STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1045

State of Minnesota,
Respondent,

vs.

Steven Douglas Nelson,
Appellant.

Filed May 30, 2023
Affirmed in part, reversed in part, and remanded
Jesson, Judge

Isanti County District Court
File No. 30-CR-21-425

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Jeffrey R. Edblad, Isanti County Attorney, Nicholas J. Colombo, Assistant County Attorney, Cambridge, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Bjorkman, Judge; and Jesson, Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

On a summer night in June 2021, appellant Steven Douglas Nelson removed his electronic ankle monitor, borrowed his stepfather's truck without permission, and entered a home without consent from the homeowner, believing that it was his ex-girlfriend's house

and wanting to surprise her. Respondent State of Minnesota charged Nelson with first-degree burglary, third-degree burglary, receiving stolen property, and escape from custody. A jury found him guilty of all four charges, and the district court sentenced him to 60 months' imprisonment for the first-degree burglary conviction, 24 months' imprisonment for the receiving-stolen-property conviction, and 26 months' imprisonment for the escape-from-custody conviction, to be served concurrently. Because escape from custody is a continuing offense for the purpose of a first-degree burglary conviction and Nelson cannot demonstrate prejudice from his attorney's actions during jury selection, we affirm his convictions. But because the district court improperly sentenced Nelson to more than the 12-month maximum sentence for his escape-from-custody conviction, we reverse and remand for resentencing on that conviction.

FACTS

On June 17, 2021, Nelson was released from custody for a 2018 second-degree burglary conviction and fitted with an electronic ankle monitor. Two days later, he removed his monitoring device and borrowed his stepfather's truck[1] without permission. Around 10:00 p.m., Nelson drove to a house where he believed his ex-girlfriend was living. After he parked the truck in the driveway and rang the doorbell, Nelson waved at the security camera. When no one answered the doorbell, he left. Nelson returned around 11:30 p.m., rang the doorbell, and again received no answer. At trial, Nelson testified that

[1] The truck belongs to Nelson's mother's significant other, who has been in a relationship with Nelson's mother for about 33 years. Accordingly, both Nelson and this opinion refer to the truck's owner as Nelson's stepfather.

he believed he was at the same house where he and his ex-girlfriend had lived eight or nine years ago. When they were living there, they kept the service door to the garage unlocked. Nelson entered the house through the unlocked service door. Nelson testified that eventually he realized that he was in the wrong house and "panicked and got the heck out of there as fast as I could, knowing that I made a mistake." He testified that he did not take anything, break anything, threaten anyone, or hurt anyone. He got back into the truck and drove away, but he returned to apologize to the homeowners.

A sheriff's deputy arrested Nelson, and the state charged him with first-degree burglary, third-degree burglary, receiving stolen property, and escape from custody.[2] Nelson brought a motion to dismiss the burglary charges, arguing that the state lacked probable cause because there were insufficient facts to establish that Nelson committed or intended to commit a crime when he was inside the house, an element of both burglary charges. The district court denied this motion, ruling that there were sufficient facts to support the burglary charges because when Nelson entered the home, he was "on escapee status." As a result, his presence in the home satisfied the committed or intended-to-commit-a-crime element of both burglary charges.

The case proceeded to trial. During jury selection, Nelson's attorney used a peremptory strike on the wrong juror and stated on the record that he had made a similar mistake earlier in the voir dire process but had corrected that mistake at the time. After jury selection, the jury saw surveillance footage from the home depicting Nelson walking

[2] These offenses violate Minnesota Statutes sections 609.582, subdivision 1(a) and subdivision 3, 609.53, subdivision 1, and 609.485, subdivision 2(1) (2020), respectively.

up the driveway and ringing the doorbell, viewed a video where Nelson admitted to entering the home without permission, and heard testimony from the homeowner whose home Nelson had entered, Nelson's probation officer, three law enforcement officers involved in the incident, Nelson's stepfather, and Nelson himself.

The jury found Nelson guilty of all four charges. Nelson moved for a new trial based on the jury-selection error, and the district court orally denied his motion at the sentencing hearing. The district court sentenced Nelson to 60 months' imprisonment for the first-degree burglary conviction, 24 months' imprisonment for the receiving-stolen-property conviction, and 26 months' imprisonment for the escape-from-custody conviction, to be served concurrently.[3]

Nelson appeals.

DECISION

I. The district court did not err by finding that Nelson committed the predicate offense of escape from custody to convict Nelson of first-degree burglary.

