IN THE COURT OF APPEALS OF IOWA

No. 7-020 / 96-0097

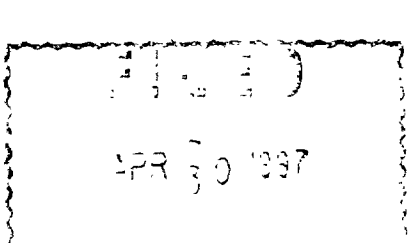
STATE OF IOWA,

Plaintiff-Appellee,

vs.

ROLANDER GILES,

Defendant-Appellant.



Appeal from the Iowa District Court for Scott County, James R. Havercamp, Judge.

Defendant appeals from the judgment and sentence entered upon his convictions for third-degree kidnapping and assault with intent to commit sexual abuse. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney General, William E. Davis, County Attorney, and Julie Walton, Assistant County Attorney, for appellee.

Heard by Habhab, C.J., and Huitink and Vogel, JJ.

HABHAB, C.J.

On the night of August 12, 1995, Renee Wells was en route to visit two of her children who live with their father at Twelfth and Esplanade in Davenport. As she was walking there, defendant Rolander Giles drove by and offered her a ride. Although she did not know defendant personally, she recognized his face. She accepted the ride and he agreed to take her to Twelfth and Esplanade. En route, defendant informed her he was going to stop for a moment on the way on Sylvan Road. He pulled into the driveway of an abandoned home and grabbed Wells by the throat. He told her to say nothing and then said, "Bitch you are going to give me some pussy." Wells then began screaming. A neighbor heard the screaming and called police. Upon the arrival of the police, defendant fled the scene.

Defendant was charged with third-degree kidnapping in violation of Iowa Code section 710.4 (1995) and assault with intent to commit sexual abuse in violation of Iowa Code section 709.11. At trial, defendant's motion for judgment of acquittal was denied. The jury found him guilty on both counts.

On appeal, defendant argues the court erred in denying his motion for judgment of acquittal because the victim voluntarily entered his vehicle and the State did not prove she was confined or removed without her consent. He contends any "removal" of the victim was simply to the backseat of the car and was merely part of the attempted sexual assault. He also argues there was no deception as he did not

deviate from any route to the victim's ultimate location and the victim did not object to the route taken.

Our scope of review is for corrections of errors of law. Iowa R. App. P. 4. A verdict will be upheld where there is substantial evidence to support the charge. *State v. Ledezma*, 549 N.W.2d 307 (Iowa App. 1996).

When reviewing sufficiency of the evidence, we consider the entire record and determine whether the verdict is supported by substantial evidence. *State v. Shumpert*, 554 N.W.2d 250, 253 (Iowa 1996). "'Substantial evidence' is 'such evidence as would convince a rational trier of fact that defendant is guilty beyond a reasonable doubt.'" *Id.* (citing *State v. Robinson*, 288 N.W.2d 337, 339 (Iowa 1980)). 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. *Ledezma*, 549 N.W.2d at 310. We consider all the evidence at trial, not just the evidence that supports the verdict. *Id.* The weight of the evidence and credibility of witnesses are to be determined by the jury and not the appellate court. *State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984).

Iowa Code section 710.1 states, in part:

> 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 or more 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.

At trial, the jury was instructed, in part, as follows:

INSTRUCTION NO. 21.

In order to find the defendant guilty of Kidnapping in the Third Degree under Count I, the State must prove all of the following elements:

1. On or about the 12th day of August, 1995, the defendant confined Renee Wells.

2. The defendant did so with the specific intent to subject Renee Wells to sexual abuse.

3. The defendant knew he did not have the consent of Renee Wells to do so.

If the State has proved all of the elements, the defendant is guilty under Count I. If the State has failed to prove any one of the elements, then the defendant is not guilty of Kidnapping in the Third Degree under Count I and you shall go on to consider the lesser included offense of False Imprisonment.

INSTRUCTION NO. 15.

Confinement requires more than what is included in the commission of the crime of Assault with the Intent to Commit Sexual Abuse Resulting in Bodily Injury.

A person is "confined" when her freedom to move about is substantially restricted by force, threat or deception. The person may be confined either in the place where the restriction began or in a place to which she had been removed.

