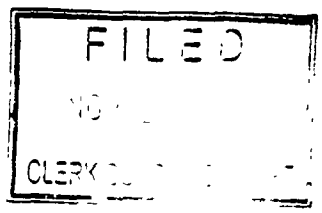
IN THE COURT OF APPEALS OF IOWA



No. 1999-258 (9-488) / 98-1412
Filed November 10, 1999

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRENT CLAYTON MOORE, SR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Edward B. deSilva, Jr., Judge.

Brent Moore appeals from his conviction and sentences, following a jury trial, for third-degree kidnapping and second-degree robbery. **JUDGMENT OF CONVICTION AFFIRMED, SENTENCE VACATED, AND REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, William E. Davis, County Attorney, and Kelly Raines, Assistant County Attorney, for appellee.

Heard by Sackett, C.J.; Huitink, Vogel, Mahan and Zimmer, JJ.; and Schlegel, S.J.*, but decided by Sackett, C.J.; Huitink, Mahan and Zimmer, JJ.; and Schlegel, S.J.

* Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

HUITINK, J.

I. Background Facts and Proceedings.

Moore was found guilty of third-degree kidnapping and second-degree robbery by a Scott County jury. Upon entry of a judgment convicting him of these offenses, the district court sentenced Moore to consecutive indeterminate ten-year terms of incarceration.

The evidence, viewed in the light most favorable to the State, indicates Moore confronted David Bowers demanding money. When Bowers refused, Moore held a knife to his throat and threatened to kill him. Bowers told Moore he would cash a check to obtain the money demanded, and the two drove to a local grocery store for this purpose. Bowers endorsed a check and passed a note to a store employee telling the employee to call the police. Moore fled the store before police arrived.

On appeal Moore challenges the sufficiency of the evidence supporting his kidnapping conviction. Moore also claims he was denied effective assistance of trial counsel. He cites counsel's failure to properly challenge the sufficiency of the evidence and object to a jury instruction containing an erroneous statement of law. In addition to these assignments of error, Moore contends the sentencing judge failed to adequately state his reasons for imposing consecutive sentences necessitating a remand for resentencing.

II. Sufficiency of the Evidence.

Our standard of review on this issue is for errors at law. *State v. Phams*, 342 N.W.2d 792, 795 (Iowa 1983). A jury's guilty verdict is binding upon us unless we conclude the record lacks substantial evidence to support such a finding. *State v. Bush*, 518 N.W.2d 778, 779 (Iowa 1994). 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. *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993). Substantial evidence does not, however, denote some elevated quantity of proof. *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994). Rather, the relevant question in our review of the case "is whether, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of facts could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

Kidnapping is defined as follows by Iowa Code section 710.1:

> A person commits kidnapp ng 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; . . . .

In *State v. McGrew*, 515 N.W.2d 36 (Iowa 1994), the court recited the law dispositive of Moore's sufficiency of the evidence claim. The court stated:

> A defendant "confines" another person in violation of our kidnapping statute only if the confinement definitely exceeds the confinement that is an inherent incident of the underlying felony. *State v. Rich*, 305 N.W.2d 739, 745 (Iowa 1981). No minimum period of confinement is required to convict a defendant of kidnapping. *Id.* Rather, the confinement must be significantly independent of the confinement incident to the commission of the underlying crime. *Id.*

> Such confinement may exist if it substantially increases the risk of harm to the victim, significantly lessens the risk of detection, or significantly facilitates escape following the commission of the underlying offense. *Id.* The rationale behind the "incidental rule" arises from our recognition that confinement of a victim, against the victim's will, is frequently an attendant circumstance in the commission of many of the crimes, notably robbery and sexual abuse. *State v. Mead*, 318 N.W.2d 440, 445 (Iowa 1982); . . . .

Id. at 39. Under Moore's version of the evidence, Bower went to the grocery store voluntarily and any resulting confinement or removal was incidental to the robbery. We disagree.

As noted earlier, Moore threatened to kill Bowers if he did not give Moore the money he demanded. Bowers's suggestion that the two go the grocery store to cash a check was made in response to this threat. Moore accompanied Bowers to the grocery store for this purpose and remained in physical proximity to Bowers during the trip to the store and while they were in the store. The jury could reasonably infer from these circumstances that Bowers was removed from his apartment to the grocery store based on Moore's threats to kill him. We hold the State's evidence was sufficient to prove Bowers's confinement and removal were more than incidental to robbery and accordingly affirm on this issue.

III. Ineffective Assistance of Counsel.

We review claims of ineffective assistance of counsel de novo. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). Generally, ineffective assistance of counsel claims are preserved for postconviction proceedings to allow trial counsel an

opportunity to defend the charges. *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987).

