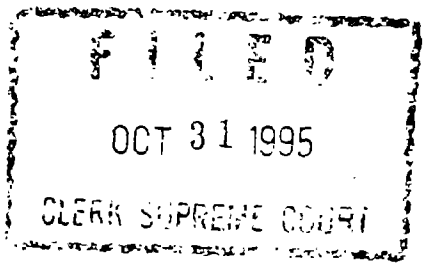
IN THE COURT OF APPEALS OF IOWA

No. 5-374 / 94-0837



STATE OF IOWA,

Appellee,

vs.

GENE E. DRYER,

Appellant.

Appeal from the Iowa District Court for Dubuque County on change of venue to Black Hawk County, Lawrence H. Fautsch, Judge.

Dryer appeals judgment and sentences, following jury trial, entered upon his convictions of first-degree kidnapping and four counts of assault with a dangerous weapon. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Fred W. McCaw, County Attorney, and Christine O. Corkin, Assistant County Attorney, for appellee.

Heard by Donielson, C.J., and Hayden and Cady, JJ.

HAYDEN, J.

H.C. checked herself out of her grade school classroom to go to the restroom. When she came out of the first stall, nearest the restroom door, a man was there. He grabbed her and dragged her to the sixth (last) stall. He attempted three times to shove a pair of underwear into her mouth. The man stripped H.C. from the waist down. H.C. managed to slide under the stall partition into the fifth stall, but she could not lock the door before the man pushed it open.

The man grabbed H.C. and tried to shove her head into the toilet. He then dragged her into the open portion of the restroom, laid her on her back, and attempted to engage in vaginal intercourse. H.C. continued to struggle with the man. He told her he would break her neck if she was not quiet. He also told her his name was Gene.

The man's sexual assault of H.C. was interrupted twice by young girls and, finally, by a teacher, Jane Boffeli. Boffeli screamed three times at the man to "get off her." She ran to a near classroom and told the teacher to call 911. She then returned to the restroom where she saw the man pulling up his pants.

Boffeli grabbed H.C. and pushed her out the doorway behind Boffeli. H.C. ran to a corner and tried to cover herself. Boffeli attempted to keep the man from leaving the restroom by grabbing his sleeve. She released his sleeve, however, when the man threatened her with a knife. She then backed out of the restroom. As the man left the

restroom, school counselor Joe Streit and teachers Judy Sykes and Jean Davis saw him Sykes and Streit began to approach the man, but Boffeli warned them he had a knife

The man then walked up the stairs and exited the school building. Streit and Davis followed him. Davis watched the man walk through the playground as Streit summoned a police officer, Brian Jobgen, who was in the building. Davis directed Jobgen to the man, and Jobgen immediately recognized the man as Gene Dryer. Eventually, Jobgen and other officers subdued Dryer and seized his knife.

Upon his arrest, Dryer complained of chest pains. Officers took him to the hospital and guarded his room. H.C., Boffeli, Streit, and Davis were brought individually to Dryer's room. Each identified him as the man seen at the school.

Dryer was charged with first-degree kidnapping, second-degree sexual abuse, and five counts of assault with a dangerous weapon. His motion to dismiss the kidnapping charge for lack of confinement was denied. Dryer's motion to suppress the identifications of H.C., Boffeli, Streit, and Davis on grounds they were a result of impermissibly suggestive procedures was denied. Dryer's objection to the court's confinement instruction and his proposed instruction were also rejected.

Dryer was convicted of first-degree kidnapping and four counts of assault with a dangerous weapon. He now appeals. Dryer contends there is insufficient evidence of confinement which is more than incidental to the sexual abuse and, consequently, the kidnapping conviction cannot stand. He also contends the district court erred in

denying his motion to suppress and in rejecting his confinement instruction. The State suggests Dryer's improper identification claim, though initially preserved, was waived when he conceded identity at trial.

I. Sufficiency of the Evidence Supporting Kidnapping Conviction.

Our scope of review for this issue is on assigned error only. Iowa R. App. P. 4. The standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* 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. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence supporting the verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." *State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981).

