

IN THE COURT OF APPEALS OF IOWA

No. 5-673 / 95-103

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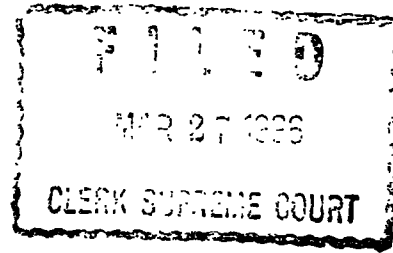
STATE OF IOWA,

Plaintiff-Appellee.

vs.

JOSE LEDEZMA,

Defendant-Appellant.



Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh,
Judge.

Defendant appeals from judgment and sentences, following a bench trial,
entered upon his convictions of first-degree kidnapping in violation of Iowa Code
sections 710.1(3) and 710.2 (1993) and second-degree sexual abuse in violation of
Iowa Code sections 709.1(1) and 709.3(3) (1993). **AFFIRMED.**

Linda Del Gallò, State Appellate Defender, and Patricia A. Reynolds, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney
General, Thomas S. Mullin, County Attorney, and James J. Katcher, Assistant County
Attorney, for appellee.

Heard by Sackett, P.J., Habhab, J., and Schlegel, S.J.*

* Senior judge from the Iowa Court of Appeals serving on this court by order
of the Iowa Supreme Court.

HABHAB, J.

Jose Ledezma and his brother, Gonzalo, were both charged with kidnapping and sexual abuse on the basis of a complaint made by Marie Joyce Big Bear.¹

At the bench trial, Marie testified she was at a bar with a friend when she met the defendants. She danced with Jose once and he bought her a beer. The bar was closing and a friend of Marie's announced there was a party and all were invited. The Ledezmas were standing nearby and Marie's friend spoke with them in Spanish. Marie assumed the Ledezmas were going to the party and accepted a ride with them. She climbed into the back seat of the two-door vehicle with Jose. Gonzalo drove and a third man sat in the front passenger seat. The third man, who spoke limited English, said, "we go to party."

The four did not go to the party. Marie testified that after driving around the car stopped at a gas station. At this point, Jose began trying to kiss Marie and he tried to put his hand under Marie's blouse. Marie pushed him away. She became frightened, so she asked to be let out of the car to go to the bathroom. Marie testified Jose placed her in a headlock and would not let her out. She struggled and kicked. One of the people in the front seat grabbed her legs and the three men were yelling in Spanish. The car left the gas station and the men drove around. Eventually they parked in a remote and overgrown area.

¹ The appeal before us involves the conviction of Jose Ledezma only.

Marie asked to leave the car so she could go to the bathroom. Jose escorted her to some weeds, at which time Marie attempted to run away. However, she ran into a fence and, in the process of trying to climb it, Jose grabbed her and pulled her to the ground. He then took off her pants and penetrated her vagina with his penis. After Jose got off her, Marie attempted to get up and get dressed. Before she could get away, Gonzalo sexually assaulted her. Once again, Marie tried to get dressed and get away; however, the third man approached her and also sexually assaulted her.

Marie testified after the assaults the men put her in the car and proceeded to drive her home. When she got out of the car, Marie noted the license plate number. She called the police immediately from her apartment and reported the crime.

The district court found Jose guilty of first-degree kidnapping and second-degree sexual abuse.

Jose appeals.

I. *Scope of Review.* On appeal, Jose contends there was insufficient evidence to support his convictions of both sexual abuse and kidnapping. The standard of review is for errors at law. *State v. Phams*, 342 N.W.2d 792, 795 (Iowa 1983).

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). A verdict is binding unless the finding is clearly against the weight of the evidence. *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981).

II. *Sexual Abuse.* Jose first contends there was insufficient evidence to convict him of second-degree sexual abuse. In order to be found guilty, the following elements were required to be found by the factfinder beyond a reasonable doubt:

1. On or about the 13th day of August, 1994, the defendant performed a sex act with Marie.
2. The defendant performed the sex act by force or against the will of Marie.
3. During the commission of sexual abuse, the defendant was aided or abetted by one or more persons.

See Iowa Code §§ 709.1, 709.3 (1993). Jose specifically contends there was insufficient evidence to support a finding on the final element. Jose does not dispute there was sufficient evidence to support the first two elements.

There are numerous instances in the testimony which support a finding Jose was aided **and** abetted by others in the commission of the crime. Initially, one of the other men, not Jose, assured Marie they were going to the party. Marie was restrained by one of the other men in the car in addition to Jose. Neither of the other two men stopped Jose from putting Marie in a headlock in the car, nor did either of the other two men allow Marie to leave the car when she asked to do so at the gas

station. One of the other men, not Jose, drove the car to the remote area where the assault took place. Marie testified one of the other two men stood over Jose for a short time while Jose was assaulting Marie. We also find the fact that the three men took turns assaulting Marie as support for the finding of aiding and abetting. Finally, Marie testified the three argued with each other in Spanish both before and after the assaults took place. We find there was substantial evidence Jose was aided and abetted in the commission of the sexual abuse by one or more persons. We affirm Jose's conviction for second-degree sexual assault.

