FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed August 26, 1982
vs.	)	2-167 / 67091
WALLIE LAWLESS,	)	382
Defendant-Appellant.	)	

Appeal from Linn District Court, Larry Conmey, Judge.

Defendant appeals from his conviction of two counts of false imprisonment in violation of Iowa Code § 710.7, two counts of sexual abuse in the second degree in violation of Iowa Code §§ 709.1 and 709.3, and two counts of robbery in the first degree in violation of Iowa Code §§ 711.1 and 711.2. AFFIRMED.

Mark C. Meyer of Kinnamon, Kinnamon, Russo & Meyer, Cedar Rapids, for defendant-appellant.

Thomas J. Miller, Attorney General, and Steven M. Foritano, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

Defendant appeals from his conviction of two counts of false imprisonment in violation of Iowa Code § 710.7(1979), two counts of sexual abuse in the second degree in violation of Iowa Code §§ 709.1 and 709.3, and two counts of robbery in the first degree in violation of Iowa Code §§ 711.1 and 711.2. We affirm the decision of the trial court.

Substantial evidence was produced at trial to support a finding of the following facts. Defendant, Wallie Lawless, lived in an apartment above a bar in Cedar Rapids. At about 1:45 a.m. on November 29, 1980, two young women, Rhonda Krewson and Lori Graham, left the bar and went to their car just outside. As they prepared to drive off, defendant forced his way into the car, waving a long knife. He forced them to drive to a quiet residential street a few blocks away, and there forced them to engage in several acts of oral sex and intercourse. He then ordered them to drive him back to the bar, where he was looking for someone in a red car. When he got out of the victims' car, they locked the doors and drove straight to the police station.

Some time after the assault, Cedar Rapids police received a tip from an informant that defendant had been involved in another assault. The modus operandi was nearly identical in the assault mentioned in the tip and that which is the subject of this appeal. The officers applied for a search warrant listing the anonymous tip and other information. The police searched defendant's apartment and seized clothing and a knife later identified by the victims. While investigating the crime, the officers talked to the manager of the bar over which defendant lived. He told them that defendant had been present on the night of the assault, had drunk a great deal of beer, was intoxicated, and had difficulty making it out of the bar.

A trial information was filed on December 23, 1980, charging defendant with two counts of kidnapping, two counts of sexual abuse, and two counts of robbery, committed on Rhonda Krewson and Lori Graham on or about November 29, 1980. At trial, the jury returned a guilty verdict on the two counts of sexual abuse and robbery, and on two counts of false imprisonment, a lesser included offense of kidnapping.

On appeal, defendant asserts that (1) the State timely failed to reveal exculpatory evidence in its possession; (2) the identity of an informant whose tip led to a search warrant for defendant's apartment should have been revealed; (3) the trial court erred in upholding the validity of the search warrant; (4) the jury should not have been instructed on kidnapping and its lesser included offenses, because these charges allegedly overlapped the sexual abuse charges; (5) evidence which was not listed on the minutes should not have been introduced; and (6) the court should have given defendant's proposed instructions setting out the penalties for the various crimes with which he was charged.

Since this action is criminal, we review the trial court's decision on assigned error only. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975); Iowa R. App. P. 4.

I. We first address the exculpatory evidence issue. Before trial, defendant made a general request for exculpatory evidence. The prosecution did not inform him of the discussion between the officers and the manager of the bar. When the State called the manager as a rebuttal witness, defendant objected that his name and information had not been disclosed, and that his appearance late in the trial prevented defendant from using his testimony for preparation. The trial court allowed the testimony over this objection.

The prosecutor's duty to disclose certain exculpatory evidence has been recognized by the United States Supreme Court. In Brady v. Maryland, 373 U.S.

83 (1963), that Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment. . ." Id. at 87. We agree with the State, however, that the testimony alleged to be exculpatory in this case was not material, nor was it suppressed.

The test for materiality in the case of a general request for exculpatory evidence was set out in United States v. Agurs, 427 U.S. 97 (1976):

> [t]he judge should not order a new trial every time he is unable to characterize a nondisclosure as harmless under the customary harmless-error standard. . . Unless every nondisclosure is regarded as automatic error, the constitutional standard of materiality must impose a higher burden on the defendant.
>
> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.

Id. at 111-12. The Iowa Supreme Court adopted this standard in State v. Sheets, 291 N.W.2d 35, 37 (Iowa 1980).

