IN THE COURT OF APPEALS OF IOWA

No. 2-278 / 91-752

FILED
AUG 27 1992
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

PATRICK McAMIS,

Appellant.

Appeal from the Iowa District Court for Linn County, Paul J. Kilburg, Judge.

McAmis appeals his conviction of first-degree kidnapping. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Amy M. Anderson, Assistant Attorney General; Denver D. Dillard, County Attorney; and Harold Denton, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Donielson and Habhab, JJ.

HABHAB, J.

FACTS

On the evening of October 20, 1990, Mindy Everette was abducted, raped, and stabbed. While driving in downtown Cedar Rapids, Everette became lost while looking for a friend's home. She pulled up in front of the Five Seasons Center and asked a man standing in front of the building for directions. She said the man, whom she later identified as the defendant-Patrick McAmis, jumped into her car, grabbed her hair, put a knife to her throat, and ordered her to drive.

Everette drove through the streets of Cedar Rapids. She was directed by the defendant to stop in an alley. When the car stopped, she attempted to escape. The defendant caught her, pushed her down to the ground, "pounded" her head into the ground, and began punching her. He then put Everette into the car and forcibly removed her clothing. Again she escaped momentarily. The defendant recaptured her, beat her,[1] and then raped her.

Then the defendant tied Everette up using her underwear and pink and black shoestrings. He ripped the speaker wires from the car and tied her with those also. He put

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1. The victim testified:

> He got my clothes off. I took off running without my pants. He caught up with me again and started hitting me some more and hitting my head in the ground some more and he got me back toward the car and tied my hands up with my pants and he raped me there.

her in the back of the car on the floor and covered her with coats. This all occurred on the southeast side of Cedar Rapids in Linn County.

The defendant then drove the car to a wooded area. He stopped the car and sexually assaulted her.[2] He started driving again and ultimately stopped, pulled her out of the car and stabbed her. She attempted to run away on several occasions, but each time the defendant caught her and continued with his stabbing.[3] Everette ran into a fence and lay very still. The defendant thought she was dead. He kicked her and then covered her with leaves. Everette heard the sound of an oncoming car, ran to the road, and flagged it down.[4] John Lieberman and Chad Haney picked

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2. The victim testified:

> He got out, walked around the car, and came around the passenger side in the back and uncovered me; and he got back in the back seat and he made me get on my hands and knees and had sex there and he also made me give him head.

3. The victim testified:

> Well, like I said, I took off running. He come running after me and I fell and he started stabbing me in my back; and he thought I was dead, so he grabbed me by my feet and drug me from one side of the ground to the other, down the grass. We ran into a fence and I got up and started taking a step and I fell back into a tree and he knocked me back down and he came up and started stabbing me some more, and I just laid there for a long time, and he kicked me a couple of times and I didn't move, so then he grabbed a bunch of grass and leaves or something and buried me there and then he left.

4. The victim testified:

> I just laid there. I heard him come back. I heard him get out of the car and start walking

Everette up on Sandy Beach Road in Johnson County. They saw a Chevette on the road and a man standing near it. When Everette told Lieberman and Haney what happened, they put her in their car and drove to a Cedar Rapids hospital.

Dr. Stewart, the emergency room physician, testified Everette sustained multiple stab wounds. He stated she had bruising on her face, knees, and elbows. She lost at least 30% of her blood volume and spent twelve days in the hospital.

Shortly after Everette was taken to the hospital, the police found the car in question on a gravel road in Johnson County. The officers also found pink and black shoelaces tied to speaker wire in the car.

The police with a search warrant seized a pair of defendant's boots from his residence. The defendant's boots were compared to a boot print which was photographed near the Sandy Beach Road crime scene. John Kilgore, a criminalist at the Department of Criminal Investigation (DCI), testified the defendant's boots were consistent with the bootprint found at the scene of the crime.

Michael Peterson, a DCI criminalist, testified he compared the results from the rape kit to the test results from the victim and the defendant. He determined the

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toward me, and that's when I heard the other car, and I got up and I ran to the car and asked them to please help me; and they pulled me in the car, and he started yelling, "You're a dead bitch. I'm going to kill you. You're a dead bitch."

seminal fluid found in the victim was consistent with that of the defendant. He further determined a blood stain on the defendant's boots was inconsistent with the defendant's blood but could have originated from the victim.

On December 4, 1990, the defendant was charged by trial information with first-degree kidnapping. Prior to trial, Everette was shown between 145 and 150 photographs. She identified a photo of the defendant as her assailant.

The jury found McAmis guilty of first-degree kidnapping. The district court sentenced him to life imprisonment. McAmis has appealed. We affirm.

SCOPE OF REVIEW

Our 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 that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

ANALYSIS

The defendant was convicted of first-degree kidnapping. The trial court submitted instruction No. 21, which provides:

> The State must prove all of the following elements of Kidnapping in the First Degree:
> 1. On or about the 20th day of October, 1990, the defendant confined Mindy Everette or removed Mindy Everette from First Avenue in Cedar Rapids to a different location.
> 2. The defendant did so with the specific intent to subject Mindy Everette to sexual abuse.
> 3. The defendant knew he did not have the consent of the victim to do so.
> 4. As a result of the confinement and removal, Mindy Everette was sexually abused.

