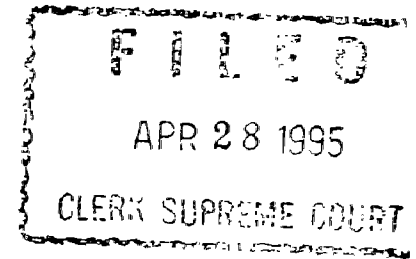


IN THE COURT OF APPEALS OF IOWA

No. 5-077 / 93-1934



STATE OF IOWA,

Appellee,

vs.

RICHARD JOHN FREITAS,

Appellant.

Appeal from the Iowa District Court for Linn County, L. Vern Robinson, Judge.

Richard John Freitas appeals the judgment and sentence entered upon his conviction, following a jury trial, of first-degree kidnapping. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, and Denver D. Dillard, County Attorney, for appellee.

Heard by Hayden, P.J., and Sackett and Huitink, JJ.

HAYDEN, J.

On December 7, 1992, at about 10:30 a.m., Mechelle Dhont stopped at a gas station in Cedar Rapids to buy cigarettes and empty trash from her car. After purchasing cigarettes, she drove to the back of the station and emptied her trash into the dumpster. She got into her car and was starting to fix her make-up when her car door was suddenly thrown open by a man she had just seen walk by her. The man told Dhont to get over into the passenger seat. Dhont eventually complied after noticing he had a knife.

Dhont told the man he could take her purse. The man replied, "No, I'm going to take you." He then ordered her several times to lay down in her seat; she refused. Dhont struggled with the man and cut her finger. He told her he was going to drop her off and would not hurt her. She continued to struggle at which point he stabbed her in the arm, back, and neck. Twice Dhont managed to honk her horn and was finally able to open the passenger door and exit the car. She ran inside the gas station for help, and the man drove away in her car.

Around 12:30 p.m. that day police located Dhont's car on Thirteenth Avenue Southwest. Police took a photograph of a footprint they believed was made by whoever parked the car. A coat and a sweater were found by residents of this area. Inside the coat pocket police found a bloody knife. One resident had observed a man without a coat walking down the street in front of her house. A garage owner in this area reported to police he had seen a man without a coat climbing a fence and entering an open field. Police followed tracks in the field until they found an entrance to a tunnel in the snow where tracks appeared to have been swept away. Freitas came out of the tunnel on demand from police and was arrested.

Both Dhont and the garage owner identified Freitas from a photo array. Freitas was charged with first-degree kidnapping.

At Freitas' jury trial a Division of Criminal Investigations (DCI) criminologist testified blood on the knife, coat, and sweater found in the residents' yard matched Dhont's blood. Another DCI criminologist testified the footprint found by Dhont's car was made by Freitas' boot.

Dr. Krivit, Dhont's treating physician, testified Dhont's injuries were not life threatening. In speaking about Dhont's injury to the neck, her most serious injury, Dr. Krivit stated her facial nerve function was essentially restored. Dhont testified she does not have complete control over her mouth.

The jury found Freitas guilty as charged. The court sentenced him to life imprisonment.

Freitas appeals. He argues the evidence was insufficient as a matter of law to show (1) he was the perpetrator of the crime charged; (2) there was a serious injury in this case; (3) the victim was in "confinement" within the meaning of the kidnapping statute; and (4) the victim was attacked with intent to commit sexual abuse.