The effect of these cases on the issue in the instant case is that error can be predicated on the State's failure to disclose the bar manager's testimony only if the testimony would have created a reasonable doubt as to the defendant's guilt that did not otherwise exist. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." United States v. Agurs, 427 U.S. at 109-110.

We find that defendant failed to demonstrate that the bar manager's testimony created a reasonable doubt that did not otherwise exist. The testimony, which was presented at trial by the State or rebuttal, was merely corroborative

and cumulative of defendant's testimony. The bar manager testified, in essence, that defendant was in the bar drinking until about 1:30 a.m. on November 29, 1980, at which time he departed out the back door. This evidence was uncontroverted, and the fact that the jury returned a guilty verdict indicates that the testimony did not create a reasonable doubt. See United States v. Kaplan, 554 F.2d 577, 580 (3d Cir.1977). Thus the testimony was not "material" within the meaning of the Brady-Agurs test.

Nor was the evidence "suppressed" by the prosecutor. The testimony was presented at trial, and this has been held to be sufficient disclosure to comply with due process. See State v. Love, 302 N.W.2d 115, 123 (Iowa 1981); State v. Hall, 297 N.W.2d 80, 92 (Iowa 1981), cert. denied, 450 U.S. 927. Moreover, the substance of the testimony was available to defendant prior to trial, and undoubtedly would have been discovered in the course of a thorough defense inverstigation. See State v. Hall, 249 N.W.2d 843, 846 (Iowa 1977). Under these circumstances it cannot be said that the prosecution suppressed the evidence. United States v. Weidman, 572 F.2d 1199, 1206-07 (7th Cir. 1978); United States v. Akin, 464 F.2d 7, 8 (8th Cir. 1972)(per curiam).

II. The trial court denied defendant's request for identification of the confidential informant, which defendant now assigns as error. The police had received information from a reliable informant that Wallie Lawless was the person who had assaulted Connie Duecker, a woman whose November 30, 1980, assault was currently under investigation. The police then connected Lawless with the assaults of Krewson and Graham because the modus operandi was virtually identical in the two incidents and because the informant mentioned certain details connecting the two incidents. Defendant now claims that the revelation of the identity of the informant was necessary because of the possibility of misidentification.

Defendant's contention is without merit. The Iowa Supreme Court has held that "generally the State is privileged to withhold the identity of a person who furnishes information relating to violations of the law." State v. Webb, 309 N.W.2d 404, 410 (Iowa 1981); State v. Lamar, 210 N.W.2d 600, 602 (Iowa 1973). To overcome this privilege, the defendant must demonstrate that the public interest in maintaining the flow of information necessary for effective law enforcement is outweighed by his need for the information in preparing an adequate defense. State v. Lamar, 210 N.W.2d at 602. Factors to be considered in this balancing process are (1) the nature of the offense charged, (2) the defenses raised, and (3) the potential significance of an informant's testimony. Id.

In light of the particular circumstances of this case, we find the public interest in protecting the identity of the informant to be the paramount consideration here. In reaching this conclusion, we note that in State v. Sheffey, 243 N.W.2d 555 (Iowa 1976), the Iowa Supreme Court stated, "[m]ere speculation an informer may be helpful is not enough to carry the burden and overcome the public interest in the protection of the informer." Id. at 559. Furthermore, we also find the following statement by the Eighth Circuit to be on point: "In cases involving the 'tipster' type of informant, who merely conveys information to the government but neither witnesses nor participates in the offense, courts generally hold that disclosure is not material and therefore not required." United States v. House, 604 F.2d 1135, 1140 (8th Cir. 1979), quoting United States v. Barnes, 486 F.2d 776, 778 n.3 (8th Cir. 1973)(citations omitted).

III. We find defendant's contention that the search warrant was invalid to be without merit. Defendant argues that the magistrate's use of the word "foregoing" in the certification provision of the Information for Search Warrant[1] indicates that he relied only on the preceding information and not on the subsequent pages. The second sentence of the certification, however, incorporates the subsequent pages by reference.

IV. Defendant was charged with two counts of kidnapping in the first degree and two counts of sexual abuse in the second degree. Prior to trial, a motion to dismiss the kidnapping charges was made on the ground that they overlapped the sexual abuse charges. For the same reason, defendant objected to instructing the jury on kidnapping and its lesser included offenses. The objections were overruled, and the jury returned verdicts of guilty of false imprisonment and sexual abuse in the second degree. Defendant now complains that the effect of this verdict is that he is being punished twice for the same criminal activity.

