FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	Filed June 24, 1987
RICHARD DOUGLAS DODD,	)	
Defendant-Appellant,	)	
and	)	
RICHARD DOUGLAS DODD,	)	
Petitioner-Appellant,	)	6-460 85-488
vs.	)	
STATE OF IOWA,	)	
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Polk County (26194), James P. Denato, Judge, and C. Edwin Moore, Senior Judge.

Defendant appeals from his conviction, following a jury trial, of kidnapping in the first degree. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender; Michael J. Laughlin, Assistant Appellate Defender; and James P. Clearly, Des Moines; for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and David L. Dorff, Assistant Attorney General, for plaintiff/respondent-appellee.

Heard by Oxberger, C.J., and Schlegel, and Sackett, JJ., but considered en banc.

PER CURIAM

Defendant appeals from his conviction, following a jury trial, of kidnapping in the first degree in violation of Iowa Code section 710.2. On direct appeal he challenges the sufficiency of the evidence presented to the jury, contending that it was insufficient to show his guilt beyond a reasonable doubt. Defendant also appeals from the trial court's denial of his application for postconviction relief. These appeals were consolidated for our consideration.

On July 9, 1984, Tina Heur was abducted from a friend's house where she had been spending the night. A strange man, who had been hiding in a closet, took Tina from the house to a parked car. The initial kidnapping took place sometime after two in the morning on July 9. The man drove her to several locations and subjected her to various forms of sexual abuse, including oral sex and sexual intercourse. At the time of the incident the victim was ten years old. When Tina's abductor released her around 4:00 a.m. she ran to a nearby home, whose residents called the police. She gave the police a full description of her abductor and the car and was then taken to a hospital for treatment and examination. Soon after this incident Tina went to the Des Moines police station and looked through several notebooks of photographs, but was unable to identify anyone. Later in the investigation a police officer went to Tina's home and showed her a photographic array. The composition of this array is contested on appeal. From this display Tina identified the defendant as her abductor.

On September 14, 1984, the Polk County Attorney filed an information charging defendant with kidnapping in the first degree. The case came to trial on January 28, 1985. During the trial defendant attempted to account for his whereabouts at the time the crime occurred. He presented evidence which allegedly established him leaving his mother's house at approximately

2:30 a.m. and picking up his girlfriend at approximately 3:30 a.m. The interim hour was allegedly due to the length of the drive and the poor condition of the automobile. At the conclusion of all of the evidence, defendant made a motion for judgment of acquittal, which was overruled. On February 1, 1985, the jury returned a verdict of guilty of kidnapping in the first degree. Defendant appealed his conviction and sentence on March 15, 1985.

While he was seeking a direct appeal, defendant requested a limited remand for amplifications of the record relating to the victim's photo identification and other matters relating to ineffective assistance of counsel. The Supreme Court granted a limited remand on August 16, 1985. On November 5, 1985, defendant filed a petition for postconviction relief. This case came before the district court on November 27, 1985, and was denied by the court. Defendant has appealed this finding and consolidated it with his direct appeal for our consideration.

Defendant, on direct appeal, contends the State failed to produce sufficient evidence to convince a trier of fact beyond a reasonable doubt of his guilt. Defendant also appeals from the denial of his application for postconviction relief. He contends he was denied effective assistance of counsel by his counsel's failure to: (1) discover and use certain allegedly favorable witnesses; and (2) investigate and suppress the victim's in-court identification which was based upon allegedly improper photo identification. Defendant finally contends he was denied due process and a fair trial because of prosecutorial misconduct. Specifically, he alleges prosecutor's manipulation, intimidation, and deference of a key witness.

I.

Initially we consider defendant's direct appeal. He contends insufficient evidence was presented from which a rational trier of fact could find him guilty of kidnapping in the first degree.

Kidnapping in the first degree is defined in section 710.1 and 710.2, Iowa Code (1985), 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 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:
>
> 1. The intent to hold such person for ransom.
>
> 2. The intent to use such person as a shield or hostage.
>
> 3. The intent to inflict serious injury upon such person, or to subject the person to a sexual abuse.
>
> 4. The intent to secretly confine such person.
>
> 5. The intent to interfere with the performance of any government function.
>
> * * *
>
> Kidnapping is kidnapping in the first degree when the person kidnapped, as a consequence of the kidnapping, suffers serious injury, or is intentionally subjected to torture or sexual abuse.
>
> Kidnapping in the first degree is a class "A" felony.

The State had the burden of proving each and every element of kidnapping in the first degree. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368, 375 (1970).

When considering a challenge to the sufficiency of the evidence we view the evidence in a light most favorable to the State and we consider all evidence and inferences that may be drawn from it. State v. Craney, 347 N.W.2d 668, 680 (Iowa 1984), cert. denied, 469 U.S. 884, 105 S. Ct. 255, 83 L. Ed. 2d 192

(1984); State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). Evidence is sufficient to sustain the verdict where there is substantial evidence from which a rational fact finder could determine defendant guilty beyond a reasonable doubt. Robinson, 288 N.W.2d at 341; State v. Mitchell, 371 N.W.2d 432 (Iowa App. 1985) (emphasis added).