I. Standard of Review.

Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

II. Identification of Defendant as Perpetrator.

The victim identified defendant in court as the man who entered her car at approximately 10:30 a.m. on December 7, 1992, brandishing a knife. When identifying defendant in the courtroom, the victim stated she had no doubt he was the kidnapper. Defendant makes several challenges to the victim's identification testimony, including evidence the victim's glasses were thrown off during attack, the victim may have "focused" too much on the attacker's knife, and the victim failed to state to police in her initial description her attacker had facial hair. However, even if true, this evidence is not fatal to the State's case. The jury was free to believe or disbelieve any testimony as it chose 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) (citing *State v. Schrier*, 300 N.W.2d 305, 309 (Iowa 1981)). "The very function of the jury is to sort out the evidence presented and place credibility where it belongs." *State v. Blair*, 347 N.W.2d 416, 420 (Iowa 1984) (citations omitted). The contrary evidence presented by defendant does not negate the existence of evidence demonstrating defendant was the perpetrator of the crime charged. See *State v. Frake*, 450 N.W.2d 817, 818-19 (Iowa 1990).

In this case, the victim's unshaken identification of defendant is confirmed by the overwhelming circumstantial evidence introduced by the State. We hold there is substantial evidence to show defendant was the man who entered the victim's car at approximately 10:30 a.m. on December 7, 1992, brandishing a knife. The trial court is affirmed on this issue.

III. Serious Injury.

First-degree kidnapping occurs "when the person kidnapped, as a consequence of the kidnapping, suffers serious injury, or is intentionally subjected to torture or

sexual abuse." Iowa Code § 710.2 (1993). Defendant contends there was insufficient evidence to show the victim suffered a serious injury

Iowa Code section 702.18 defines "serious injury" as meaning "disabling mental illness, or bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." The jury in this case was allowed to find a serious injury had been inflicted on the victim under the last three alternatives.

We determine based on the record there was sufficient evidence to show substantial risk of death from the injuries. To establish a substantial risk of death, the prosecution is only required to show there was a "real hazard or danger of death." *State v. Anderson*, 308 N.W.2d 42, 47 (Iowa 1981) (internal quotation and citation omitted). The record reflects a serious stab wound in the neck which was bleeding profusely. If the victim had not received medical treatment, she undoubtedly would have bled to death.

The State also established a serious injury based on protracted loss or impairment of the function of a bodily member or organ. One of the knife wounds damaged a motor nerve which supplied function and control to the victim's face. The evidence showed, as a result of that injury, the function of her mouth was impaired from the date of the attack, December 7, 1992, through the date of defendant's trial in October 1993, and beyond that time, to some extent. The mouth is a bodily member or organ for purposes of the serious injury statute. *State v. Welton*, 300 N.W.2d 157, 161 (Iowa 1981). Defendant appears to believe these problems will improve over time and thus there is no protracted loss or impairment. However, even assuming the victim's mouth function and control had been restored by the time of defendant's trial, there still had been a loss or impairment for almost one year. This would constitute a

protracted loss or impairment for purposes of the statute. *Id.* at 160 (broken jaw which was wired shut for six weeks was a protracted loss or impairment).

The State also proved defendant inflicted a serious injury because the victim suffered a serious permanent disfigurement. The evidence showed the victim was left with a scar on her face and neck. Although final treatment of the scar had not been completed as of the date of defendant's trial, her doctor testified she will always have a scar, although its appearance later might be improved. As our supreme court has stated, "We have recognized that the statutory definition of serious injury includes those injuries which leave the victim permanently scarred or twisted . . . , in contrast to a black eye, a bloody nose, and even a simple broken arm or leg." *State v. Phams*, 342 N.W.2d 792, 796 (Iowa 1983) (internal quotation and citation omitted and emphasis added).

The evidence was sufficient to show the victim suffered serious injury. The trial court is affirmed on this issue.

