permit the charge of flight to avoid prosecution. Defendant also raises an issue of ineffective assistance of counsel, claiming trial counsel was ineffective in failing to argue in a motion for new trial that the verdicts were contrary to the weight of the evidence. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David A. Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Brent D. Heeren, County Attorney, and Doug Hammerand, Assistant Attorney General, for appellee.

Heard by Miller, P.J., and Hecht and Vaitheswaran, JJ.

MILLER, P.J.

David Lee Tomlinson, Jr. appeals his convictions, following jury trial, for first-degree and second-degree murder and fleeing to avoid prosecution. Tomlinson argues the district court erred in: (1) denying his motion for mistrial made after a State's witness allegedly improperly commented on his guilt or innocence and his exercise of his Fifth Amendment right to remain silent; (2) failing to suspend the trial in order to hold a competency hearing; and (3) concluding there was sufficient evidence to permit the charge of flight to avoid prosecution to be submitted to the jury. Tomlinson also raises a claim of ineffective assistance of counsel, asserting trial counsel was ineffective in failing to allege and argue in the motion for new trial that the verdicts were contrary to the weight of the evidence. We affirm on all grounds and find there was no ineffective assistance of counsel.

I. BACKGROUND FACTS AND PROCEEDINGS

On the morning of May 22, 1998 Scott Rosenberger went to work at Dave's Auto Repair in Tama, Iowa. The business was owned and operated by David Tomlinson, Sr., the father of the defendant David Lee Tomlinson, Jr. (hereafter "Tomlinson"). Tomlinson lived with his father and sister, Angela Miell, in his father's house, across a driveway from the business. The previous evening Tomlinson had borrowed the key to the repair shop from Rosenberger and returned it promptly. The morning of May 22 when Rosenberger arrived at work he noticed the door to the shop was unlocked and a black truck which had been there for repairs was gone. As time passed on May 22 and David Tomlinson, Sr. did not show up for work at the shop, Rosenberger assumed he

was out running errands. Around noon Rosenberger made several phone calls around town attempting to locate David, Sr. but could not find him. The phone at David, Sr.'s house was repeatedly busy.

Some time later Rosenberger received several emotional phone calls from Tomlinson's mother Jackie, David, Sr.'s former wife, who eventually told him Tomlinson had told her not to go to the house because "it wasn't pretty." She asked Rosenberger to go check it out because she believed Tomlinson may have done something to the others. Rosenberger informed Jackie she needed to call the police, however she stated she could not call the police on her own son. Rosenberger called the police to check whether anything had happened at David, Sr.'s house.

Police arrived at the house and discovered both Tomlinson's sister, Angela, and his father had been shot to death in their bedrooms. Forensic experts concluded they had both been shot with deer slugs from the father's missing twelve-gauge shotgun. An empty shotgun shell box, which had contained shells identical to the ones that killed the victims, was found in the kitchen trash can. A box of shells similar to those found at the crime scene was later found in the glove compartment of Tomlinson's truck in a bag with a receipt indicating two boxes of shells had been purchased the day before. Fingerprint analysis revealed Tomlinson's prints on the battery of a smoke alarm which had been removed from the smoke alarm and left at the scene, the empty shell box, and the bag holding the box of shells in Tomlinson's truck.

The day of the killings Tomlinson drove to Kansas City in the black truck taken from the repair shop. After calling his mother he checked himself into the

Western Missouri Mental Health Center on her advice. Following examination by hospital staff, Tomlinson was admitted. He made several statements to staff there indicating he had gotten into trouble in Iowa, and stated he had to run.

Following arrest, the State charged Tomlinson with two counts of first-degree murder, for the deaths of Angela Miell and David Tomlinson, Sr., in violation of Iowa Code sections 707.1 and 707.2, and flight from the state to avoid prosecution, in violation of Iowa Code section 719.4(4). Tomlinson filed a notice of his intent to rely upon the legal defenses of insanity and diminished responsibility. Both parties filed applications for psychiatric evaluations of Tomlinson by their respective experts. Tomlinson's request was that he be evaluated as to competency, insanity, and diminished responsibility. The court sustained the applications and scheduled a competency hearing pursuant to Iowa Code section 812.3. Tomlinson was evaluated at the Iowa Medical and Classification Center at Oakdale. A report was submitted to the district court based on this evaluation. The evaluators found that Tomlinson suffered from no mental condition which would interfere with his ability to appreciate the charges against him, understand the proceedings, or assist in his defense. Based on this report, and prior to the competency hearing, Tomlinson subsequently withdrew any challenge to his competency.