Nelson contends that the district court erred in finding that he committed the predicate offense of escape from custody to convict him of first-degree burglary because escape from custody is not an ongoing offense. Nelson was convicted under Minnesota Statutes section 609.582, subdivision 1(a). The elements of first-degree burglary are as follows: (1) the defendant enters, (2) a dwelling, (3) without the consent of the person in lawful possession of the dwelling, (4) when another person is present in the dwelling,

[3] Though Nelson was convicted of the third-degree burglary charge, because it is a lesser-included offense to first-degree burglary, he was not sentenced on that conviction.

(5) where the defendant *commits or intends to commit a crime while in the dwelling*. Minn. Stat. § 609.582, subd. 1(a). Nelson only disputes the final element—that he committed or intended to commit a crime while in the dwelling. The district court concluded that a jury could find that Nelson escaped from custody while in the house because, although he removed his ankle monitor before entering the house, his escapee status continued while he was in the house. In other words, the district court found that escape was a continuing offense. Whether escape from custody is a continuing offense requires interpretation of the burglary statute, a question of law that we review de novo. *State v. Dorn*, 887 N.W.2d 826, 830 (Minn. 2016).

The Minnesota Supreme Court has answered this question twice, holding that escape is a continuing offense. *State v. Burnett*, 195 N.W.2d 189, 189 (Minn. 1972); *see State v. Washington*, 908 N.W.2d 601, 606 (Minn. 2018) (citing *Burnett* for the proposition that the Minnesota Supreme Court has concluded that other crimes, including escape, are continuing offenses for the purpose of the statute of limitations). But the statute that defines escape has been amended since *Burnett* was decided. At that time, Minnesota Statutes section 609.485, subdivision 1 (1971), defined escape as "departure without lawful authority and failure to return to custody following temporary leave granted for a specific purpose or limited period." And while the text of that definition remains identical today, the statute now includes the clarification that escape includes "absconding from electronic monitoring or removing an electronic monitoring device from the person's body." Minn. Stat. § 609.485, subd. 2 (2020).

This modification does not change the controlling holding in *Burnett*. 195 N.W.2d at 189. The statutory amendment added *another* act for which a defendant could be found guilty of escape from custody, but it did not alter the fundamental principles of the crime.

Still, focusing on the "or" in the definition of escape, "absconding from electronic monitoring *or* removing an electronic monitoring device from the person's body," Nelson contends that because he was convicted of removing his electronic monitor, he committed a discrete act which cannot be a continuing offense because the offense was complete once he removed the monitor. Minn. Stat. § 609.485, subd. 2. But this "or" is in a clarification to the definition, not within the definition itself, which includes "departure without lawful authority." *Id.*, subd 1. And if departing from custody is what makes escape a crime, then remaining out of custody is a continuation of that crime because the crime is ongoing until the escapee has turned themselves in or been apprehended again. Because the change to the statute expands what acts constitute an escape rather than changes the underlying structure of the crime, Nelson's act of escape by removing an electronic ankle monitor, like the escape in *Burnett*, was a continuing offense.

Examination of other continuing-offense cases supports this conclusion as well. This court held in 2011 that a burglary conviction for an appellant who fled police could be upheld based on the premise that the appellant continued to flee police when she entered a garage without permission such that she committed a crime inside a dwelling. *Anderson v. State*, 806 N.W.2d 856, 859-60 (Minn. App. 2011), *rev. denied* (Minn. Jan. 17, 2012). And in *State v. Jones*, this court held that the appellant's plea

provided a sufficient factual basis to establish a burglary conviction when he admitted to being a felon in possession of a firearm inside a building he did not have permission to enter. 921 N.W.2d 774, 781-82 (Minn. App. 2018), *rev. denied* (Minn. Feb. 27, 2019).

Further support comes from cases analyzing the statute of limitations for a continuing offense. The supreme court in *Washington* held that although the language of the predatory-offender-registration statute does not explicitly state that failure to register is a continuing offense, the continuing obligation of the offender to register under the statute renders failure to do so a continuing offense. 908 N.W.2d at 606. And the supreme court held that for a statute of limitations, possession of stolen property is a continuing offense because property is being kept from someone in violation of a duty to return, and this duty to return continues. *State v. Lawrence*, 312 N.W.2d 251, 253 (Minn. 1981).