No minimum time of confinement or distance or removal is required. It must be more than slight. The confinement must have significance apart from the Assault with the Intent to Commit Sexual Abuse Resulting in Bodily Injury.

In determining whether confinement exists, you may consider whether:

1. The risk of harm to Renee Wells was increased.
2. The risk of detection was reduced.
3. Escape was made easier.

We first address defendant's contention the evidence was insufficient to support a finding that he confined Wells without her consent and that any confinement was merely incidental to the sexual abuse.

In *State v. Coen*, 382 N.W.2d 703 (Iowa App. 1985), we upheld the defendant's conviction of kidnapping in the third degree and assault with intent to commit sexual abuse. In that case, unbeknownst to the victim, the defendant let the air out of her tire. After changing the tire, he then coerced the victim into giving him a ride home. While passing through an industrial area, the defendant informed the victim he had a knife and that she was to do as he said. The victim ultimately escaped his confinement. In upholding the kidnapping charge, this court, after thoroughly reviewing prior cases dealing with the issues of "confinement" and "removal," reasoned:

> What makes this situation distinctive is the fact that [the defendant] did not initially confine or remove [the victim] by physical force or threat, but rather by deception. [The defendant's] deceptive ploy and the resultant transport of [the victim] was not merely movement incidental to sexual abuse. [The defendant] selected the location for perpetration of the crime which was in the immediate vicinity where he sexually abused [a prior victim] after threatening her with a knife. A jury could infer he selected the ultimate destination because he could there sexually abuse [the victim] without detection. Removing [the victim] from a public environment to an isolated area also increased the risk of harm to [the victim].
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> . . . .
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> The harm the kidnapping statute is designed to prevent is the removal of a victim from one place to another with attendant increased risks to the victim.

Id., 382 N.W.2d at 713.

In *State v. Wilcoxen*, 549 N.W.2d 304 (Iowa App. 1996), the defendant's first-degree kidnapping conviction was affirmed where the defendant deceived the mother of a child by telling her he was taking the child to the park to play. The defendant instead led the child to a secluded area where he sexually abused her.

Similarly, we find defendant deceived Wells in leading her to believe he would take her to her children's residence. Wells did not object to defendant's pronouncement that he was going to stop at the abandoned home. The State argues Wells had no idea why they were making the stop and, as such, her failure to object to the stop may not be construed as assent. We agree.

In stopping Wells and representing to her that he would take her to see her children, defendant employed an act of deception to lure Wells into his vehicle. "[C]onsent obtained by fraud or deceit negates the consent, or is not consent at all." *State v. Osborn*, 455 N.W.2d 292, 294 (Iowa App. 1990). Defendant's contention he did not deviate from the path and stop at the vacant house without Wells' consent is without merit. Wells' alleged "consent" to stop at the abandoned house was obtained by defendant's use of fraud and deceit; as such, we find it was not "consent" as contemplated by the drafters of Iowa Code section 710.1. *See id.*

We next address defendant's contention the confinement was incidental to the attempted sexual abuse. "[T]he terms 'confines' or 'removes' require more than the confinement or removal inherent to the crime of sexual abuse." *Wilcoxen*, 549 N.W.2d at 305 (citing *State v. Rich*, 305 N.W.2d 739, 745 (Iowa 1981)). We find the

confinement and removal of Wells had independent significance from the attempted sexual assault. Defendant's relocation of Wells to the abandoned home increased the risk of harm to Wells, reduced the risk of defendant's detection, and facilitated his escape.[1]

We note this case is distinguishable from those in which the kidnapping charge was reversed. In *State v. Marr*, 316 N.W.2d 176 (Iowa 1982), our supreme court reversed the defendant's conviction of first-degree kidnapping. In that case, the defendant chased the victim just outside of her apartment building. He yelled at her to stop and she did. He then clamped his hand over her mouth and threw her down on the ground. He pinned one hand behind her and then sexually abused her. In reversing the kidnapping conviction, the court held:

> Although it has been stated section 710.1(3) encompasses "an extremely wide variety of factual circumstances," 1 J. Roehrick, The New Iowa Criminal Code: A Comparison 110 (1978), we do not believe the facts of this particular case warranted the defendant's conviction for kidnapping. To hold otherwise merely exemplifies the defendant's assertion that every rape would thus constitute a kidnapping, as well as every robbery or other assault involving some minimal degree of confinement or removal. In the present case substantial evidence was not presented that the defendant's actions *substantially* increased the risk of harm to the victim, that the risk of detection was *significantly* lessened, or that following the sexual abuse escape was *significantly* facilitated thereby. *See Rich*, 305 N.W.2d at

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[1] We note that kidnapping convictions where the victim escaped confinement by the defendant have been upheld in this state. *See State v. Hardin*, 359 N.W.2d 185, 189-90 (Iowa 1984); *State v. Ristau*, 340 N.W.2d 273, 274-76 (Iowa 1983); *State v. Knupp*, 310 N.W.2d 179, 181-83 (Iowa 1981); *State v. Tryon*, 431 N.W.2d 11, 15 (Iowa App. 1988); *State v. Coen*, 382 N.W.2d 703, 708-13 (Iowa App. 1985).

> 745.[2] Moreover, the means by which control of the victim was secured and the duration of that control distinguish this case from *Rich*, as well as *Knupp*.[3]
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> We conclude the State failed to sustain its burden of proof under the kidnapping charge that the confinement or removal definitely exceeded that normally incidental to the commission of sexual abuse. *See Rich*, 305 N.W.2d at 745.

Marr, 316 N.W.2d at 179.

In *State v. Mead*, 318 N.W.2d 440 (Iowa 1982), our supreme court reversed the defendant's conviction of second-degree kidnapping. In that case, the defendant attempted to rob a woman and her daughter at knife point while they were entering their home. In reversing the conviction, our supreme court reasoned:

> We are impressed by the distinction between "seizure" and "detention" (which the court equated to confinement) drawn by the court in *Hardie v. State*, 140 Tex.Crim. 368, 377, 144 S.W.2d 571, 575 (1940). The present case involved a seizure of [the victim] by the defendant, not a confinement of her. Under the statute, kidnapping cannot be predicted on merely "seizing" another person.

Mead, 318 N.W.2d at 445.

Recently in *State v. McGrew*, 515 N.W.2d 36, 40 (Iowa 1994), our supreme court upheld the first-degree kidnapping charge of the defendant. The defendant in

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[2] In *State v. Rich*, 305 N.W.2d 741 (Iowa 1981), our supreme court found the defendant's "confinement" or "removal" of the victim was sufficient to affirm the conviction of third-degree kidnapping. In *Rich*, the victim worked in a shopping mall and was abducted, bound, and sexually assaulted after-hours by a custodian.

[3] In *State v. Knupp*, 310 N.W.2d 179 (Iowa 1981), our supreme court found the defendant's "confinement" of the victim was sufficient to affirm the conviction of first-degree kidnapping. In *Knupp*, the defendant pulled the victim into his car and, after a struggle, ultimately sexually assaulted her.

that case broke into the victim's home, bound her hands, and gagged her. He possessed a knife and a loaded shotgun. After sexually abusing her, he confined her for several hours. After citing the above language from *Mead*, the court determined the defendant's confinement of the victim "was vastly more than a 'seizure.'" *Id.* at 40. The court noted the facts in *McGrew* "were much more compelling in favor of upholding the kidnapping conviction" than the facts in *Marr* and *Mead*. In making this determination, the court reasoned:

> In both *Marr* and *Mead*, the duration of the confinement lasted no longer than the time required to commit the underlying offenses. We believe the facts of this case are more similar to our courts' previous decisions upholding kidnapping convictions predicated on an underlying sexual abuse offense. *See Rich*, 305 N.W.2d at 740-41; *State v. Tryon*, 431 N.W.2d 11, 12-13 (Iowa App. 1988).

McGrew, 515 N.W.2d at 40.

We find the case at hand distinguishable from *Marr* and *Mead*. Here, defendant did more than "seize" Wells. The jury could have rationally concluded defendant confined Wells through use of deceit and, as such, did so without her consent. The district court properly overruled defendant's motion for judgment of acquittal.

AFFIRMED.