On the third day of trial Tomlinson moved for a continuance of the trial proceedings until evidence could be presented concerning his competency to proceed. He asserted that medical evidence he had just acquired questioned his competency to proceed with trial. The court initially declined to hold a hearing, stating a finding that it did not reasonably appear that Tomlinson was not

competent to proceed with trial. It did, however, by way of offer of proof hear the evidence Tomlinson wished to present on the question of his competency. As part of the offer of proof hearing the court also received, without objection, a written report concerning the competency evaluation that had been done at the Iowa Medical and Classification Center at Oakdale. Following the offer of proof hearing the court continued with trial. Tomlinson later moved for a mistrial after the State's witness, Dr. Michael Taylor, gave an answer that Tomlinson perceived as violating his Fifth Amendment right to remain silent. The motion for mistrial was denied.

The jury found Tomlinson guilty of first-degree murder for the death of Angela Miell, second-degree murder for the death of David Tomlinson, Sr., and flight from the state to avoid prosecution. Tomlinson was sentenced to life in prison for first-degree murder, a term of no more than fifty years for second-degree murder, and a term of no more than five years on the flight charge, the sentences to run consecutively. Notice of appeal was timely filed.

Tomlinson argues on appeal the district court erred in denying his motion for mistrial. He contends Dr. Taylor's answer violated his Fifth Amendment rights and crossed the line from medical opinion testimony to commentary on the ultimate issue of his guilt or innocence. Secondly, Tomlinson asserts the district court erred in denying his motion to hold a competency hearing based on the newly discovered evidence questioning his competency to proceed with trial. Tomlinson also contends the court erred in concluding there was sufficient evidence he fled the state to avoid prosecution. He maintains his actions were not solely to avoid prosecution. Finally, Tomlinson argues his trial counsel was

ineffective in failing to allege as a ground in the motion for new trial that the verdicts were contrary to the weight of the evidence. As there are a variety of issues in this case which require us to employ several different standards of review, we address each of these issues and standards separately.

II. MERITS

A. Denial of Motion for Mistrial

Tomlinson argues the answer of the State's expert witness, Dr. Taylor, violated his Fifth Amendment right to remain silent and not have that silence used against him by implying he had a duty to communicate with the doctor as to the events underlying the charges against him. Tomlinson further contends the answer was an unfair comment upon his guilt or innocence. Specifically, Dr. Taylor was asked why it is important to talk to Tomlinson about what happened during the day of and day before the murders. This inquiry was in part a response to the earlier testimony of Tomlinson's expert, Dr. Olson, who had testified Tomlinson did not go into the events of those two days with him either.

Dr. Taylor answered:

Well, there were only three people there and two of them are dead, so the only person who can give us any information about what happened and why he did what he did is Mr. Tomlinson, and so I always make my best effort coming at it every which way to get as much information from a Defendant as possible because that's the only way I can get at least the Defendant's version of what his state of mind was at the time these events occurred. If an act occurs in front of 15 witnesses, all of whom have talked to the Defendant, then there are other sources of information, but in this particular situation, there wasn't anybody else who could provide any information about Mr. Tomlinson's state of mind on the 21st and 22nd except for two persons who were dead.

At that point defense counsel asked to be heard, the jury was excused, and defense counsel moved for a mistrial, claiming the answer violated

Tomlinson's Fifth Amendment right in that it directly put "a focus on his not testifying." The district court denied the motion but found the answer improperly commented on Tomlinson's guilt or innocence, based on *State v. Taylor*, 516 N.W.2d 38 (Iowa App. 1994). The judge then reconvened the jury and admonished it to disregard the question as well as the answer and struck both from the record.¹

1. Improper Comment on Guilt or Innocence

As stated by Tomlinson, trial courts have considerable discretion in ruling upon motions for mistrial, since they are present throughout the trial and are in a better position than an appellate court to gauge the effect of the matter in question on the jury. *State v. Cage*, 218 N.W.2d 582, 586 (Iowa 1974); see also *State v. Bishop*, 387 N.W.2d 554, 564-65 (Iowa 1986). We will intervene only when the court has abused its discretion. *Bishop*, 387 N.W.2d at 564.

