

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Appellant,

v.

MARK BUGELY,

Appellee.

Filed September 21, 1978

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Appeal from Lee District Court - David B. Hendrickson, Judge.

Defendant appeals convictions of escape and conspiracy to escape. Affirmed on the escape charge, reversed on the conspiracy charge.

Richard C. Turner, Attorney General, and Richard A. Williams, Assistant Attorney General, for appellant.

Thomas Skewes, of Johnson & Phelan, Fort Madison, for appellant.

Submitted to Donielson, Acting C.J., Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant, Mark Bugely, appeals his convictions of escape, in violation of § 745.1, The Code 1977, and conspiracy, in violation of § 719.1, The Code 1977. He was sentenced to serve a term not to exceed three years on the conspiracy conviction, said sentence to run concurrently with any existing sentence. On the escape conviction defendant was sentenced to a term of three years, commencing at the expiration of existing sentences. Defendant's appeal of the conspiracy conviction urges that the trial court erred in failing to sustain his motion for directed verdict which challenged the sufficiency of the State's evidence to prove the elements of conspiracy. We find merit in this assignment and therefore reverse the conspiracy conviction. Defendant's appeal of the escape conviction contends the trial court erred by submitting to the jury an instruction (No. 13) which misstates the law of escape. The overruling of defendant's motion for new trial, raising the same issue, is also assigned as error. We find no merit in these contentions and therefore affirm the escape conviction.

I. Facts. It is undisputed that on the night in question defendant and a few other prisoners at the Fort Madison Penitentiary were released from their cells at approximately 2:00 A.M. to work in the kitchen. They were not given permission to leave the kitchen-dining room area. At approximately 3:45 A.M. defendant and another inmate, Jan Criswell, were found sitting in the prison stockade. The stockade is an open-air area within the penitentiary with 15-foot walls on three sides. The fourth wall of the rectangular area is formed by a 15-foot locked iron gate. One wall of the stockade is the outer wall of the penitentiary. When the defendant was found, prison officials observed a ladder propped up against the outer wall. The stockade is a considerable distance from the kitchen.

II. Escape. Defendant's argument that Instruction No. 13 misstated the law of escape is based upon his contention that that crime requires an actual escape from legal custody. The State concedes that the defendant was always in legal custody, never having breached the penitentiary's outer walls.

Instruction No. 13 directed the jury to return a guilty verdict if they found that the State had established beyond a reasonable doubt that the defendant left the kitchen-dining room area, a place where he was directed to go and allowed to be. We conclude that as applied to the facts of this case, Instruction No. 13 properly defined escape.

Under the language of § 745.1 and the case law construing that statute the fact an accused is found within the penitentiary walls does not foreclose a violation of § 745.1. *State v. Cahill*, 196 Iowa 486, 488-89, 194 N.W. 191 (1923). It is only necessary that the accused "... leave without due authority... any place... in which he is allowed to be..." Section 745.1, The Code 1977. The trial court's instruction adequately apprised the jury of the requisite elements of the crime.

III. Conspiracy. The defendant challenges the sufficiency of the State's evidence to support the charge and urges his motion for directed verdict, made on this basis, was improperly overruled. The State's evidence was completely circumstantial. Defendant and his alleged co-conspirator, Jan Criswell, were both incarcerated in cellblock 19, both were assigned to the kitchen on the night in question, and were found sitting together in the stockade.

A conspiracy is a combination or agreement between two or more persons to do or accomplish a criminal act. Section 719.1, The Code 1977; *State v. Jennings*, 195 N.W.2d 351, 356 (Iowa 1972). Where circumstantial evidence alone is relied on as to an essential element, the circumstances must be entirely consistent with defendant's guilt; it must generate something more than suspicion and speculation. *State v. Overstreet*, 243 N.W.2d 880, 884 (Iowa 1976). In the present case the only evidence of an agreement is that the inmates were both assigned to work in the kitchen and were together when found. We conclude this evidence to be insufficient to sustain the conviction on the conspiracy charge. Evidence of a crime itself does not prove conspiracy to commit the crime. *State v. Johnson*, 222 N.W.2d 483 (Iowa 1974). Defendant's motion for directed verdict should have been sustained. The conspiracy conviction is reversed.

AFFIRMED IN PART AND REVERSED IN PART.