



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed November 24, 1981
vs.	)	
MARVIN ALLEN MEAD,	)	<u>1-269</u>
Defendant-Appellant.	)	<u>64124</u>

Appeal from Scott District Court - J. Hobart Darbyshire, Judge.

The defendant appeals his conviction of kidnapping in the second degree (§ 710.3, The Code 1979), assault while participating in a felony (§ 708.3, The Code 1979), and burglary in the first degree (§ 713.2, The Code 1979). AFFIRMED IN PART AND REVERSED IN PART.

Patrick R. Grady, State Appellate Defender's Office, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Richard Cleland and Shirley A. Steffe, Assistant Attorneys General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Carter, and Johnson, JJ. Snell, J., takes no part.

The defendant appeals his conviction of kidnapping in the second degree (§ 710.3, The Code 1979), assault while participating in a felony (§ 708.3, The Code 1979), and burglary in the first degree (§ 713.2, The Code 1979). We affirm in part and reverse in part.

I. The Burglary Charge. Our examination of defendant's argument on appeal reveals no ground asserted or argument rendered which relates to the burglary conviction. We therefore have no reason to consider the merits of that conviction and affirm same on the basis that it has not been challenged on appeal.

II. The Kidnapping Charge. The defendant argues the trial court erred in overruling his motion for directed verdict of acquittal on the charge of kidnapping. Defendant's arguments in this regard all center upon the contention that the extent of movement or confinement of the victim, as shown by the evidence, is insufficient as a matter of law to constitute kidnapping. We disagree.

The information in the present case charges defendant with kidnapping under subparagraph (2) of section 710.1, The Code. This is one of several alternative means of committing the statutory crime of kidnapping. As applied to this subparagraph, the necessary means and elements are:

A person commits kidnapping when he or she either confines a person or removes a person from one place to another, knowing that he or she has neither the authority nor the consent of the other to do so; provided, that to constitute kidnapping the act must be accompanied by one or more of the following:

* * *

2. The intent to use such person as a shield or hostage.

In the present case, the evidence reflects that defendant made an unlawful entry to the porch of a dwelling house. When confronted by the victim and her daughter, he seized the victim from behind with his left hand, held a knife to her throat, and stated "This woman is dead." The victim was shortly freed from this confinement by the forcible intervention of her daughter. We conclude that the jury was in a position to find from this evidence that the victim was confined without her authority. While the point is not directly argued, we also conclude that given the facts of defendant's surprise confrontation by the victim and her daughter while he was in the midst of an unauthorized entry, the jury could infer that the purpose of his holding the victim in

front of him at knifepoint and threatening to kill her, was to use the victim as a shield or hostage in order to extricate himself from the predicament he was facing.¹

In finding that the confinement in the present case is sufficient to constitute guilt under the statutory definition of kidnapping, we distinguish criminal prosecutions involving subparagraph (2) of section 710.1 from those decisions which have interpreted subparagraph (3) of the statute.

The defendant incorrectly assumes that standards such as those set forth in State v. Rich, 305 N.W.2d 739, 744-45 (Iowa 1981), for determining the required degree of confinement or movement under subsection (3) apply equally to indictments or informations based upon the other subsections of that statute. We disagree with this conclusion in general and in particular as it applies to indictments or informations charging confinement or movement with intent to use the victim as a shield or hostage. The alternative methods for establishing kidnapping under section 710.1, The Code, suggest a legislative intent to make clearly distinguishable types of conduct punishable as kidnapping. This pattern of definition admits of dissimilarity in the conduct required to violate the different subsections of the statute.

The reasons which prompted the court in Rich to establish a minimum degree of confinement or removal in the interpretation of subsection (3) of the statute do not exist with respect to the interpretation of subsection (2). Subsection (3), as applied in Rich is, by its very terms, related to confinement or movement with the intent to commit another legislatively defined criminal act, i.e., sexual abuse. The crimes of sexual abuse and kidnapping (as defined in subsection (3)) are not related in such a manner that conviction of one would preclude conviction of the other. Therefore, unless, in a prosecution for kidnapping under subsection (3), some additional acts by the defendant are required to be shown beyond those acts which encompass the usual case of sexual abuse, all persons guilty of sexual abuse would also be guilty of kidnapping. This is the result which the court in Rich found to be not either "sensible or just."