We will not reverse on appeal unless the trial judge's ruling denying a mistrial was 'so palpably and grossly violative of fact and law that it evidences not the exercise of will but perversity of will, not the exercise of judgment, but defiance thereof, not the exercise of reason but rather of passion or bias.' Ordinarily, abuse of discretion is found only where there is no support in the record for the trial court's determination.

State v. Lewis, 391 N.W.2d 726, 730 (Iowa App. 1986) (quoting *State v. Brewer*, 247, N.W.2d 205, 211 (Iowa 1976)).

¹ We agree with the State that the district court did not explicitly comment on the Fifth Amendment issue. However, as that was the basis for Tomlinson's motion for mistrial and the motion was overruled we will assume that ruling encompassed the Fifth Amendment claim. The fact the district court proceeded to sustain an objection based on a ground that was never specifically argued by Tomlinson does not mean the court did not rule on the Fifth Amendment claim in denying the motion for mistrial. Therefore, we find error was preserved on this issue.

It is well-established law that a witness is not permitted to express an opinion as to the ultimate fact of the accused's guilt or innocence. *State v. Griffin*, 564 N.W.2d 370, 374 (Iowa 1997); *State v. Myers*, 382 N.W.2d 91, 97 (Iowa 1986). However, we cannot find that Dr. Taylor was commenting on Tomlinson's guilt or innocence when an equally plausible explanation exists for his answer. See *State v. Jones*, 511 N.W.2d 400, 408 (Iowa App. 1993) (citing *United States v. Griggs*, 735 F.2d 1318, 1322 (11th Cir. 1984)). The most readily apparent reason for the State's question and the doctor's answer was as rebuttal testimony to Tomlinson's expert's testimony. Dr. Olson had testified for Tomlinson regarding Tomlinson's mental state at the time of the murders. He had expressed an opinion that Tomlinson could not have known right from wrong at that time, even though Tomlinson had never told him what he did or did not do on May 22, 1998, the day of the murders. When asked by Dr. Olson what happened on May 21 and May 22, 1998, Tomlinson stated he did not want to talk about it. Dr. Taylor was merely answering a question that asked why it was important to discuss the events of that day with Tomlinson. While the answer Dr. Taylor gave might have been better phrased, it did not demonstrate an intention to comment on Tomlinson's guilt or innocence and, when viewed in the context of the question that was being answered, does not appear to be such a comment.

Even assuming this answer by Dr. Taylor was an improper comment on Tomlinson's guilt or innocence, it was not prejudicial to him in any way. In assessing whether a mistrial is necessary, it has been stated by our supreme court that:

[g]enerally, a trial court's quick action in striking the improper response and cautioning the jury to disregard it, coupled, when

necessary, with some type of general cautionary instruction, will prevent any prejudice. A defendant who asserts these actions were insufficient bears the heavy burden of demonstrating a clear abuse of discretion on the part of trial court.

State v. Veal, 564 N.W.2d 797, 809 (Iowa 1997) (quoting *State v. Wade*, 467 N.W.2d 283, 285 (Iowa 1991)). Here the trial court did strike the question and answer and admonished the jury to disregard both. In addition, upon submission of the case the judge instructed the jury that Tomlinson was presumed innocent until proven guilty by evidence beyond a reasonable doubt, and that any testimony she had told them to disregard was not evidence. We believe the court's actions were more than sufficient to prevent any prejudice, to the extent Dr. Taylor's answer might be seen as including an improper comment on Tomlinson's guilt or innocence.

Therefore, we determine the trial court did not err in denying Tomlinson's motion for mistrial based on his assertion the answer given by Dr. Taylor exceeded the scope of proper witness testimony. We do not believe the answer improperly commented on Tomlinson's guilt or innocence and, assuming it did, the trial court's action of striking the question and answer, admonishing the jury to disregard the question and answer, and giving certain instructions at the close of the case prevented any prejudice to Tomlinson.

2. Fifth Amendment Violation

Tomlinson argues the above referenced answer by Dr. Taylor put an improper focus on his choice not to testify and inferred that he had a duty to communicate to the doctor regarding the events underlying the charges. Tomlinson argues that Dr. Taylor's answer infringed on his Fifth Amendment right to remain silent and not have his silence used against him. Because a

constitutional right is involved in this claim, we review the issue de novo to determine whether the trial court abused its discretion. *Veal*, 564 N.W.2d at 809 (citing *State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994)).