IV. Confinement.

A defendant "confines" another person in violation of our kidnapping statute only if the confinement definitely exceeds the confinement that is an inherent incident of the underlying felony. *State v. Rich*, 305 N.W.2d 739, 745 (Iowa 1981). No minimum period of confinement is required to convict a defendant of kidnapping. *Id.* Rather, the confinement must be significantly independent of the confinement incident to the commission of the underlying statute. *Id.* Such confinement may exist if it substantially increases the risk of harm to the victim, significantly lessens the risk of detection, or significantly facilitates escape following the commission of the underlying offense. *Id.* The rationale behind the "incidental rule" arises from recognition confinement of a victim, against the victim's will, is frequently an attendant circumstance in the commission of many other crimes, notably robbery and sexual abuse. *State v. McGrew*, 515 N.W.2d 36, 39 (Iowa 1994) (citing *State v. Mead*, 318

N.W.2d 440, 445 (Iowa 1982); Natalie A. Kanellis, Note, *Kidnapping in Iowa: Movements Incidental to Sexual Abuse*, 67 Iowa L. Rev 773, 780 (1982)). In its decisions since *Rich*, our supreme court has adhered to the "incidental rule" analysis. See, e.g., *McGrew*, 515 N.W.2d at 39; *State v. Hatter*, 414 N.W.2d 333, 338 (Iowa 1987); *State v. Newman*, 326 N.W.2d 788, 791 (Iowa 1982); *State v. Mead*, 318 N.W.2d 440, 443-45 (Iowa 1982); *State v. Marr*, 316 N.W.2d 176, 178 (Iowa 1982); *State v. Knupp*, 310 N.W.2d 179, 182 (Iowa 1981)).

Defendant claims the confinement of the victim in this case was not sufficient to constitute kidnapping within the meaning of Iowa Code section 710.1. We disagree.

Although the length of the confinement was not extensive, no minimum period of time is required. *Rich*, 305 N.W.2d at 745. Of course, in this case the confinement was ended by the victim's struggle with defendant and her eventual escape, and not by any action on the part of defendant. The fact the victim was able to escape does not change the nature of the confinement and does not support finding no kidnapping occurred in this case. See *State v. Coen*, 382 N.W.2d 703, 713 (Iowa App. 1985).

We believe the jury could have found the confinement in this case substantially increased the risk of harm to the victim and significantly lessened the risk of detection. By confining the victim in her car, the risk of harm to her was substantially increased. There was evidence the car was parked in a relatively remote area behind the gas station; this can also be inferred from the fact no one came to help the victim after she twice honked the car's horn. The seclusion increased the risk of harm to the victim, because defendant, with his victim secluded, was free to deal with her as he wished. See *McGrew*, 515 N.W.2d at 40.

By choosing to confine the victim in her car in a remote area, the confinement also significantly lessened the risk of detection, whether or not the victim was to be abused or injured while in the car parked behind the gas station, or was to be sexually

abused or injured at another location of defendant's choosing. *See id.* at 40 ("Choosing the seclusion of his victim's own bedroom as the situs of the offense lessened the risk of detection for McGrew.") In the event the victim had not escaped, there is no telling how much time would have elapsed before anyone in the area would have suspected the occurrence of criminal activity.

Our supreme court has recently drawn a distinction for purposes of the kidnapping statute between a "seizure" and "confinement" of a victim. *Id.* (citations omitted) Under this record defendant's confinement was more than a "seizure." We determine the victim was in "confinement" within the meaning of the Iowa kidnapping statute. The trial court is also affirmed on this issue.

V. Sexual Abuse Alternative.

The trial information charged defendant with three alternatives of the crime of first-degree kidnapping: to hold the victim as a hostage, to inflict serious injury upon her, or to sexually abuse her. Iowa Code §§ 710.1(2), 710.1(3), 710.2 (1993). Defendant claims the trial court erred in submitting the sexual abuse alternative of kidnapping to the jury. Defendant claims there was a total lack of evidentiary support for the sexual abuse alternative. We disagree.

The intent to commit sexual abuse was included in the kidnapping instruction based upon the following evidence: (1) defendant has declined the victim's offer of money during the confinement; (2) when he declined the offer, defendant stated, "No, I'm going to **take** you"; and (3) he repeatedly ordered the victim to lay her seat back and lie down upon the seat.

We hold this constitutes sufficient evidence to generate a jury question on the issue. The trial court is also affirmed on this issue.

AFFIRMED.