In sum, escape by removal of an electronic ankle monitor involves a continuing obligation to return to custody. It is a continuing offense. Therefore, we affirm on this issue.[4]

II. The district court did not err by denying Nelson a new trial based on ineffective assistance of counsel.

Nelson maintains that he was denied effective assistance of counsel because his attorney accidentally struck the wrong juror with a peremptory strike. When an ineffective-assistance-of-counsel claim is properly raised in a direct appeal, we examine

[4] The state also alleges that the crime of receiving stolen property can form the basis for Nelson's burglary convictions because he was in possession of his stepfather's truck—stolen property—when he entered the house. Because we hold that escape is a continuing offense, we need not reach this argument.

the claim under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017). "We review a district court's application of the *Strickland* test de novo because it involves a mixed question of law and fact." *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017).

To meet the *Strickland* test, a party must show that (1) their counsel's representation "fell below an objective standard of reasonableness," and (2) "there was a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different." *Peltier v. State*, 946 N.W.2d 369, 372 (Minn. 2020) (quotation omitted). If one prong is not satisfied, we may dispose of the claim without considering the other prong. *Id.* We apply a strong presumption that an attorney's performance "falls within the wide range of reasonable professional assistance." *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986) (quotation omitted).

Here, Nelson alleges that he was prejudiced by his attorney's conduct when his attorney struck the wrong juror. This court has held that an attorney's representation during jury selection is below the objective standard of reasonableness if the party can prove "that defense counsel was so inattentive or indifferent during the jury selection process that the failure to remove a prospective juror was not the product of a conscious choice or preference." *Jama v. State*, 756 N.W.2d 107, 114 (Minn. App. 2008). But while Nelson's attorney's conduct might meet this standard, Nelson must also establish that "there was a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different." *Peltier*, 946 N.W.2d at 372 (quotation omitted). Nelson fails to carry this burden.

Nelson contends that this mistake deprived him of the right to be tried by a jury composed of those persons whom he believed would be most fair. But there is no evidence to support that with the correct juror, the outcome would have been any different. Nelson admitted to all the elements of both burglary offenses, possession of stolen property, and escape in his testimony and in a video recording played to the jury. The juror he meant to strike was not the foreperson, the jury did not ask the district court questions during deliberation, and it returned four guilty verdicts in less than one hour. Because Nelson cannot demonstrate that his counsel's conduct altered the result of the proceedings given the strength of the case against him, his ineffective-assistance-of-counsel claim fails.

III. The district court erred by sentencing Nelson to 26 months' imprisonment for his escape-from-custody conviction.

Nelson argues, and the state agrees, that the district court erred when it sentenced Nelson to 26 months' imprisonment for his escape-from-custody conviction because the statutory maximum sentence is 12 months. Whether a sentence conforms to the requirements of a statute or the sentencing guidelines is a question of law reviewed de novo. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009). Nelson was convicted under Minnesota Statutes section 609.485, subdivision 2(1). And while the same statute provides a maximum sentence of five years under subdivision 4(a)(1) (2020), subdivision 4(f) states:

> Notwithstanding paragraph (a), any person who escapes or absconds from electronic monitoring or removes an electric monitoring device from the person's body is guilty of a crime and shall be **sentenced to imprisonment for not more than one year** or to a payment of a fine of not more than $3,000, or both. A person in lawful custody for a violation of

> section 609.185, 609.19, 609.195, 609.20, 609.205, 609.2112, 609.2113, 609.2114, 609.221, 609.222, 609.223, 609.2231, 609.342, 609.343, 609.344, 609.345, 609.3451, or civil commitment under chapter 253D, or Minnesota Statutes 2012, section 609.21, and who escapes or absconds from electronic monitoring or removes an electronic monitoring device while under sentence may be **sentenced to imprisonment for not more than five years** or to a payment of a fine of not more than $10,000, or both.

Minn. Stat. § 609.485, subd. 4(f) (2020) (emphasis added). Nelson was in lawful custody for a 2018 second-degree burglary conviction under Minnesota Statutes section 609.582, subdivision 2(a)(1) (2016). Because this statute is not one of the listed statutes that would authorize a five-year maximum sentence, the maximum sentence for Nelson's escape-from-custody conviction is one year, per the first part of subdivision 4(f). Minn. Stat. § 609.485, subd. 4(f). Because it was error for the district court to sentence Nelson to more than 12 months' imprisonment for this conviction, we reverse and remand for resentencing on this count.

In sum, because escape from custody is a continuing offense for the purpose of a first-degree burglary conviction and Nelson cannot demonstrate prejudice from his attorney's actions during jury selection, we affirm his convictions. But because the district court improperly sentenced Nelson to more than the 12-month maximum sentence for his escape-from-custody conviction, we reverse and remand for resentencing on that conviction.

Affirmed in part, reversed in part, and remanded.