In kidnapping cases where there is an underlying offense, the confinement or removal necessary to sustain the conviction must be more than incidental to the commission of the underlying offense. *State v. Tryon*, 431 N.W.2d 11, 14 (Iowa App. 1988). A kidnapping conviction can only stand where the confinement or removal

definitely exceeds that which is merely incidental to the commission of the sexual abuse *State v. Rich*, 305 N.W.2d 739, 745 (Iowa 1981). In order for confinement to have independent significance, the confinement must: (1) substantially increase the risk of harm to the victim; (2) significantly lessen the risk of detection; or (3) significantly facilitate escape following the completion of the offense. *Id.* These factors are considered in light of the totality of the facts. *Id.* at 746.

Considering the above test, we determine the confinement or removal present in this case was not merely incidental to the assault and was adequate to support the kidnapping conviction. The confinement substantially increased the risk of harm to the victim, H.C., and lessened the risk of detection. First, Dryer chose to commit the rape in a restroom where only young girls, not adults, would enter. He waited there until a young girl entered. Dryer removed H.C. from outside the first stall of the bathroom to the last, sixth, stall in the back of the restroom. He attempted three times to put a pair of underwear in her mouth to keep her quiet, and also attempted to put her head in the commode. Dryer also threatened to break H.C.'s neck if she made any noise, and also had a knife serving as a threat.

Taken together, these actions indicate Dryer "sought seclusion as a means of avoiding detection." *State v. Ristau*, 340 N.W.2d 273, 276 (Iowa 1983). Furthermore, his actions substantially increased the risk of harm to H.C. We determine the confinement in this case was more than incidental to the assault. We affirm.

II. Suppression of Identification Testimony.

When a defendant is alleging error involving a constitutional right, such as here, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. *Rinehart v. State*, 234 N.W.2d 649, 658 (Iowa 1975); *State v. Jeffries*, 417 N.W.2d 237, 239 (Iowa App. 1987). As such, review on appeal is de novo in light of the totality of the circumstances. *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993).

Dryer contends the trial court erred in failing to suppress identification testimony from several witnesses who participated in a one-person "show-up" at the hospital Dryer was transported to after his apprehension. We determine Dryer failed to preserve any appeal concerning identification testimony because he conceded the issue at trial. In his motion in limine the defendant stipulated he performed a sex act upon H.C. In fact, in opening and closing argument, Dryer's counsel refer to the assault committed by Dryer against H.C. and challenged only the kidnapping charge. A defendant cannot both object and consent to evidence if he expects to preserve error.

Even if we found error was properly preserved, we would determine the trial court did not err in admitting the identification testimony. To prove the identification procedure was impermissibly suggestive and, therefore, violated due process, Dryer must establish (1) the procedure was in fact impermissibly suggestive and (2) the

irregularities gave rise to a substantial likelihood of irreparable misidentification. *State v. Veal*, 353 N.W 2d 83, 87 (Iowa 1984).

First, we must determine whether the out-of-court identification procedure was "impermissibly suggestive." *State v. Rawlings*, 402 N.W.2d 406, 409 (Iowa 1987) (citing *Manson v. Brathwaite*, 432 U.S. 98, 108-09, 97 S. Ct. 2242, 2250, 53 L. Ed. 2d 140, 150 (1977)). Courts have generally conceded a one-on-one confrontation between an accused and an eyewitness, as was done in this case, is inherently suggestive. *State v. Jackson*, 387 N.W.2d 623, 631 (Iowa App. 1986). It does not, however, aid the defendant to say his confrontation with the witness was merely suggestive. *State v. Salazar*, 213 N.W.2d 490, 493 (Iowa 1973). The confrontation must be *unnecessarily* suggestive in order to violate due process. *Id.* at 493-94 (emphasis added).

We determine the identification procedures in this case were not unnecessarily suggestive and were constitutionally permissible. At the show up, the witnesses, including the nine-year-old victim, observed Dryer individually and were told not to speak with any of the other witnesses during the identification process. Dryer was handcuffed to the bed, and there were two uniformed officers in the room with Dryer.