Tomlinson is correct in stating the general rule that he has a right to remain silent and his silence cannot later be used against him by the prosecution at trial. See *Doyle v. Ohio*, 426 U.S. 610, 617-18, 96 S. Ct. 2240, 2244-45, 49 L. Ed. 2d 91, 97-98 (1976). However, it has been generally recognized that when a defendant asserts an insanity defense he may constitutionally be subjected to compelled examination by a psychiatrist chosen by the prosecution. See *Estelle v. Smith*, 451 U.S. 454, 465, 101 S. Ct. 1866, 1874, 68 L. Ed. 2d 359, 370-71 (1981). See also *United States v. Byers*, 740 F.2d 1104, 1115 (D.C. Cir. 1984); *United States v. Madrid*, 673 F.2d 1114, 1121 (10th Cir. 1982); *United States v. Cohen*, 530 F.2d 43, 47-48 (5th Cir. 1976); *Pope v. United States*, 372 F.2d 710, 720-21 (8th Cir. 1967).

Tomlinson gave notice of insanity as a defense. Therefore, he had no Fifth Amendment right to remain silent in his interviews with the psychiatrists. Further, those psychiatrists could then testify as to statements made by Tomlinson, provided such statements did not incriminate him. See *State v. Craney*, 347 N.W.2d 668, 674 (Iowa 1984). We conclude Tomlinson did not, therefore, have a privilege to refuse to communicate with Dr. Taylor regarding events underlying the charges, as his assertion of the insanity defense waived his Fifth Amendment right to remain silent during the psychiatric interviews. However, he continued to have the right to not testify at trial and to otherwise

remain silent, and the exercise of those rights could not be used against him by the State.

The first question we must answer in determining whether Tomlinson's Fifth Amendment rights to be free from self-incrimination and to not testify were violated is whether Dr. Taylor's answer can be seen as a comment on the exercise of those rights. See *Matire v. Wainwright*, 811 F.2d 1430, 1435 (11th Cir. 1987) (holding that remark must be manifestly intended, or naturally and necessarily understood by the jury, as a comment on the defendant's silence.) We do not believe Dr. Taylor's answer was intended, or could naturally and necessarily be understood by the jury, as commenting on Tomlinson's silence. As stated above, the State was asking Dr. Taylor to explain why it is important for a psychiatrist to talk with Tomlinson about the days in question in making his or her evaluation of Tomlinson's mental state at the time of the crime. The question and answer went to rebut the previous testimony of Tomlinson's expert, Dr. Olson, who had testified as to his opinion that Tomlinson lacked sanity, despite the fact that Tomlinson had never told him what he did or did not do and had refused to speak about what happened on the days in question. Neither the question nor the answer went to Tomlinson's right to remain silent and not testify.

In addition, for two reasons Dr. Taylor's answer did not prejudice Tomlinson by improperly focusing the jury on his choice not to testify. First, as noted above, his own expert had already commented on the fact Tomlinson had declined to discuss the events of the day of the murders. Similar testimony by Dr. Taylor was merely cumulative. Second, immediately following Dr. Taylor's

answer the court instructed the jury to disregard the testimony and it was struck from the record.²

Generally, a trial court's quick action in striking an improper response and cautioning the jury to disregard it, coupled with some type of general cautionary instruction, will prevent any prejudice. *Veal*, 564 N.W.2d at 809; see also *State v. Baccam*, 476 N.W.2d 884, 886-87 (Iowa App. 1991). The jury was also given an instruction specifically stating Tomlinson was not required to testify and they should draw no inference of guilt from the fact he did not testify. We presume the jury followed the court's instructions. See *State v. Proctor*, 585 N.W.2d 841, 845 (Iowa 1998). Furthermore, we note there is no evidence in the record the State made any further reference to Tomlinson's silence throughout the remainder of the proceedings. See *Baccam*, 476 N.W.2d at 886-87.

For all of the reasons stated above, based on our de novo review we find the trial court did not abuse its discretion in declining to grant a mistrial based on an alleged violation of Tomlinson's Fifth Amendment rights.

