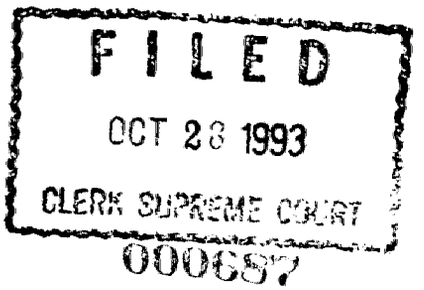
IN THE COURT OF APPEALS OF IOWA

No. 3-343 / 92-499



STATE OF IOWA,

Appellee,

vs.

TRACY ALLAN McGREW,

Appellant.

Appeal from the Iowa District Court for Polk County, Ray A. Fenton, Judge.

Tracy Allen McGrew appeals his conviction, following a jury trial, of kidnapping in the first degree, burglary in the first degree, and escape. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Julie Halligan Brown, Assistant Attorney General, John Sarcone, County Attorney, and Daniel Voogt, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.

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OXBERGER, C.J.

The victim was awakened in the middle of the night by a man with his hand over her mouth. The man taped her mouth and tied her hands behind her back with a pair of nylons. He touched her thigh and cheek with a "cold steel object". He used a knife to tear off her T-shirt and underpants. He then sexually abused her several times.

The man then unbound the victim's hands and took the tape off her mouth. He gave her a pillow, a clean T-shirt and underpants. She pulled the blanket over her head. Before falling asleep, she heard the man walking around her room, writing on paper while sitting on the edge of her bed, and moving from the bed to the window.

The victim awoke to the sound of her television. She heard messages from her employer and sister on the answering machine. Finally, her sister left a message saying she would come over if necessary. The victim became worried about her sister's safety and attempted escape. The man was asleep next to her so she quietly got out of the bed and left the house. A neighbor called the police.

The police entered the house and found Tracy McGrew asleep in the victim's bedroom. A shotgun was leaning against a night stand and two notes were found. One note was signed "T. McGrew". At one point the note said, ". . . this was the best way out for Kris and I. . . ." The other note said "Sorry but I loved him." It was signed "Kris."

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The police arrested McGrew. The State charged him with kidnapping in the first degree, burglary in the first degree, and escape.

At trial, McGrew presented evidence he met the victim at a bar prior to the incident. McGrew asserted he came across the victim while she was walking her dog. He testified she invited him in and later engaged in consensual sexual intercourse. The victim testified she had not met McGrew before the incident the sexual intercourse was not consensual.

McGrew moved for a judgment of acquittal. He argued the State failed to establish that any confinement of the victim was not incidental to the commission of the sexual abuse. The district court denied McGrew's motion. He was found guilty and was sentenced to life imprisonment for kidnapping, a term not to exceed twenty-five years for burglary and a term not to exceed five years for escape.

McGrew appeals.

Sufficiency of the Evidence

McGrew claims there was insufficient evidence to convict him of kidnapping in the first degree. He contends the State failed to establish that any confinement of the victim was not incidental to the commission of the sexual abuse.

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

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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).

Iowa Code section 710.1 (1991), in relevant part, provides:

> A person commits kidnapping when he or she confines . . . 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:
>
> (3) The intent to inflict serious injury upon such person, or to subject the person to a sexual abuse.

No minimum period of confinement or distance of removal is required for conviction of kidnapping. State v. Rich, 305 N.W.2d 739, 745 (Iowa 1981). However, the confinement or removal must exceed that normally incidental to the commission of the sexual abuse. Id. at 745. The confinement or removal must be more than slight, inconsequential, or an incident inherent in the crime of sexual abuse so that it has a significance independent from sexual abuse. Id. In order to constitute kidnapping,

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confinement or removal must (1) substantially increase the risk of harm to the victim, (2) significantly lessen the risk of detection, or (3) significantly facilitate escape following the consummation of the offense. State v. Hardin, 359 N.W.2d 185, 190 (Iowa 1984).