III. *Kidnapping.* Jose next contends there was insufficient evidence to convict him of kidnapping. Under the sexual abuse alternative of kidnapping, the trial court was required to find all of the following elements beyond a reasonable doubt in order to find Jose guilty:

1. On or about the 13th day of August, 1994, the defendant confined or removed Marie.
2. The defendant did so with the specific intent to subject Marie to sexual abuse.
3. The defendant knew that he did not have the consent of Marie nor the authority to do so.
4. As a result of the removal or confinement, Marie was sexually abused.

See Iowa Code §§ 710.1 and 710.2 (1993). Jose's primary contention is there was insufficient evidence to support the first two elements.

The confinement or removal necessary to sustain a conviction must be more than incidental to the commission of the underlying offense of sexual abuse. *State v.*

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Newman, 326 N.W.2d 788, 791 (Iowa 1982); *State v. Marr*, 316 N.W.2d 176, 178 (Iowa 1982); *State v. Knupp*, 310 N.W.2d 179, 183 (Iowa 1981); *State v. Rich*, 305 N.W.2d 739, 745 (Iowa 1981); *State v. Tryon*, 431 N.W.2d 11, 14 (Iowa App. 1988).

In order for the confinement or removal to have independent significance, one of the three following criteria must be met. The 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 completion of the offense.

Rich, 305 N.W.2d at 745. A broader interpretation of removal and confinement would produce unjust results since extremely disparate penalties may exist between the kidnapping charge and the underlying crime. *Id.* Jose argues none of the criteria were met.

As Marie voluntarily went in the car with the three men, we cannot find the confinement began upon her entering the car. We do not believe the evidence is clear, as the State argues it is, that deception was used to get Marie into the car.

We do find, however, the confinement and removal occurred at the gas station when Marie was restrained by Jose. At the gas station, Jose tried to kiss Marie and put his hands underneath her blouse. Marie pushed him away. Marie wanted to get out of the car to get away from Jose, so she told the men she wanted out of the car to go to the bathroom. She was not allowed to go. Jose prevented Marie from leaving the car by putting her in a headlock. Marie testified she could not yell or scream as

a result of the headlock. Marie then began kicking her legs. One of the men in the front seat held Marie's legs down to prevent her from kicking. The men started yelling at each other. Marie testified she became scared for her life at this point. The car left the gas station and proceeded to the remote area where the assault took place.

We find there was clearly confinement and removal at the gas station. After Marie fought off Jose's sexual advances, she stated she wanted to leave the car and the men did not let her go. Marie struggled and the men restrained her. There could not be any doubt. at this point, Marie wanted out of the car, yet the men would not let her out. Instead, they drove away from the gas station to a remote area.

The confinement and removal substantially increased the risk of harm to Marie. Removal to the remote, isolated area provided a location the defendants could freely deal with the victim as they wished. It also provided the freedom to assault Marie for an extended period of time. The confinement and removal also significantly decreased the risk of detection. The dark, remote area away from the general public allowed for the assault to take place without interruption. By removing Marie from the gas station to the remote area, the risk of a third party intruding upon the assault was significantly decreased. We find the criteria discussed in *Rich* is clearly met in this case. The confinement and removal was clearly more than incidental to the commission of the underlying crime of sexual assault.

Jose further contends Marie's testimony was insufficient to establish a lack of consent. Upon our review of Marie's testimony, we find Jose's claim is without merit. Accordingly, we affirm Jose's conviction of kidnapping.

AFFIRMED.

Schlegel, S.J., concurs; Sackett, P.J., specially concurs.

I concur with the majority's decision, applying recent case law, there is substantial evidence to prove beyond a reasonable doubt the defendant is guilty of first-degree kidnapping.

First-degree kidnapping is punished by life in prison. Kidnapping in some cases is easily defined where the person is abducted for the sole purpose of holding him or her for ransom or as a hostage. In these cases, kidnapping is the central crime.

Clearly, kidnapping was not the central crime here; sexual abuse in the second degree was. However, by elevating the crime to kidnapping, the punishment is elevated to life in prison without the possibility of parole, the most severe sentence a defendant can receive in Iowa.

The victim here was returned in a relatively short period of time. The victim could identify her assailants. If penalties preclude persons from committing crimes, and there are those who believe they do, what incentive does an abuser have in allowing the victim to return alive?

If the legislature wants sexual abuse to be punished by life in prison, then the crime should be so punished. I have difficulty with decisions finding kidnapping has been committed when the victim is returned in a very short period of time after the act of sexual abuse occurs.