B. Failure to Suspend Trial for Competency Hearing

On the third day of trial Tomlinson's attorney requested a hearing as to Tomlinson's competency to stand trial, pursuant to Iowa Code section 812.3. Based in part on the written evaluation report from the Iowa Medical and Classification Center, the court initially declined to suspend the trial and conduct a competency hearing, finding it did not reasonably appear that Tomlinson was suffering from a mental disorder which prevented him from continuing with trial.

² The fact the trial court struck the question and answer because it believed the answer was an improper comment on Tomlinson's guilt or innocence, rather than doing so on Fifth Amendment grounds, is not of significance. What is significant is that the trial court struck the question and answer and admonished the jury to disregard them.

The court did, however, allow Tomlinson to make an offer of proof through the testimony of Dr. William Logan. Dr. Logan testified that Tomlinson's mental disorder would not prevent him from appreciating the charges, would not prevent him from understanding the proceedings although he might ascribe other meaning to things that were occurring, but that in his opinion Tomlinson's mental disorder was such that he could not effectively assist in his defense without treatment. Following Dr. Logan's testimony the court also received for its consideration the July 21, 1999 written evaluation report from the Medical and Classification Center. Trial then continued. During trial the State filed a motion requesting that the court enlarge its findings and conclusions regarding Tomlinson's competency. The trial court did so in a written ruling on the last day of trial, October 18, 1999.

"Due process requires that a hearing be held to determine the competency of a defendant when there is sufficient doubt of the defendant's mental capacity to show a need for further inquiry." *State v. Mann*, 512 N.W.2d 528, 531 (Iowa 1994) (citing *Drope v. Missouri*, 420 U.S. 162, 180, 95 S. Ct. 896, 908, 43 L. Ed. 2d 103, 118 (1975)).

Iowa Code section 812.3 requires a competency hearing "if the record contains information from which a reasonable person would believe a substantial question of the defendant's competency exists." *State v. Rieflin*, 558 N.W.2d 149, 152 (Iowa 1996). Because no formal competency hearing was held, our review is de novo. *Id.*; *Mann*, 512 N.W.2d at 531. There is a presumption a defendant is competent to stand trial and the burden is on the defendant to prove otherwise. *Mann*, 512 N.W.2d at 531. "The standard of review is 'whether a

reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial.” *Mann*, 512 N.W.2d at 531 (quoting *Griffin v. Lockhart*, 935 F.2d 926, 930 (8th Cir. 1991)).

The relevant considerations in determining if a competency hearing is necessary include (1) the defendant's apparent irrational behavior, (2) any other demeanor at trial that suggests a competency problem, and (3) any prior medical opinion on the defendant's competency to stand trial of which the trial court is aware. *Id.*; *Rieflin*, 558 N.W.2d at 152. In applying these factors the district court judge must decide whether the defendant has a present ability to (1) appreciate the charge, (2) understand the proceedings, and (3) assist effectively in his defense. Iowa Code section 812.3; *Rieflin*, 558 N.W.2d at 152-53.

In the trial court's ruling on the State's motion to enlarge, the court gave the specific reasons why it did not reasonably appear Tomlinson's mental disorder prevented him from appreciating the charge, understanding the proceedings, or assisting effectively in his defense, and why therefore no competency hearing was necessary. The court noted that the issue of competency had been raised prior to trial, and that on at least one occasion Tomlinson had an opportunity to visit with Dr. Logan on the issue before the trial but had declined to do so. It mentioned that Tomlinson had been observed by professionals at the Oakdale facility and their written evaluation report indicated that while Tomlinson was uncooperative, he was not incompetent. The court noted that there was no indication from prison personnel where he was currently serving time that he was incompetent. The trial judge also stated she had the

opportunity to observe Tomlinson in the courtroom on several occasions, he acted appropriately, and he “clearly was aware of the proceedings going on around him and the nature of those proceedings.” She also pointed out Tomlinson consulted with counsel both privately and in the courtroom, and she observed no overt sign he was incapable of doing so. Additionally, the court recognized that Tomlinson had made numerous “pro se” filings in which he indicated he clearly appreciated the charges against him.