In State v. Rich, 305 N.W.2d 739 (Iowa 1981), the Iowa Supreme Court construed the kidnapping statute in the context of a sexual abuse case:

> [W]e do not believe the legislature intended to afford the prosecution a choice of two penalties of such a disparate nature for the typical crime of sexual abuse. The disparity between the sentences for first-degree kidnapping and third-degree sexual abuse—life imprisonment as opposed to not more than ten years—is significant. Although the plain language of section 710.1 appears to encompass the usual case of sexual abuse, in which some movement or confinement occurs, a literal interpretation of the statutory language would not be sensible or just. We therefore believe that because of the substantial disparity between sentences the legislature intended the kidnapping statute to be applicable only to those situations in which confinement or removal definitely exceeds that which is merely incidential to the commission of sexual abuse.

[1] "I, James E. Bennett, hereby certify that in issuing the search warrant in this matter, I relied upon the foregoing sworn testimony of the foregoing applicant(s). In addition, I relied upon the sworn testimony of the persons whose names, addresses and an abstract of their sworn testimony, appears below." (Emphasis supplied).

Id. at 745. Defendant contends that this case did not resolve the problem of the identity of the offenses and therefore requests that the case be overruled. We find no merit in this contention.

An instruction for the separate offense of kidnapping is warranted if the evidence indicates that the "confinement or removal [of the victim] definitely exceeds that which is merely incidental to the commission of sexual abuse." State v. Rich, 305 N.W.2d at 745. Such confinement or removal may be found if it 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. Id.

The Iowa Supreme Court has considered cases with similar facts and found the evidence sufficient to support a conviction for the separate offense of kidnapping. See State v. Knupp, 310 N.W.2d 179, 183 (Iowa 1981)(defendant pulled victim into his vehicle, drove six or seven blocks to a point under a bridge, hit her several times and forced her to submit to his sexual abuse); State v. Holderness, 301 N.W.2d 733, 736 (Iowa 1981)(defendant lured girl to his car, struck her several times, transported her to the country, and subjected her to various incidents of sexual abuse while still confined in his car). In each case, the court found that the risk of harm to the victim was increased and the risk of detention was lessened. Cf. State v Marr, 316 N.W.2d 176 (Iowa 1982). Similarly, we find that the defendant's actions in the instant case, particularly transporting the women to a deserted residential neighborhood and confining them in the car for an hour and forty-five minutes, increased the risk of harm to the women and decreased the risk of detention. We therefore conclude that the evidence was sufficient to submit to the jury instructions on the separate offense of kidnapping and its lesser included offenses. While State v. Whitfield, 315 N.W.2d 753 (Iowa 1982), suggests that we should reach a contrary result, defendant has raised no argument that sexual abuse in the second degree is a lesser included offense of kidnapping in the first degree.

V. Defendant contends that the trial court should have declared a mistrial when the State introduced evidence allegedly not listed on the minutes of testimony. Defendant refers to the heavy boots seized from defendant's apartment. Contrary to this contention, however, the minutes did list the "heavy shoes" worn by the assailant. The fact that the minutes did not specifically state that the boots were identified by the victims does not require exclusion of the evidence where there was no evidence of surprise or prejudice to defendant. See State v. Waterbury, 307 N.W.2d 45, 51 (Iowa 1981).

In this case, the other evidence seized from defendant's apartment was identified by the victims. Furthermore, the boots were listed on the search warrant, defendant had examined Rhonda Krewson regarding their identification, and defendant had the opportunity to inspect them prior to trial. Under these circumstances, we cannot say that defendant was surprised or prejudiced by the introduction into the evidence of the boots. See State v. Waterbury; 307 N.W.2d 45, 50-51 (Iowa 1981). We therefore conclude that the State properly filed a "full and fair statement of the witness' expected testimony" in accordance with Iowa R. Crim. P. 5(3).

VI. The trial court properly refused defendant's request that the jury be instructed regarding the penalties for conviction of the offenses charged. The Iowa Supreme Court held such an instruction improper in State v. Loucks, 218 Iowa 714, 719, 253 N.W. 838, 841 (1934).

Because we find each of defendant's arguments to be without merit, we affirm the decision of the trial court.

AFFIRMED.