The record reflects in the early morning hours of July 9, 1984, the victim was abducted from a friend's home, driven around Des Moines, and sexually abused. Defendant does not argue these events did not happen but he contends that he was not the abductor. On appeal he attacks the victim's identification of him and the automobile used. He alleges it was impossible for him to have been present to commit the crime. He urges us to find insufficient evidence because of the amount of conflicting testimony in the record.

After a thorough review of the evidence, we conclude sufficient evidence exists to support the jury's finding of guilt. Defendant left his mother's home between 2:30 a.m. and 2:45 a.m. on the morning of July 9, 1984; this was approximately the time the victim was abducted. Defendant's mother's home and the house from which the victim was abducted are in the same neighborhood. The victim was released by her abductor at approximately 4:00 a.m. Testimony was presented defendant did not pick up his girlfriend until 5:30 a.m. There were conflicts in the victim's identifications and defendant's appearance. Conflicts also existed regarding her description and the actual appearance of the automobile he was driving that night. In considering the weight of this evidence, we note the tenderness of the victim's age and the horror of her experience. Although variances existed in her identification, we find these overcome by her acts of picking defendant from the photographic lineup and her in-court identification. There is substantial evidence in the record from which a jury could find defendant guilty beyond a reasonable doubt.

II.

In his postconviction relief appeal defendant contends he was denied effective assistance of counsel and denied due process through prosecutorial misconduct.

Since defendant contends his constitutional right to a fair trial was violated, we make an independent evaluation of the totality of the relevant circumstances; the equivalent of de novo review. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

In determining a claim of ineffective assistance of counsel, we consider whether under the entire record and the totality of the circumstances counsel's performance was within the range of normal competency. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). Defendant must overcome a strong presumption that counsel is competent. Taylor, 352 N.W.2d at 685. In the test for ineffective assistance of counsel claims the defendant must show: (1) counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the sixth amendment, and (2) the deficient performance so prejudiced the defense as to deprive defendant of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (Iowa 1984); State v. Losee, 354 N.W.2d 239, 243 (Iowa 1984). Defendant has the burden to prove both of these elements by a preponderance of the evidence. Sallis v. Rhoades, 325 N.W.2d 121, 122 (Iowa 1982).

The United States Supreme Court has held "a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would have reasonably likely have been different absent the errors." Strickland v. Washington, 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

Regarding his ineffective assistance of counsel claim, defendant argues his trial counsel failed to investigate and have two witnesses testify. Further, he argues counsel erred in failing to suppress in-court identification of him by the victim based upon improper and suggestive photographic show-up.

We have carefully considered defendant's contentions. After a review of the record regarding Mike Keeran and Linda Webb, we find no error in counsel's performance regarding their testimony. There is no evidence Mr. Keeran's testimony was in any way helpful and Ms. Webb's testimony was not brought forth because of counsel's trial strategy. Trial counsel determined Ms. Webb was working closely with the prosecutor's office. Defendant also claims counsel erred in not suppressing in-court identification based on a one photograph show-up. Although the victim testified she was shown one photograph by a policeman at her home, her mother and the police officer testified at least half a dozen photographs were involved. Defendant has failed his burden as to both elements required by Strickland. Defendant's trial counsel performed beyond the range of normal competency.

Finally, defendant contends the prosecutor's manipulation, intimidation, and deterrence of Linda Webb, along with her conduct towards the victim, denied him due process and a fair trial. Defendant argues the prosecutor's violation of office guidelines and personal protocol in interviewing Ms. Webb alone, buying her colas, and using her statements in deterring defense counsel from calling her, denied him the testimony of a valuable witness. He also maintains the prosecutor's giving the victim a present before her postconviction testimony constituted improper conduct requiring the presumption of prejudice and mandating a new trial.

In order to prevail on a matter of prosecutorial misconduct, the defendant must show both misconduct and prejudice resulting therefrom. Wycoff v. State,

382 N.W.2d 462, 465-66 (Iowa 1986). "Trial courts are vested with broad authority to determine whether prejudice has resulted from an act of prosecutorial misconduct." State v. Ruble, 372 N.W.2d 216, 218 (Iowa 1985). Appellate courts will not overturn trial court rulings in the absence of a showing of abuse of discretion. Id.

Although we do not sanction the prosecuting attorney's actions, we do not believe her actions resulted in prejudice to the defendant. It is important that prosecuting attorneys remember they have a duty to ensure the defendant receives a fair trial; their job is not just to secure convictions. State v. Tate, 341 N.W.2d 63, 65 (Iowa App. 1983). Any appearance of misconduct must be avoided.

AFFIRMED.