¹ Under instruction no. 12 the jury was required to so find in order to convict defendant of kidnapping. As we interpret defendant's claims on appeal, they do not challenge the sufficiency of the evidence to support a finding of intent to use the victim as a shield or hostage but relate solely to the issue of whether a sufficient moving or confinement has been shown.

Subsection (2) of section 717.1, presents no similar problems in its interpretation. By its plain language, any unauthorized confinement or removal with the intent to use the victim as a shield or hostage is punishable as kidnapping. The legislature did not relate the act required in any way to another statutory crime which can stand as a benchmark for determining a standard of conduct beyond which the acts of kidnapping must extend. Therefore, unlike subsection (3), the acts involved cannot be said to be incidental to any other statutory crime. In the defendant's argument in the present case, a related crime is invented in the form of an assault. But there is no legislative linkage between kidnapping, as defined in subsection (2), and assault. The relationship exists only because it is ordinarily impossible to confine or move a victim without committing an assault. We do not believe that this circumstance should serve to restrict in any manner the definition of kidnapping under subsection (2). That definition standing alone includes any confinement or removal which is done with the intent to use the victim as a shield or hostage. We find no reason to suspect that the legislature did not intend that a momentary, on-the-spot seizure and threat to the victim would be punishable as kidnapping if that act was done with the intent to use such person as a shield or hostage. As to conduct of this type, there is no logical standard either within the statute or inherent in the conduct involved which suggests that a minimum amount of movement or confinement is necessary to violate the statute. In the present case, there was a confinement; the confinement was completed, and the duration of the confinement was minimized only as a result of the forcible intervention of the victim's daughter. We find the evidence is sufficient to sustain the conviction for kidnapping.

III. The Dangerous Weapon. The defendant contends there was insufficient evidence to show that he was armed with a dangerous weapon. This argument has no merit. We view the evidence in the light most favorable to the State. State v. Schrier, 300 N.W.2d 305 (Iowa 1981). Both the victim and her daughter testified that they saw the defendant use a knife. The victim's throat received a small cut during the crime. The Iowa Code definition of dangerous weapon includes a knife when used in the manner the defendant used it. Section 702.7, The Code. Therefore, the evidence was sufficient to show the defendant was armed with a dangerous weapon.

IV. The Assault While Participating in a Felony Charge. Defendant urges and we agree that the conviction on the charge of assault while participating in a felony under section 701.9, The Code, is merged in the kidnapping and that he cannot be

separately convicted and punished therefor. Under the circumstances, the conviction and sentence on the greater charge (here, kidnapping) should be permitted to stand. The conviction and sentence under section 701.9 is reversed with directions to permanently vacate the judgment and sentence on that charge.

AFFIRMED IN PART; REVERSED IN PART; REMANDED FOR ENTRY OF AN ORDER VACATING JUDGMENT AND SENTENCE ON THE CHARGE OF ASSAULT WHILE PARTICIPATING IN A FELONY.

OXBERGER, C.J., (dissenting.)

The majority concludes that the jury could find that the purpose of the defendant holding the victim in front of him at knife-point was to use her as a shield or hostage. The majority does not consider several key facts in its recitation of the circumstances. When the defendant was "surprised" on the victim's enclosed porch, he came off the porch and stood alongside the victim and her daughter. He told them he was looking for a Cheryl Weeks. The daughter then placed the dishes she was holding on the front step. When she stood up, the defendant was holding the victim with a knife at her throat.

There is sufficient evidence to show the defendant intended to do serious injury to the victim, to rob her, and to burglarize her home. But I do not find the circumstances justify an inference that the defendant was using the victim as a hostage or a shield. There were no other people who were threatening his escape from the scene. The victim seemed to have accepted his explanation as to why he was on her porch. There was nothing about the size or the disposition of the women that required the defendant to need a hostage or a shield. He was not cornered on the porch; he was outside, in the open, and free to leave.

I would find that the trial court erred in failing to sustain the motion for directed verdict as to the kidnapping charge due to lack of evidence to show that the defendant intended to use the victim as a shield or a hostage.

Snell, J., joins this dissent.