On appeal, the defendant argues the evidence was insufficient on the fourth element: "the State failed to prove that the defendant committed sexual abuse in the second degree." He also argues he was denied effective assistance of counsel because trial counsel did not request a marshaling instruction for first-degree kidnapping which provides that second-degree sexual abuse must be proved in order to commit the charged offense. We disagree with the defendant except we reserve for postconviction relief, if defendant so desires, the ineffective assistance of counsel claim.

I. First-Degree Kidnapping.

The defendant argues the State failed to prove the elements of second-degree sexual abuse and, consequently, failed to establish he committed first-degree kidnapping.

He contends the rape and the display of the weapon and serious injury were separate because Everette testified she was raped and then driven to another location where she was stabbed. He additionally maintains that even if the stabbing could be used to show he committed second-degree sexual abuse, it would be improper here because the evidence shows the stabbing occurred in Johnson County and he was prosecuted in Linn County. Therefore, he argues the stabbing evidence could not be used to show he committed second-degree sexual abuse in Linn County. We do not find these arguments to be persuasive.

The State was required to prove the following elements of first-degree kidnapping:

> 1. The defendant confined or removed the victim.
> 2. The defendant did so with the specific intent to subject the victim to sexual abuse.
> 3. The defendant knew that he did not have the consent of the victim to do so.
> 4. As a result of the confinement/removal, the victim was sexually abused.

See Iowa Code §§ 710.1, 710.2 (1991); see also 1 Iowa Uniform Jury Instructions 1000.1 (1991).

The State emphasizes either second-degree sexual abuse or third-degree sexual abuse could have served as the basis of the jury's verdict that the defendant committed first-degree kidnapping. In State v. Mitchell, 450 N.W.2d 828, 831 (Iowa 1990), the Iowa Supreme Court held "the reference in the kidnapping statute to sexual abuse

embraces all the various degrees of sexual abuse identified in chapter 709."

The required elements of second-degree sexual abuse include the following:

> 1. The defendant performed a sex act with the victim.
> 2. The defendant performed a sex act by force or against the will of the victim.
> 3. During the sex act, the defendant:
> (a) displayed a dangerous weapon in a threatening manner; or
> (b) used or threatened to use force creating a substantial risk of death or serious injury to any person.

See Iowa Code §§ 709.1, 709.3 (1991); see also 1 Iowa Uniform Jury Instructions 900.2 (1991).

The required elements of third-degree sexual abuse include the following:

> 1. The defendant performed a sex act with the victim.
> 2. The defendant performed a sex act by force or against the will of the victim.

See Iowa Code §§ 709.1, 709.4 (1991); see also 1 Iowa Uniform Jury Instructions 900.3 (1991).

The defendant does not on appeal dispute there is substantial evidence from which the jury could find that he confined or removed the victim, without her consent, with the specific intent to subject her to sexual abuse. He maintains, however, the State failed to prove the elements of second-degree sexual abuse.

We find there is substantial evidence from which a reasonable jury could find the victim was forced to have

sexual intercourse against her will after the defendant put a knife to her throat, forced her to drive to an alley, pounded her head against the ground, and raped her. The victim testified:

> Q. So what happened when you pulled up and asked this man for directions? A. I asked him where it was and he just stood there for a minute and he jumped in the car, grabbed my hair, and had a knife to my throat and told me to drive.

This event occurred in Linn County, Iowa. We mention the place as Linn County for the defendant urges on appeal that the actual stabbing took place in Johnson County; therefore, there is no proof of sexual abuse in the second degree in Linn County.

As we have noted, the defendant, after forcing Everette into the victim's car, held a knife to her throat and told her to drive. He directed her to an alley and then raped her. We conclude a jury question existed as to whether there was "displaying a dangerous weapon in a threatening manner" during the sex act. He had the knife with him at all times as is evidenced by the stabbing of the victim in the wooded area in Johnson County. In addition, we believe a jury question was generated as to whether the defendant, during the sex act, used or threatened to use force creating a substantial risk of death or serious injury to the victim.

We find there is substantial evidence the defendant committed second-degree sexual abuse in Linn County, Iowa. With this finding, we need not address defendant's

contention that evidence of third-degree sexual abuse cannot be used as a basis for first-degree kidnapping nor need we discuss defendant's additional argument that Johnson County is the proper forum since the actual stabbing took place in that county.

Viewing the evidence in the light most favorable to the State, we find there is substantial evidence the defendant committed the crime of first-degree kidnapping. We affirm the district court on this issue.

II. Ineffective Assistance of Counsel.

The defendant also argues he was denied effective assistance of counsel because trial counsel did not request a marshaling instruction for first-degree kidnapping which provides that second-degree sexual abuse must be proved in order to commit the charged offense.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate defendant's claim without counsel's explanation for his/her conduct. We therefore preserve defendant's ineffective

assistance of counsel claim if the defendant desires later proceedings.

CONCLUSION

After considering all issues presented, we affirm the district court.

Costs of this appeal are taxed to the appellant.

AFFIRMED.