The presence of police officers is a usual and necessary element in the ordinary identification procedure. *Jackson*, 387 N.W.2d at 631. The handcuffs were often not visible. Even if they were visible, courts have held such circumstance is not unnecessarily suggestive. *Id.* Additionally, as the State indicates in its brief, the fact

Dryer was in a hospital room is less suggestive of guilt, particularly when his ailment was unrelated to the crime.

Even if the procedures were unnecessarily suggestive, our inquiry does not end there. Dryer must also prove there was a substantial likelihood of irreparable misidentification. It is Dryer's burden to prove this element. *State v. Webb*, 516 N.W.2d 824, 829 (Iowa 1994). There are five factors to use in evaluating the likelihood of irreparable misidentification including: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of prior descriptions; (4) the witness's level of certainty; and, (5) the length of time between the crime and the confrontation. *Id.* at 830.

Considering the above factors, we determine there was no substantial risk of irreparable misidentification. First, as the State mentions, all five witnesses saw Dryer in either a lighted school building or outside in the daylight. Dryer was not wearing a disguise and merely walked, rather than ran, from the school. All of the witnesses got a clear view of H.C.'s assailant. In fact, one witness, Officer Jobgen, identified the man leaving the school as Gene Dryer even before the show up. Furthermore, all the witnesses were paying close attention to the man who had just attacked a young student especially when he was displaying a weapon. Although there is little evidence of the witnesses' prior description, all witnesses identified Dryer with a great level of certainty. The teachers and counselor were all certain they would be able to identify the

attacker if they saw him. H.C. only needed to see Dryer for a second or two before she responded, "That's him." Lastly, the show ups occurred within an hour and one-half of the attack. All these facts reveal there was not a substantial risk of irreparable misidentification in this case. We affirm.

III. Jury Instruction.

When a defendant challenges the adequacy of the trial court's instruction concerning the definition of confinement, appellant review is for errors at law. Iowa R. App. P. 4. A challenge to improper denial of a requested instruction may not only be based on the trial court's failure to instruct, but also based upon the adequacy of the instructions given. *State v. Lindsey*, 302 N.W.2d 98, 102 (Iowa 1981). The trial court is not required to instruct the jury in the language requested by counsel, if the subject is already covered in the court's own instruction. *Id.* at 102. The court's instructions, however, must adequately cover the legal principles involved as raised by the particular facts of the case. *Id.* at 104.

During the trial, Dryer objected to Jury Instruction No. 18 which read as follows:

> A person is "confined" when her freedom to move about is substantially restricted by force, threat, or deception. A person may be confined either in the place where the restriction began or in a place to which she has been removed.
>
> No minimum time of confinement or distance of removal is required. It must be more than slight. The confinement must have significance apart from the crime of Sexual Abuse in the Second Degree.

In determining whether confinement exists, you may consider whether:
1. The risk of harm to [H.C.] was increased
2. The risk of detection was reduced
3. Escape was made easier.

Dryer contends the jury was improperly instructed because these three factors were not qualified with the language "substantially" or "significantly," in accordance with the standards enunciated in *Rich*, 305 N.W.2d at 745.

Instruction 18 was a Uniform Instruction, and we disapprove of Uniform Instructions reluctantly. *State v. Doss*, 355 N.W.2d 874, 881 (Iowa 1984). Even if it were not a Uniform Instruction, we would determine the instruction as given fully and fairly instructed the jury on the applicable law. As stated above, trial courts are not required to instruct a jury in the language requested by counsel so long as the topic is covered by the court's own instructions. *Id.* The language of instruction 18 as a whole indicated kidnapping must have independent significance. The instruction clearly indicated the confinement must be more than slight. It stated confinement or removal must have significance apart from the sexual abuse. Implicit in those statements is the recognition confinement or removal of a small or inherent degree will not suffice to elevate sexual abuse to kidnapping regardless of whether additional words preface the three listed factors. The trial court did not err in instructing the jury as it did. We affirm.

AFFIRMED.