We determine there is sufficient evidence of confinement and removal to support the jury's verdict finding McGrew guilty of kidnapping. The victim was bound for about half an hour during the actual sexual abuse. He held a "cold steel object" against her thigh and cheek, clearly leading her to believe it was a weapon. Although he untied her after the attack, she was by no means free to leave. She believed he was armed and knew he remained in her apartment. She heard him moving around her room and writing on paper. She did not believe she was free to leave and eventually fell asleep. When she awoke in the morning she heard messages being left on her answering machine by her sister and her employer, but was afraid to go to the phone to respond. When she finally garnered the courage to see if her attacker was still there, she saw him laying next to her on the bed. At this point, she had been confined to her bedroom for at least seven hours - much longer than the time incident to the underlying sexual abuse.

In addition, the confinement substantially increased the risk of harm to the victim. The ongoing presence of weapons and the increased agitation of the attacker

increased the likelihood of harm. The letters written by McGrew throughout the night suggest he may have intended to harm the victim.

Finally, McGrew's confinement of the victim significantly reduced the risk of detection. McGrew broke into the victim's home to attack her in her secluded bedroom rather than attacking her outside where he first spotted her. Inside, the victim was unable to enlist aid from a bystander. Seclusion clearly acts as a means of avoiding detection. See State v. Ristau, 340 N.W.2d 273, 276 (Iowa 1983).

We conclude the jury's verdict was supported by substantial evidence. We affirm the district court.

AFFIRMED.

Hayden, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

Defendant-appellant Tracy Allen McGrew appeals following a jury trial finding him guilty of kidnapping in the first degree, burglary in the fist degree, and escape, in violation of Iowa Code sections 710.1, 710.2, 713.1, 713.3, and 719.4(1) (1991). Defendant contends the trial court erred in not sustaining his motion for directed verdict on the charge of kidnapping in the first degree. I agree and would reverse and remand for further proceedings.

The victim claimed defendant raped her in her apartment on June 20, 1991. Defendant specifically argues the State failed to establish any confinement of Kristen, the victim, that was not incidental to the commission of sexual abuse and the evidence of any confinement or removal of the victim was not sufficient to support the conviction for kidnapping.

The state bears the burden of proving every fact necessary to constitute the crime with which a person is charged. State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976).

In defining kidnapping, Iowa Code section 710.1 provides:

> A person commits kidnapping when the person either confines a person or removes a person from one place to another, knowing that the person who confines or removes the other person 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 of the following:
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> * * *

> 3. The intent to inflict serious injury upon such person, or to subject the person to a sexual abuse.

Iowa Code § 710.1 (1991). To constitute kidnapping in the first degree, the Iowa Code provides:

> [w]hen 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 (1991).

The question is whether, considering the evidence in the light most favorable to the state, a rational trier of fact could have found the essential elements of the crime were established beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979).

To be convicted under section 710.1, a defendant must confine or remove a person from one place to another. State v. Mead, 318 N.W.2d 440, 443 (Iowa 1982). The pivotal question is whether the confinement of the victim was more confinement than merely the confinement or removal inherent to the commission of the underlying crime. See State v. Rich, 305 N.W.2d 739, 745 (Iowa 1981). Our Supreme Court pointed out that care needs to be taken that the interpretation of the removal language is not over broad, for, if it were, an unjust result may result because of the extremely disparate penalties that exist between kidnapping and the underlying crime. See Rich, 305 N.W.2d at 745. The trivial aspects of robbery, rape, or some

other crime will not be classified as the most serious version of kidnapping. See Mead, 318 N.W.2d at 445. The necessary confinement or removal may exist if the defendant's conduct substantially increases the risk of harm to the victim, significantly lessens the risk of detection, or significantly facilitates escape following the consummation of the offense. Mead, 318 N.W.2d at 444; Rich, 305 N.W.2d at 745.

