

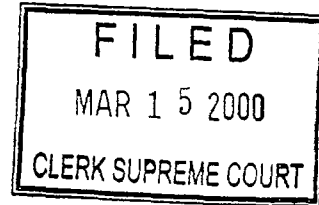
IN THE COURT OF APPEALS OF IOWA

No. 1999-570 (9-831) / 99-0258
Filed March 15, 2000

**STATE OF IOWA,
Plaintiff-Appellee,**

vs.

**DAMON MARCELLE CALAWAY,
Defendant-Appellant.**



Appeal from the Iowa District Court for Polk County, Robert Blink, Judge.

Defendant-Appellant Damon Marcele Calaway and four others were charged following the death of Dawue Stigler with first-degree murder in violation of Iowa Code sections 707.1 and 707.2 (1997) and first-degree kidnapping in violation of Iowa Code sections 710.1 and 710.2 (1997). Defendant was convicted following a jury trial as charged. On appeal he contends (1) there was insufficient evidence of kidnapping; (2) his trial counsel was ineffective; and (3) the district court erred in admitting a note. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, Jamie Bowers and Daniel Voogt, Assistant County Attorneys, for appellee.

Considered by Sackett, C.J., and Vogel and Hecht, J.J.

SACKETT, C.J.

Defendant-Appellant Damon Marcelle Calaway and four others were charged following the death of Dawue Stigler with first-degree murder in violation of Iowa Code sections 707.1 and 707.2 (1997) and first-degree kidnapping in violation of Iowa Code sections 710.1 and 710.2 (1997). Defendant was convicted following a jury trial as charged. On appeal he contends (1) there was insufficient evidence of kidnapping; (2) his trial counsel was ineffective; and (3) the district court erred in admitting a note.

The State's theory of the case was defendant, Larry Botts, Joseph Huston, Darrell Smith and Tahamed Fowler, all members of a gang called "Crips," killed Stigler sometime between August 11, 1996 and September 6, 1996. The killing was in retaliation. Stigler, a member of a rival gang called "Gangster Disciples" was believed to have killed a "Crips" member Raphael Robinson on July 31, 1996.

After Robinson's murder members of the "Crips" gang met in Joanna Cheatam Park. A prospective gang member, Charles Tucker, testified that at the meeting Botts volunteered to take care of Robinson's murder. Tucker also testified defendant was at the meeting.

In July and August of 1996 defendant lived with his mother in an apartment at 900 East Lyon Street in Des Moines. Shauntelle Brown, a babysitter for defendant's younger siblings and Botts' girlfriend, also was staying there. Botts often spent the night there with her.

Brown testified while she was cooking chicken at the Calaway apartment she saw Stigler come into the apartment and go down to the basement with

several other people. As she was standing at the stove she heard yelling and screaming as if people were fighting and bottles breaking. She recognized defendant's voice coming up from the basement. It sounded to her like someone was getting beaten up.

Later, Botts arrived and went to the basement. After a couple of hours, the people who were in the basement came upstairs to eat. While they were eating defendant told Brown some one was beaten up. Afterwards Botts told Brown to go the basement and clean up blood. While she cleaned, Brown observed blood spattered on the walls and bloodstains in the carpet.

The next day Botts told Brown, "[T]hey took him to the cornfield, and they killed him" He then gave her a bracelet he said had belonged to Stigler. He was wearing a ring he said was Stigler's. That day defendant told Brown he shot a person in the head.

Joseph Robinson testified defendant told him the following story: defendant picked up Stigler on 21st Street and took him back to his apartment to smoke a blunt, a marijuana-filled cigar. They had him in the basement. While in the basement they stripped him, cut off his finger, took his ring off and beat him. Then they took him to a cornfield. At the cornfield, Stigler got away and started running. Fowler caught Stigler and defendant shot him.

On August 15, 1996, Stigler's mother, Paula Stigler, filed a missing person report stating she had not seen her son since August 11, 1996.

