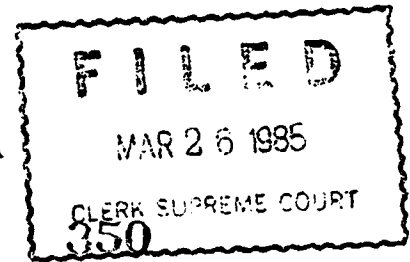


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)

Plaintiff-Appellee,)

Filed March 26, 1985

vs.)

WILLIAM BARBEE, JR.,)

4-513
84-117

Defendant-Appellant.)

Appeal from the Iowa District Court for Woodbury County - Michael S. Walsh, Judge.

Defendant appeals his conviction of first-degree kidnapping and the sentence imposed. REVERSED AND REMANDED.

Charles Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellant Defender, for the defendant-appellant.

Thomas J. Miller, Attorney General, and Marcia Mason, Assistant Attorney General, for the plaintiff-appellee.

Heard by Schlegel, P.J., Hayden, and Sackett, JJ.

SCHLEGEL, P.J.

Defendant, William Barbee, Jr., appeals his conviction of first-degree kidnapping and the sentence imposed. He argues the trial court erred: (1) in failing to submit a jury instruction for a lesser included offense of assault with intent to commit sexual abuse; (2) in receiving and responding to a jury communication when Barbee was not present; and (3) in failing to consider probation when sentencing Barbee. We reverse and remand.

The events leading to Barbee's arrest and conviction occurred on February 14, 1982. Shirley Christensen, a 58-year-old woman, returned to her car from grocery shopping. Barbee was standing next to her car with a knife. The two of them got into the car, and Barbee forced Christensen to drive in a zig-zag route. Christensen testified at trial that Barbee had her drive to a rather isolated location where they stopped. He then had her remove her clothes. She resumed driving while Barbee allegedly fondled her genitals and inserted a finger into her vagina. They eventually returned to the isolated location, remained there awhile, and then began driving again. The car became stuck in the snow in an alley. Barbee got out to push the car. Christensen locked the doors and sounded the horn. Barbee ran away, throwing his knife to the ground. While he was in the car, Barbee took about \$100 from Christensen's purse.

Barbee was tried by jury and convicted of kidnapping in the first degree, sexual abuse in the second degree, and robbery in the first degree. Because sexual abuse is an essential element of the first-degree kidnapping charge, the court ruled that those two offenses had merged. He therefore set aside the conviction for sexual abuse. Barbee was sentenced to life imprisonment for the kidnapping, and to imprisonment for a term not to exceed 25 years for the robbery.

I. Scope of Review. Our review of this criminal proceeding is at law for correction of errors only, and not de novo. Iowa R. App. P. 4.

II. Lesser Included Offense. Barbee's first argument on appeal is that the trial court erred when it refused to submit a jury instruction for assault with intent to commit sexual abuse as a lesser included offense of sexual abuse. To be an included offense the assault had to be both "factually" and "legally" included in the kidnapping. State v. Goff, 342 N.W.2d 830, 835 (Iowa 1983).

The legal test has been stated as follows:

To pass the legal or element prong of our test for lesser included offenses, the lesser offense must be composed solely of some but not all elements of the greater crime. State v. Wales, 325 N.W.2d 87, 88 (Iowa 1982). The lesser offense necessarily is included in the greater offense if it is impossible to commit the greater offense without also committing the lesser.

State v. Aswegan, 331 N.W.2d 93, 97 (Iowa 1983). That test has been met in this instance. Assault with intent to commit sexual abuse is composed of two elements: (1) an assault; (2) with the intent to commit sexual abuse. 1981 Iowa Acts, ch. 204, § 6. Both elements are elements of the greater crime of sexual abuse. Assault is an element of a charge of sexual abuse when the allegation (as in this case) is that the sex act was committed by force or against the will of the complainant. See State v. Donelson, 302 N.W.2d 125, 134-35 (Iowa 1981). The intent elements for each crime are identical. Thus, in this instance Barbee could not have committed the greater offense without also committing the lesser offense.

