IN THE COURT OF APPEALS OF IOWA

No. 0-103 / 89-887

FILED
MAY 24 1990
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

JAMES C. HOWELL,

Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, George W. Bergeson, Judge.

Defendant appeals his convictions, following a jury trial, of first-degree kidnapping and first-degree sexual abuse. **AFFIRMED IN PART AND VACATED IN PART.**

Raymond E. Rogers, State Appellate Defender, and Linda Del Gallo, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, James Smith, County Attorney, and Nan Horvat, Assistant County Attorney, for appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

SACKETT, J.

Defendant-appellant James C. Howell was accused of abducting a woman, holding her hostage for approximately fifteen hours, sexually abusing her on several occasions during that time, stabbing her in the back, and stealing her car. A jury rejected his insanity defense and found him guilty of first-degree kidnapping, first-degree sexual abuse, and second-degree theft. Defendant was sentenced to life in prison for the kidnapping and sexual abuse convictions.

Our standard of review is for the correction of errors at law. Iowa R. App. P. 4. We affirm in part and vacate in part.

Defendant first contends the district court erred by refusing to let him inform prospective jurors, during voir dire, of the consequences of an acquittal on the ground of insanity. He argues he should have been permitted to tell the jurors that an acquittal on the ground of insanity would not set him free, but rather would trigger his immediate commitment to a mental hospital.

We disagree with defendant's contention, having found the Iowa law in this area to be well settled. "[A]n instruction to the jury regarding the post-trial disposition of a defendant found not guilty by reason of insanity is irrelevant to the jury's proper function." State v. Hamann, 285 N.W.2d 180, 186 (Iowa 1979). The

supreme court reaffirmed its opinion on this issue in State v. Oppelt, 329 N.W.2d 17, 21 (Iowa 1983). We have also spoken about informing jurors of the consequences of their decisions. See State v. Hatter, 381 N.W.2d 370, 375 (Iowa App. 1985) ("Knowledge of the penalty is wholly irrelevant to the jury's unique part of the judicial system, that being a fact-finder for two opposing parties."). Defendant's first argument is without merit.

Defendant also contends his conviction for first-degree sexual abuse should be vacated because it was a lesser included offense of the first-degree kidnapping charge. He argues that the incidents of sexual abuse were treated by the trial court as one overall occurrence, and thus any alleged sexual abuse was a lesser included offense of the kidnapping offense.

The State contends two distinct and separate crimes took place as follows: (1) Kidnapping occurred upon the initial abduction, and became first-degree when defendant committed an initial series of second-degree sexual abuses; (2) Another sexual abuse, several hours later in another location, became first degree because during its commission defendant stabbed the victim and inflicted serious injury.

Iowa Code section 701.9 (1989) provides:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

Kidnapping is of the first degree when the victim is intentionally subjected to sexual abuse as a consequence of the kidnapping. Iowa Code § 710.2 (1989).

We find both incidents of sexual abuse occurred during the commission of kidnapping and were thus lesser included offenses of the first-degree kidnapping offense. Accordingly, under the dictates of section 701.9, defendant's conviction for first-degree sexual abuse must be and is hereby vacated. We affirm defendant's conviction for first-degree kidnapping.

AFFIRMED IN PART AND VACATED IN PART.