IN THE COURT OF APPEALS OF IOWA

FILED
JAN 29 1997
CLERK SUPREME COURT

No. 6-633 / 95-2195

STATE OF IOWA,

Plaintiff-Appellee,

000363

vs.

JEFFREY G. BOZARTH,

Defendant-Appellant.

Appeal from the Iowa District Court for Marion County, Michael J. Streit, Judge.

The defendant appeals his conviction and sentence for third-degree kidnaping and second-degree robbery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, Annette L. Hitchcock and Christopher Cooklin, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, and Terry A. Rachels, County Attorney, for appellee.

Considered by Habhab, C.J., and Cady and Huitink, JJ. Streit, J. and Vogel, J., take no part.

HUITINK, J.

Defendant Jeffrey Bozarth appeals his conviction and sentence for kidnaping in the third degree, in violation of Iowa Code sections 710.1 and 710.4 (1995), and robbery in the second degree, in violation of sections 711.1 and 711.3. We affirm.

Bozarth was convicted on the following evidence following a bench trial: On July 14, 1995, Bozarth entered the Quik Trip in Knoxville, Iowa. He ordered all customers to leave and proceeded to place the store clerk, Chad Smith, in a "choke-hold" while making demands for helicopters and bullet-proof limousines. Approximately three hours later, the Iowa State Patrol Central Iowa Tactical Team secured the release of the employee and then arrested Bozarth. He was charged with kidnaping in the second degree and robbery in the second degree.

Bozarth relied on the defenses of diminished responsibility and intoxication. Testimony at trial revealed Bozarth had a long history of mental health and substance abuse problems. Four days before the incident at the Quik Trip, the State obtained Bozarth's involuntary mental health commitment. The Judicial Hospitalization Referee, finding Bozarth a danger to himself or others, committed him to the care of the Knoxville Veterans Administration Hospital. On July 21, the VA Hospital sent a letter to the Referee indicating Bozarth's commitment would be terminated because he was incarcerated. On July 26, the VA Hospital filed a discharge report stating Bozarth was receiving care pursuant to the July 11 court order. The Referee

000365

terminated the commitment on July 25.

At the close of the State's evidence, Bozarth moved for a directed verdict of acquittal which the trial court denied. Following his conviction of the lesser-included offense of kidnaping in the third degree and also robbery in the second degree, Bozarth was sentenced to an indefinite term of ten years imprisonment on each count.

Bozarth appeals his convictions, claiming his convictions lack sufficient evidentiary support. He argues the State failed to prove he had either the specific intent to commit a theft or use Smith as a shield or hostage. Bozarth cites evidence of his mental illness and intoxication which prevented him from forming the specific intent necessary to commit kidnaping or robbery. He also cites the State's petition for his involuntary mental health commitment granted four days prior to this offense. Alternatively, Bozarth argues the State failed to prove he confined Smith within the meaning of the kidnaping statute.

We review claims of insufficient evidence for errors at law. Iowa R. App. P. 4. A verdict of guilty is binding on appeal unless there is no substantial evidence in the record to support it or it is clearly against the weight of the evidence. *State v. Schrier,* 300 N.W.2d 305, 306 (Iowa 1981). Substantial evidence means evidence that could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *Id.* In determining the sufficiency of evidence, we view the record in a light most favorable to the State. *State v. Robinson,* 288 N.W.2d 337, 340 (Iowa 1980). All

evidence is considered, not simply the evidence supporting the verdict. *Id.*

The element of intent is seldom susceptible to proof by direct evidence; it often depends on circumstantial evidence and inferences drawn from such evidence. *State v. Hernandez,* 538 N.W.2d 884, 887 (Iowa App. 1995). Evidence of a defendant's lack of mental capacity is admissible on the issue of the defendant's ability to form specific intent where such intent is an element of the crime charged. *State v. Wheeler,* 403 N.W.2d 58, 63 (Iowa App. 1987) (citations omitted).

We find sufficient evidence indicating Bozarth had the specific intent necessary to commit both offenses. The only evidence of intoxication at the time of the crime was Bozarth's testimony and that of his father who spoke with him by phone during these events. Bozarth described drinking large quantities of alcohol in the hours just prior to the incident. He also denied any recollection of what happened at the Quik Trip. This testimony was contradicted by Chad Smith, the officers at the scene, and a psychiatric nurse who treated Bozarth. The witnesses testified Bozarth's speech was not slurred, he seemed coherent, and his movements did not indicate any impairment. These observations were confirmed by the store's security videotape.

There is also evidence contradicting Bozarth's claim of mental incapacity. Dr. Hunziker, a clinical psychologist who evaluated Bozarth, testified he did not think Bozarth was delusional. Hunziker characterized Bozarth's problems as deficits in emotional maturity, personality, and his inability to cope with stress. A psychiatric

nurse who treated Bozarth at the VA Hospital testified he had never observed Bozarth to be "psychotic" or mentally unstable. The nurse described Bozarth as "perfectly lucid" during his brief stay at the VA Hospital.

The district court as the finder of fact was required to resolve the conflicting factual assertions made by the State and the defendant. The court was not obligated to accept Bozarth's testimony claiming intoxication and lack of mental capacity. *Hernandez*, 538 N.W.2d at 888; *State v. Trammell*, 458 N.W.2d 862, 863 (Iowa App. 1990). We affirm on this issue.

We also reject Bozarth's alternative argument that Smith's confinement was merely incidental to the robbery. Third-degree kidnaping requires that confinement must be more than slight, inconsequential, or merely incidental to the underlying offense. *State v. Rich,* 305 N.W.2d 739, 745 (Iowa 1981). Confinement required for kidnaping must accomplish one of the following: (1) substantially increase the risk of harm to the victim; (2) significantly lessen the risk of detection; or (3) significantly facilitate the escape following the offense. *Id.* The record includes testimony Bozarth held Smith in front of him "to protect him" from "snipers." Bozarth held Smith for three hours in a choke-hold and threatened to break his neck. One witness testified Smith cried out in pain as Bozarth tightened his grip around his neck. Smith's confinement substantially increased his risk of harm. We also affirm on this issue.

Bozarth's last argument that confinement is an element of robbery is without

merit. Confinement for purposes of escape is not an essential element of robbery. Iowa Code § 711.1 (1995).

AFFIRMED.