FILED
MAY 31 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed May 31, 1983
vs.)
JAMES LEONARD FOSTER,) 3-38 / 68167
Defendant-Appellant.)

Appeal from Polk District Court - Theodore H. Miller, Judge.

Defendant appeals his conviction of assault while participating in a felony (third-degree kidnapping) in violation of Iowa Code section 708.3 (1981). AFFIRMED.

Charles S. Lavorato of Roehrick, Lavorato, Schuster & Hassel, P.C., Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General, and John P. Messina, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ. Hayden, J. takes no part.

DONIELSON, J.

Defendant appeals his conviction of assault while participating in a felony (third-degree kidnapping) in violation of Iowa Code section 708.3 (1981). He claims that the trial court erred in overruling his motions for judgment of acquittal, asserting that there was insubstantial evidence to support his conviction in that the State failed to prove beyond a reasonable doubt that the defendant attempted to confine or remove the victims or have the specific intent to secretly confine them. He also claims that the trial court erred by failing to marshall and instruct on all the required elements of assault while participating in a felony by incorporating the definition of kidnapping into the marshalling instruction by reference to an earlier instruction rather than restating the elements of kidnapping in the marshalling instruction. We affirm.

Defendant was charged by trial information with assault while participating in a felony in connection with an incident in which he allegedly pointed a gun at Robert Niffenegger and Tonya Irving and attempted to force them into his pickup truck. The underlying felony forming the basis of the assault charge was kidnapping in the third degree (see Iowa Code § 710.4). After a jury trial, defendant was found guilty of the charged offense. In addition, the jury found by a special interrogatory that defendant was in fact attempting to kidnap the victims at the time of the assault and did so with the intent to secretly confine them. Defendant's motion for a new trial was overruled and he was sentenced to a term not to exceed five years. He brought this appeal.

I.

Defendant first claims that there was insufficient evidence that he was participating in a felony at the time of the assault and that, therefore, his motions for judgment of acquittal should have been sustained. Our guidelines for reviewing claims of evidentiary insufficiency were detailed in State v. Aldape, 307

N.W.2d 32, 39 (Iowa 1981). It is enough to reiterate here that we look at all of the record evidence and that we view it in a light most favorable to the State. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

From the record at trial, the jury could have found the following facts. At approximately 1:30 a.m. on August 7, 1981, Robert Niffenegger and Tonya Irving were walking along a street in Des Moines when defendant, who was operating a pickup truck, drove by them several times and then stopped and asked for directions to Vandalia Road, an uninhabited area of Des Moines. Defendant pulled to the side of the road where Niffenegger gave him directions. Irving waited at a nearby corner. After Niffenegger provided directions and started walking away from the truck, defendant told him to come back. Niffenegger walked back to the vehicle where defendant pointed a shotgun at him, concealing most of the weapon. The defendant told Niffenegger to tell his girlfriend to come to the truck. Niffenegger told Irving to come to the truck and when she arrived the defendant told both of them to get in the truck. They started to walk around the back of the truck and then ran toward an alley. Defendant yelled "freeze" but the couple continued running and subsequently hid underneath a van in the alley. Defendant drove down the alley but the couple remained undetected. They started to walk back to Niffenegger's home but again saw defendant driving slowly around the area. They made their way back to the Niffenegger's home. The next day they spotted the truck involved in the incident and took down its license plate number. Defendant was subsequently arrested.

"Kidnapping" is defined in Iowa Code § 710.1 in relevant part as follows:

> A person commits kidnapping when he or she either confines a person or removes a person from one place to anotner, knowing that he or she 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:
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> * * *

4. The intent to secretly confine such person.

Third-degree kidnapping was the underlying basis for defendant's conviction under Iowa Code § 708.3 which proscribes the commission of "an assault . . . while participating in a felony." "Participation" for these purposes is defined in Iowa Code § 702.13:

> A person is "participating in a public offense," during part or the entire period commencing with the first act done directly toward the commission of the offense and for the purpose of committing that offense, and terminating when the person has been arrested or has withdrawn from the scene of the intended crime and has eluded pursuers, if any there be. A person is "participating in a public offense" during this period whether the person is successful or unsuccessful in committing the offense.

Reading these statutes together, it is apparent that a defendant, to be convicted under § 708.3, does not have to successfully complete the felonious conduct forming the basis of the assault charge under that statute. In this case, defendant would be "participating" in third-degree kidnapping, the underlying charge, when he committed "the first act done directly toward the commission of the offense and for the purpose of committing that offense." § 702.13. "That offense," of course, is kidnapping as defined in Iowa Code § 710.1.

With this analysis in mind, we conclude that the trial court correctly overruled defendant's motions for judgment of acquittal. After Niffenegger gave him directions, defendant pointed a shotgun at him, directed him to call his girlfriend back and ordered both of them to get into the truck. We believe these acts to be the "first . . . done directly toward the commission of the [kidnapping] offense." With regard to the "purpose" element of the definition of "participation," we first note that purpose or intent is seldom capable of direct or positive proof and must often be determined from reasonable inferences drawn from common experience and observation. See State v. Rinehart, 283 N.W.2d 319, 321 (Iowa 1979). We believe the requisite intent to commit kidnapping may

reasonably be inferred from defendant's actions outlined above. There is sufficient evidence in the record to sustain the conviction for assault while participating in a felony under § 708.3 as that "participation" element is defined in § 702.13 because there is sufficient evidence to sustain the underlying kidnapping offense. The court did not err in failing to rule otherwise.

II.

Defendant also claims trial court erred in the giving of certain marshalling instructions to the jury. Instruction number 9 defined the elements of kidnapping. Instruction number 11, the marshalling instruction, delineated the elements of assault while participating in a felony and incorporated by reference to Instruction number 9 the elements of the underlying kidnapping offense without setting them forth again in full. Defendant contends that the court erred in failing to set forth the elements of kidnapping in the marshalling instruction and in simply referring to those elements spelled out in the prior instruction.

We do not view each instruction in isolation; rather, we view them as a whole. State v. Holmes, 276 N.W.2d 823, 826 (Iowa 1979). We find no reversible error. The jury was fully instructed as to the elements of kidnapping and assault while participating in a felony. The latter instruction clearly referred to and incorporated the elements of kidnapping contained in the former. Under these circumstances, defendant's objection was properly overruled.

Finding no error below, we affirm defendant's conviction and sentence.

AFFIRMED.