Defendant argues the risk to the victim was no greater than the risk of sexual abuse. He points out the victim was in her own home and suffered no injuries other than the sexual penetration. Defendant advances the force used was necessary for the sexual assault, and once the sexual assault was over, the victim was not harmed physically in any other way. He notes after the sexual assault, she was unbound, handed different clothes and a pillow and she went to sleep. He points out he then fell asleep and when the victim woke she left the apartment without waking him. He also argues the fact the crime took place in the bedroom of the victim's home increased, not decreased, the risk of detection. The defendant even stayed in the victim's bedroom to be caught even after she had left. More than momentary confinement is necessary to prove kidnapping. See Mead, 318 N.W.2d at 445; State v. Marr, 316 N.W.2d 176, 177-78 (Iowa 1982).

I look at the evidence in the light most favorable to the State. State v. Wheeler, 403 N.W.2d 58, 60 (Iowa App.

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1987). This evidence was the victim woke in her own bed to find defendant's hand over her face and mouth. Defendant put a wad of tape in the victim's mouth and held her. Then he told her to spit the tape out, put the tape across her mouth and the around the back of her head and tied her hands behind her back. He touched her thigh and cheek with a cold steel object and asked her if she knew what it was. He briefly moved her about in her bedroom then put her on the bed, cut off her T-shirt and underwear, fondled her breasts, placed lotion in her vagina, had vaginal intercourse with her and also oral sex. He ultimately put her on her stomach and attempted anal intercourse and then had vaginal intercourse again. Then he unbound her hands and mouth, handed her a different T-shirt and underwear and told her to put them on. She crawled in bed, he handed her a pillow and covered her up. He moved from the bed to the window a number of times. She also heard him writing on paper while sitting on the edge of her bed. She fell asleep and woke to hear the sound of her television. A news program was on that stated it was 8:15 a.m. The victim heard her phone downstairs ringing. She heard messages being left on her answering machine. The victim's sister called and said if the victim did not answer her phone, she was going to break her door down. At that point, the victim looked and saw defendant lying next to her with his head turned away from her. She got out of bed and ran for help. The police returned and found defendant

sleeping. There was a loaded shotgun leaning against a nightstand. The victim had not been aware defendant had a shotgun and the shotgun was never identified as belonging to defendant.

Defendant's versions of the events, which the jury apparently decided not to believe, was he met the victim while she was walking her dog and she invited him into her apartment where they engaged in consensual sexual intercourse.

A note, determined to be written by defendant was found at the apartment. The note, in part, provided:

> I'm sorry for what I'm writing about and not showing up for court. I'm not so sure what to say but this was the best way out for Kris and I. I met her at the Hub tower etc. . . . I just can't go back to prison and all the stuff that's been said about me is pretty off the wall. . . .

The State argues the evidence supports a finding the confinement was more than slight, inconsequential , or an incident inherent in the crime of sexual abuse.

The State argues the confinement increased the risk of harm to the victim and her freedom was restricted by the way defendant put the cold steel against her thigh and cheek and cut her underwear and T-shirt. The State also argues her risk of harm was increased because defendant brought a loaded shotgun left propped up next to the nightstand. And the State points to the victim's testimony that she did not feel free to leave following the events and in escaping she risked her physical safety. The State

relies in a large part on State v. Tryon, 431 N.W.2d 11 (Iowa App. 1988).

The State also argues the confinement reduced defendant's risk of detection. The victim was inside a home and unable to obtain help from a bystander and defendant's presence in the victim's house prevented her from answering her doorbell or telephone and the note he wrote suggested defendant planned to kill the victim.

The evidence of detention of the victim is the approximately one-half hour period when the sexual abuse took place. There is no other evidence of confinement or a thwarted attempt to escape. Defendant's extended presence in the victim's apartment increased, not decreased, his risk of detection. The fact he fell asleep further increased his risk of detection as well as negated any inference the victim was restrained for any extended period.