To demonstrate ineffective assistance of counsel, one must show that "under the entire record and totality of the circumstances" his attorney's performance was not "within the normal range of competence." *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). One must show that his lawyer failed to perform an essential duty, and that failure resulted in prejudice. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997).

In order to meet the first test, one must overcome the "strong presumption" that his attorney's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996). To succeed on the second test he must show that, but for counsel's error, the result of the proceedings would have been different. *State v. Buck*, 510 N.W.2d 850, 858 (Iowa 1994). It is not necessary to determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance claim. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

Moore's contention that counsel failed to move for judgment of acquittal based on insufficient evidence of confinement or removal is not supported by the record. Counsel's oral motion for judgment of acquittal included an express reference to evidence indicating Bowers voluntarily left his apartment with Moore. We believe the context in which this argument was made sufficiently implicated the State's proof of confinement or removal. We are unable to say counsel breached an essential duty

under these circumstances. Because the record is insufficient, we preserve for postconviction proceedings Moore's claims concerning the court's jury instructions.

IV. Sentencing.

We review the district court's sentencing decision for an abuse of discretion. *State v. Mai*, 572 N.W.2d 168, 170 (Iowa App. 1997). No abuse of discretion will be found unless the defendant shows that such discretion was exercised for reasons clearly untenable or to an extent clearly unreasonable. *Id.* Where an improper sentence is severable this court may strike invalid portions of the sentence without disturbing the remainder and remand for appropriate action in the district court. *State v. Hutt*, 548 N.W.2d 897, 898-99 (Iowa App. 1996).

It is well settled that the measure of punishment selected by the district court lies within its sentencing discretion. *State v. Patterson*, 161 N.W.2d 736, 737 (Iowa 1968). The sentencing court's duty is to consider all available sentencing options, give consideration to all circumstances of a particular case, and to exercise the sentencing option which will best accomplish justice for society and for the defendant. *State v. Robbins*, 257 N.W.2d 63, 70 (Iowa 1977).

Moore contends the district court failed to give reasons for the consecutive sentences. A sentencing court is required to state on the record its reasons for selecting a sentencing option. *Mai*, 572 N.W.2d at 170. The purpose of this rule is to allow the appellate court to determine whether there has been an abuse of discretion. *Id.* Failure to adequately do so requires us to vacate the sentence and

remand the case for resentencing. *State v. Taggart*, 525 N.W.2d 877, 882 (Iowa App. 1994) (citations omitted). The sentencing court in this case provided the following:

> Well, the Court's considered the information offered relevant to the question of sentencing including the statements made by the defendant and his attorney, and the Court finds the defendant is guilty of the crime of kidnapping in the third degree in violation of Section 710.4 of the Code of Iowa, which is a Class C forcible felony, and that the defendant has served - is confined for a term of not to exceed ten years. In connection with Count II of the Trial Information, it's the finding of this Court that the defendant is guilty of the crime of robbery in the second degree, which is also a Class C forcible felony. The defendant is sentenced under said section 902.3 and 902.9 of the Iowa Code to be confined for a term of not to exceed ten years as well. The defendant is committed to the Director of the Iowa Department of Corrections, and the Sheriff is directed to deliver the defendant into said Director's custody at the reception center at the Iowa Medical and Classification Center at Oakdale, Iowa. The defendant is credited with 117-no, it would be 124 days upon that sentence. Costs are assessed to the defendant.
> * * *

We find the court failed to give sufficient reasons for imposing consecutive sentences.

We affirm the judgment entered upon Moore's convictions but vacate his sentences and remand for sentencing. We do not mean to suggest what the new sentence should be.

JUDGMENT OF CONVICTION AFFIRMED, SENTENCE VACATED, AND REMANDED FOR RESENTENCING.

Sackett, C.J., and Mahan and Zimmer, JJ., concur; Schlegel, S.J., dissents.

SCHLEGEL, S.J. (dissenting)

I respectfully dissent.

I am not prepared to hold that the failure to object to the erroneous instruction is not the failure of an essential duty, or that it was not prejudicial. The correct instruction would have advised the jury that "Confinement or removal requires more than what is included in the commission of the crime of robbery." Instead, it totally failed to advise the jury of the correct requirements of "confinement." We cannot speculate as to what the jury might have found, had the instruction been correct. I would hold that counsel for the defendant failed in an essential duty and that prejudice resulted.

This whole series of events had a rather bizarre twist. Far from being confined, the victim was freely allowed to go to a store to obtain the proceeds of a check. He was threatened with harm in connection with the robbery. That threat was nothing that wasn't included in the crime of robbery. The facts of this case do not fit the crime of kidnapping.

I would affirm the second-degree robbery conviction. I would decide the ineffective assistance of counsel claim on direct appeal, and would hold that as to the third-degree kidnapping charge, counsel was ineffective, resulting in prejudice, and entitling the defendant to a new trial on that charge.