Tucker, a prospective gang member, testified that at a barbeque at Troy Mure's house after Stigler's disappearance, he overheard defendant describe the beating and shooting of Stigler. Tucker stated defendant said Stigler had been

beaten, threatened with a shotgun, tied up, thrown into the trunk of a car and driven to a field in farm country. Defendant also said after Stigler begged for his life, he had shot him and joked they had burned him cut off his body parts and scattered them.

On September 16, 1996, Roland Rufus saw a white object in the grass while he was mowing a grassy area near one of his cornfields in southeastern Polk County. When he got off his tractor and looked at the object he saw that it was a human skull. He looked into the field and could see that someone had been in the field in two places where corn stalks had been bent down and broken. He went to one of the places and found clothing and what he believed to be a bone.

Des Moines police department evidence technicians searched the grassy area and adjacent cornfield. They removed the skeletal remains of an African-American youth from the area. An examination of the remains revealed three gunshot wounds on the back of the skull and a bullet wound on one of the ribs. The technicians found a spent bullet in the grassy area underneath the skull. Another bullet fell out of the shirt that was removed from the remains at the autopsy. They found a ring and an earring belonging to Stigler in the cornfield.

DNA tests were performed on samples taken from the bone marrow and other tissues taken from the body found in the cornfield and blood samples given by Stigler's biological parents, Paula Stigler and David Goudy. The results of the DNA tests showed Paula Stigler and Goudy to be statistically within .5 percent of the African-American couples who could be parents of the person whose body was found.

In September of 1997 tests were done comparing the DNA taken from the skeletal remains with DNA recovered from the bloodstains taken from carpet squares at the basement of 900 East Lyon Street. The test results were that within the African-American racial group, one in 19,000 persons would have DNA material that would have matched both of the samples.

On July 28, 1998 defendant and Botts, Houston, Smith and Fowler were charged with first-degree murder in violation of Iowa Code sections 707.1 and 707.2 and first-degree kidnapping, in violation of Iowa Code sections 710.1 and 710.2. Motions to sever on behalf of the co-defendants were granted.

Defendant's first claim is that the district court erred in finding sufficient evidence to support the submission of the kidnapping charge to the jury. Defendant preserved error when he made a motion for judgment of acquittal. The district court denied defendant's motion.

The scope of review for a motion for judgment of acquittal is for errors at law. *State v. Cartee*, 577 N.W.2d 649, 651 (Iowa 1998). The question is whether substantial evidence supports the verdict. *Id.*

Substantial evidence is defined as proof that could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. *Id.* In making this determination, the record is viewed in the light most favorable to the State, without regard to contradiction or inconsistencies and assisted by all reasonable inferences. *State v. Robinson*, 228 N.W.2d 337, 338 (Iowa 1980). If there is substantial support for the verdict in the record, the verdict is conclusive. *Id.* All evidence at trial is considered, not just the evidence that supports guilt. *State v.*

Smith, 508 N.W.2d 101,102 (Iowa 1993). Where the verdict is clearly against the weight of the evidence, a new trial should be granted.

Kidnapping is defined in Iowa Code section 710.1 as follows:

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 or 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 . . .

Iowa Code § 710.1.

Under this section a defendant must confine or remove a person as one element of the offense. *State v. Osborn*, 455 N.W.2d 292, 293 (Iowa 1990).

Removal will be considered enough to constitute kidnapping, rather than merely incidental to the underlying crime, when the acts relied upon either substantially increase the risk of harm to the victim or significantly lessen the risk of detection or facilitate escape. *Id.* at 294. Removal may be committed by deception or fraud as well as by force. *See id.*

In order to “confine” another person under the kidnapping statute, the character of the confinement must exceed what is inherently incident in the underlying felony. *State v. Davis*, 584 N.W.2d 913, 916 (Iowa App. 1998). In addition, other factors may be considered, two of which we find relevant here. The first is the duration of the confinement. While no minimum period of confinement is required for a kidnapping conviction, it is more likely that a confinement that lasts beyond the time period it takes to commit the underlying crime is kidnapping. *See id.* The second is whether defendant selected a

secluded location in which to confine the victim. Secluding the victim lessens the risk of detection and further increases the risk of harm to the victim. *Id.*

There is substantial evidence to support the submission of the kidnapping charge. There was evidence from which the jury could have found the element of removal. Defendant and others fraudulently induced Stigler to go to the basement of the apartment building to smoke a blunt with the intent to inflict injury upon him. Later they threw him into the trunk of a car to take him to the cornfield where they eventually shot him.