Nothing in the record suggests that Tomlinson’s mental disorder prevented him from appreciating the charges against him. The only record information suggesting that Tomlinson might not be able to understand the proceedings is the testimony of Dr. Logan, and that testimony is equivocal at best on the point. Arrayed against it are repeated “pro-se” filings by Tomlinson in which he recognizes the elements of competency, asserts he is not incompetent, and refuses to be subjected to any evaluation; a recent decision by Tomlinson and his counsel to withdraw counsel’s request for a competency evaluation; and the written evaluation report of two experts for the State, finding that Tomlinson had no mental condition that would prevent him from understanding legal proceedings. The only record information suggesting that Tomlinson might not be able to assist effectively in his defense was the opinion of Dr. Logan. Opposing it was not only the information arrayed against any claim that he might not be able to understand the proceedings, but also the trial court’s observations that he had in fact been consulting and cooperating with counsel.

Based on our de novo review of the entire record, and taking into account the relevant considerations stated above, we conclude a reasonable judge,

situated as the trial judge was here, could have determined it did not reasonably appear Tomlinson was suffering from a mental disorder which prevented him from appreciating the charge, understanding the proceedings, or assisting effectively in his defense. For the same reasons as stated by the trial court, we do not believe such a substantial question as to Tomlinson's competence existed as to require a competency hearing.

Although not necessary to our decision on this issue, we do note that the trial court in effect did hold a competency hearing. Through his offer of proof Tomlinson presented evidence that he was suffering from a mental disorder which prevented him from effectively assisting in his defense. In connection with the offer of proof the court was allowed to and did consider the report from Oakdale finding Tomlinson had no medical conditions which prevented him from appreciating the charges, understanding the proceedings, and assisting in his defense. Little if any additional evidence would have been offered to the trial court had a formal hearing on the issue of competence been held. Therefore, the absence of a more formal hearing cannot have resulted in any prejudice to Tomlinson.

C. Sufficiency of the Evidence on Flight Charge

At the close of the State's evidence Tomlinson moved for a "directed verdict of acquittal" as to all three counts, arguing there was not a jury question engendered as to any of the counts. The court denied the motion on counts I and II, the murder charges, and took the motion under advisement as to count III, the charge alleging flight to avoid prosecution. The motion was renewed by Tomlinson at the close of all evidence. The court denied the motion as to all

three counts. On appeal Tomlinson argues the State has not carried its burden of proof on count III and shown he fled the State of Iowa with the intent of avoiding prosecution. We disagree.

Our standard and scope of review in reviewing a denial of a motion for judgment of acquittal is well settled:

We will uphold the trial court's denial of a motion for judgment of acquittal if there is substantial evidence in the record to support the defendant's conviction. Our review of sufficiency-of-evidence challenges is for correction of errors at law. The jury's findings of guilt are binding on appeal if supported by substantial evidence. Substantial evidence is such evidence as could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt.

In deciding whether there is such substantial evidence, we view the record evidence in the light most favorable to the State. Direct and circumstantial evidence are equally probative. A verdict can rest on circumstantial evidence alone. However, "[t]he evidence must at least raise a fair inference of guilt as to each essential element of the crime. Evidence which merely raises suspicion, speculation, or conjecture is insufficient."

State v. Kirchner, 600 N.W.2d 330, 333-34 (Iowa App. 1999) (internal citations omitted).

We give consideration to all the evidence, not just the evidence supporting the verdict. *State v. Schmidt*, 588 N.W.2d 416, 418 (Iowa 1998). "Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury was free to reject certain evidence, and credit other evidence." *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994). The credibility of witnesses, in particular, is for the jury: "The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive." *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). It is the State's burden to prove beyond a reasonable doubt each and every element of

the crime charged. *In Re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368, 375 (1970); *State v. Allen*, 293 N.W.2d 16, 20 (Iowa 1980).

Iowa Code section 719.4(4) provides, "A person who flees from the state to avoid prosecution for a public offense which is a felony or aggravated misdemeanor commits a class "D" felony." "The statute prohibits an otherwise lawful act, the leaving of the state, when that act is performed for an unlawful purpose, to avoid prosecution." *State v. Gleason*, 431 N.W.2d 363, 364 (Iowa 1988). The State need not prove a prosecution had commenced when the defendant leaves the jurisdiction to support a conviction for violation of this section. *Id.* One can avoid the commencement and continuation of a criminal proceeding before the filing of a criminal complaint. *Id.* One form of unlawful flight would be that which was to prevent even the occurrence of prosecution. *Id.*

The State presented evidence that showed Tomlinson took a vehicle which was not his own from his father's repair shop, left the State of Iowa, and went to Missouri sometime between when the murders occurred and the bodies of the victims were discovered. In addition, State's witness testimony revealed Tomlinson had put plates from a different vehicle on the black truck before he took it. He stated he did this "so it would be legal."