The "factual" test for a lesser included offense "is an ad hoc determination whether there is a factual basis in the record for submitting the included offense to the jury." State v. Fernald, 263 N.W.2d 751, 752 (Iowa 1978). The factual test is clearly met in this case. The record shows evidence of both an assault and an intent to commit sexual abuse. Further, evidence introduced at trial controverted the additional element of sexual abuse: Barbee denied committing a sex act.

Because both the factual test and legal test were satisfied in this case, the jury should have been instructed on the lesser included offense of assault with

intent to commit sexual abuse. Iowa R. Crim. P. 6.3, 21.3; see State v. Sangster, 299 N.W.2d 661, 664 (Iowa 1980). The trial court's refusal to submit such an instruction was reversible error.

The trial court did submit to the jury instructions on the elements of third degree kidnapping and of false imprisonment—two lesser included offense of first-degree kidnapping. Because the jurors rejected those lesser charges in favor of first-degree kidnapping, the State argues that the failure to submit the charge of assault with intent to commit sexual abuse was harmless error. Cf. State v. Youngbear, 203 N.W.2d 274, 278 (Iowa 1972) ("Where a choice is given to select a lesser offense than that charged and the jury refuses to do so, there is no prejudice to defendant in the court's failure to submit still lesser offenses."). That argument is without merit.

Barbee's defense consisted, essentially, of a denial that any sex act took place. He took the stand and testified to that effect, but did not controvert any of the other charges against him. Thus, he did not deny that he had no intent to commit sexual abuse or that he had assaulted Christensen. The problem with the jury instructions given was that they did not allow the jury to find in accordance with the defense: assault without sexual contact. Because assault is not a lesser included offense of third-degree kidnapping, see Goff, 342 N.W.2d at 835, the jury's alternatives were to find that a sex act occurred, or to find that no assault occurred. "The no-harm exception urged by the State does not apply here." Donelson, 302 N.W.2d at 135.

III. Communication to Jury in Defendant's Absence. More than five hours after the jurors commenced their deliberations, they submitted a question to the court. The following discussion then occurred:

THE COURT: Let the record show that the—we're outside the presence of the jury, and the defense attorney is here, along with both county attorneys who prosecuted this case.

MR. TENTINGER [the defense attorney]: Your Honor, before we go any further, do you think it's necessary to have the defendant present?

THE COURT: I don't think so, but do you want him present? I'll leave it up to you, but I don't think it is.

MR. JONES [assistant county attorney]: We've never done it in the past, ever, defendant present.

THE COURT: All right. I consider this not to be—or to be a procedural matter, but if—if you're uncomfortable, let's have him over.

MR. TENTINGER: No. That will be fine.

THE COURT: I'll leave that up to you.

MR. TENTINGER: That be fine.

THE COURT: Without his presence?

MR. TENTINGER: That be fine.

The court then proceeded to draft an answer to the jury communication.

Barbee argues that the reception and response to the jury's communication when he was absent violated his constitutional rights of due process and confrontation, as implemented by Iowa Rules of Criminal Procedure 18(5)(g) and 25(1). The State claims that the record is inadequate and that an evidentiary hearing should be held to determine whether Barbee waived his right to be present.

We do not accept the State's argument. A written record of the relevant proceedings exists. The record gives no indication whatsoever that Barbee knew of the proceeding and waived his rights. Barbee's counsel could not waive Barbee's right to be present. State v. Foster, 318 N.W.2d 176, 178 (Iowa 1982). Under these circumstances, it would be improper to forego review because of speculative matters that do not appear in the record.

The jury communication was an inquiry asking for information on a point of law. Therefore, the trial court had no discretion in deciding whether the defendant and counsel need be present. State v. Griffin, 323 N.W.2d 198, 200-01

(Iowa 1982). "[A]ll communications between court and jury are required to be given in the presence of the defendant and counsel." State v. Williams, 341 N.W.2d 748, 751 (Iowa 1983). Thus, whatever the practice was in Woodbury County, the trial court erred in going forward with the proceedings while Barbee was absent.

IV. Failure to Consider Probation. Because Barbee was a juvenile at the time of the offenses, the State concedes that the trial court had discretion to grant probation, State v. Greiman, 344 N.W.2d 249, 253 (Iowa 1984), and that failure to consider that sentencing option was error that would require resentencing if the conviction were not reversed.

REVERSED AND REMANDED.