There was also evidence from which the jury could have found confinement. Stigler was kept in the basement for about two hours and taken to the cornfield and murdered. This time period of confinement clearly exceeds that necessary for the murder itself. The secluded areas of the basement and cornfield were also places in which the risk of harm to the victim would be increased and the risk of detection of defendant and others would be decreased.

Defendant next claims he received ineffective assistance of counsel because his trial attorney failed to object to the jury instructions which permitted the jury to consider conviction on the alternate theory of felony murder, specifically, murder in the course of kidnapping or robbery.

Ineffective assistance of counsel claims are reviewed under a de novo standard. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1988). In order to prevail, defendant must prove his or her counsel failed in an essential duty and prejudice resulted. *State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998). Defendant has the burden to show his counsel was ineffective by a preponderance of the evidence. *State v. Allen*, 565 N.W.2d 333, 336 (Iowa 1997). A claimant must

also overcome a strong presumption of counsel's competence. *Collins v. State*, 588 N.W.2d 399, 402 (Iowa 1998). The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competency. *Id.*

To establish prejudice defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* *State v. Bugley*, 562 N.W.2d 173, 178 (Iowa 1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of defendant's trial. *Id.* The court can affirm on appeal if either element is absent. *McPhillips*, 580 N.W.2d at 754.

We review jury instruction challenges for legal error. *State v. Engle*, 590 N.W.2d 549, 552 (Iowa App. 1998). The general rule is a trial court's instruction must have support in the record. *Id.* at 551.

Defense counsel was not ineffective for failing to object to these instructions. The felony murder instructions were supported by substantial evidence of kidnapping. An objection to these instructions by counsel at trial would have been properly overruled. Thus, defendant was not prejudiced by counsel's failure to object.

Defendant finally asserts counsel was ineffective for failing to make timely objections to prejudicial hearsay testimony. This claim involves the testimony of two witnesses. The first is Tucker's testimony that he heard a comment by Mure at the barbeque that "they should find [Stigler] around harvest time." The second is Brown's testimony that Botts told her Stigler had been shot and dumped in the cornfield.

Defendant was not prejudiced by the admission of these statements into evidence, given his own admissions to the same effect and other overwhelming evidence of his guilt.

Defendant also claims the district court erred by admitting a note into evidence that was seized in the jail while he was awaiting trial. He contends the note was inadmissible hearsay, prejudicial and its introduction into evidence violated his constitutional right of confrontation.

Pending trial defendant was housed in the Polk County jail. Each floor contains a security area called a "sally port" that can be closed off from other areas to allow transportation of prisoners. While defendant was passing through the sally port on the seventh floor, a guard saw him talking in the day room in the east wing with Smith, who was the only inmate in the room. A guard saw defendant move his arm as if throwing something in Smith's direction just before he walked away from the day room. The guard locked defendant down and went to see what had been thrown. He retrieved a handwritten, unsigned note that said, "Babe¹, C.T. and Joe is snitching. We got to get something together. Tell me what's up." Defendant objected to the admission of the note on hearsay grounds. The court denied his motion.

A trial court's rulings on the admissibility of evidence are discretionary. *State v. Hubka*, 480 N.W.2d 867, 868 (Iowa 1992). We will reverse an evidentiary ruling only when a trial court is shown to have abused its discretion in balancing the probative force of the challenged evidence against the danger of undue prejudice or influence. *Id.*

¹ People referred to Botts as Babe.

Without considering whether the note was admissible hearsay, we find the admission of the note into evidence was not prejudicial, given the overwhelming evidence of guilt in this case.

AFFIRMED.

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