The element that Tomlinson is claiming the State failed to prove is that he left the state *solely with an intent* to avoid prosecution. It is undisputed Tomlinson left Iowa to travel to Missouri, in the stolen black truck, on the day of the murders. The evidence of his intention in doing so is, by its nature, circumstantial. However, it is well established that a verdict may rest on circumstantial evidence alone. *State v. Torres*, 506 N.W.2d 470, 472 (Iowa App.

1993). The element of intent is rarely capable of direct proof and must usually be shown by circumstantial evidence. *State v. Delay*, 320 N.W.2d 831, 835 (Iowa 1982); *State v. Salkil*, 441 N.W.2d 386, 387-88 (Iowa App. 1989). Thus, it is clearly appropriate for this element of the challenged count to have been proven with circumstantial evidence alone. We emphasize that inherent in our review is the principle the jury is free to reject certain evidence and credit other evidence. *See State v. Arne*, 579 N.W.2d 326, 328 (Iowa 1998). Therefore, the jury was free to believe or disbelieve the circumstantial evidence on Tomlinson's intent in leaving the state and make its own determination.

Viewed in the light most favorable to the State, we conclude there was substantial evidence in the record to support Tomlinson's conviction under section 719.4(4) for flight to avoid prosecution. The trial court was correct in overruling Tomlinson's motion for judgment of acquittal on the flight charge. The evidence was sufficient to convince a rational fact finder that Tomlinson was guilty beyond a reasonable doubt on count III. Therefore, the jury's verdict is binding upon us and must be upheld. *See Kirchner*, 600 N.W.2d at 333-34.

D. Ineffective Assistance of Counsel

Tomlinson argues that trial counsel's failure to include as one of the grounds in the motion for new trial that the verdicts were contrary to the weight of the evidence constituted a failure to perform an essential duty on the part of counsel and that he was prejudiced by this exclusion. We disagree.

A defendant is entitled to the assistance of counsel under the Sixth Amendment to the United States Constitution and Article 1, section 10 of the Iowa Constitution. A claimed violation of the right to effective assistance of

counsel requires an appellate court to review de novo the totality of the circumstances surrounding counsel's representation of the defendant. See *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987).

To establish an ineffective assistance of counsel claim, the defendant must show that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *State v. Wenmark*, 602 N.W.2d 810, 814 (Iowa 1999); *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). A reviewing court may look to either prong to dispose of an ineffective assistance claim. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984), *State v. Nebinger*, 412 N.W. 2d 180, 192 (Iowa App. 1987). The test of ineffective assistance of counsel focuses on whether the performance by counsel was reasonably effective. *Strickland v. Washington*, 466 U.S. 668, 687, 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 role in the adversary process that the Sixth Amendment envisions. *Id.* A strong presumption exists that counsel is competent and that counsel's conduct falls within the wide range of reasonable professional assistance. *Wenmark*, 602 N.W.2d at 814. The defendant must overcome this presumption and has the burden of proving by a preponderance of the evidence both of the two elements of such a claim. *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996).

"Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981); see also *Wenmark*, 602 N.W.2d at 814. A defendant is not entitled to perfect representation, but rather only that which is

within the range of normal competency. *Karasek v. State*, 310 N.W.2d 190, 192 (Iowa 1981). To warrant a finding of ineffective assistance of counsel, the circumstances must include an affirmative factual basis demonstrating counsel's inadequacy of representation. *Aldape*, 307 N.W.2d at 42.

While we often preserve ineffective assistance of counsel claims for a possible postconviction proceeding, we consider such claims on direct appeal if the record is sufficient. *State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999). However, this preference for preserving ineffective of assistance claims does not relieve Tomlinson of his duty on direct appeal to state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome. *State v. Astello*, 602 N.W.2d 190, 198 (Iowa App. 1999); see also *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). Neither party suggests the record is inadequate to address Tomlinson's ineffective assistance claim, neither party suggests the claim be preserved for a possible postconviction proceeding, and we believe the record is adequate to address his claim.

In deciding the first prong, we require more than a mere showing that some trial strategy backfired or that another attorney would have prepared or tried the case somewhat differently. *Whitsel v. State*, 439 N.W.2d 871, 872 (Iowa App. 1989). To prove counsel failed in an essential duty, the defendant must prove the attorney's performance was outside the range of normal competency. *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). As stated above, a defendant is not entitled to perfect representation, but only that which is within

the range of normal competency. *State v. Halstead*, 362 N.W.2d 504, 508 (Iowa 1985).

Tomlinson claims his trial counsel failed to perform an essential duty by not including, among the numerous other claims in his motion for new trial, a claim that the verdicts were contrary to the evidence. We reiterate that improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 1998).

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066, 80 L.Ed.2d at 695. An attorney's decision regarding strategy or tactics does not ordinarily provide an adequate basis for a claim of ineffective assistance of counsel. See, e.g., *State v. Wilkens*, 346 N.W.2d 16, 19 (Iowa 1984). When trial counsel acts reasonably in selecting and following through on the chosen strategy, the claim of ineffectiveness is without merit. *Id.*; *State v. Foell*, 512 N.W.2d 809, 814 (Iowa App. 1993).

A heavy professional responsibility devolves upon an appellate lawyer when it comes to assessing possible assignments of error. *Osborn*, 573 N.W.2d at 922. Most experienced lawyers or judges will attest it is a tactical blunder, often devastating to an appellant, to assign every conceivable complaint. *Id.* Highly competent appellate lawyers generally assign only the strongest points and rely on them. *Osborn*, 573 N.W.2d at 922-23. Hindsight may show this judgment call was wrong, but this is a far cry from qualifying as ineffective

representation. *Osborn*, 573 N.W.2d at 923. Logically, the same principles apply in selecting grounds to assert in a motion for a new trial.

We believe that trial counsel's decision to not allege the verdicts were contrary to the weight of the evidence, in addition to the numerous other grounds alleged in the motion for new trial, represented a conscientious, meaningful and reasonable tactical decision which falls well within the constitutional standards of adequate representation. However, even assuming this decision constituted a breach of an essential duty, Tomlinson has failed to prove the requisite second prong of the stated test, that he was prejudiced by this omission.

When deciding the second component of a claim of ineffective assistance the person making the claim must show that counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage, thereby constituting a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation. *Miles*, 344 N.W.2d at 234. The crux of the prejudice prong rests on whether the defendant has shown there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Origer v. State*, 495 N.W.2d 132, 135 (Iowa App. 1992). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Tomlinson's argument on this issue is that the evidence of his insanity at the time of the murders was substantial, credible and sufficient to establish that he was insane. However, there was also substantial, credible and sufficient evidence to refute his claim of insanity. Dr. Taylor testified that although Tomlinson suffered from paranoid schizophrenia, in his opinion Tomlinson was

not legally insane at the time of the events giving rise to the charges. He gave detailed reasons for holding an opinion that Tomlinson was neither incapable of knowing the nature and quality of his acts nor incapable of distinguishing between right and wrong in relation to those acts. Although the record contains expert opinion contrary to Dr. Taylor's, nothing in the record suggests that Dr. Taylor's opinion is based on facts that are so improbable, or is so lacking in credibility, that it cannot support the jury's verdicts.

Upon our de novo review of the record, and the totality of the circumstances surrounding counsel's representation of Tomlinson, we conclude there is no substantial likelihood the trial court would have found the evidence concerning Tomlinson's sanity so heavily preponderated against the jury's verdicts that they had to be set aside as contrary to the evidence. See *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). We thus conclude Tomlinson's counsel did not breach an essential duty in not raising such a claim in the motion for new trial and that Tomlinson was not prejudiced by the absence of such a claim in the motion.

VI. CONCLUSION

We agree with the trial court and conclude it did not err in denying Tomlinson's motion for mistrial based on Dr. Taylor's comment. The comment was neither an improper statement as to Tomlinson's guilt or innocence nor did it violate his Fifth Amendment right to remain silent. We conclude Tomlinson's right to due process was not violated by the trial court's decision to not hold a more formal hearing on the issue of Tomlinson's competence to stand trial. The trial court did not err in denying Tomlinson's motion for judgment of acquittal on

the charge of flight from the state to avoid prosecution. There was sufficient evidence in the record to support that verdict. Finally, we find Tomlinson was not denied effective assistance of counsel. Trial counsel's actions were both within the range of normal professional competence and did not prejudice Tomlinson in any way. For all of the reasons stated above, we affirm the convictions of David Lee Tomlinson, Jr.

AFFIRMED.