IN THE COURT OF APPEALS OF IOWA

No. 5-352 / 94-1455

STATE OF IOWA,

Plaintiff-Appellee,

vs.

RICHARD ALAN ABEL,

Defendant-Appellant.

FILED
JUL 25 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Muscatine County, Bobbi M. Alpers, Judge.

Defendant appeals from judgment and sentence, following jury trial, entered upon his conviction of second-degree kidnapping in violation of Iowa Code sections 710.1(3), 710.1(4) and 710.3 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Richard R. Phillips, County Attorney, and Dana Christiansen, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Habhab and Cady, JJ.

SACKETT, P.J.

Defendant-appellant Richard Alan Abel was convicted following a jury trial of kidnapping in the second degree in violation of Iowa Code sections 710.1(3) and 710.1(4) and 710.3 (1993). Defendant contends his trial attorney was not effective because he did not object when the trial court failed to give an instruction defining confinement. We affirm.

Defendant's victim was his former wife who he had been ordered by the district court not to contact. Despite the order, defendant, during daylight hours, went to the building where she worked to talk to her about visitation with their children. While there, defendant hit her and then dragged her out of the building, threatened her with a gun, and forced her to get in his car. He drove about ten miles holding her at gunpoint. He was pursued by police officers. Defendant eventually dropped the gun and stopped the car.

Defendant sought to justify his behavior over his fear for the safety of his son. Defendant provided expert testimony he was temporarily insane and the State disputed it.

An instruction defining confinement as used in the kidnapping statutes was not requested by defendant's attorney nor did defendant's attorney object to the failure of the trial court to give the instruction. No such instruction was given by the trial court. Defendant contends his trial counsel was not effective because of this.

The State charged defendant with alternative means of kidnapping in the second degree, one with the intent to secretly confine and one with the intent to do serious injury. Under either theory, the State had to prove defendant's former wife was removed or confined to a greater extent than that which was merely incidental to the commission of another crime. *State v. Misner*, 410 N.W.2d 216, 222-23 (Iowa 1987).

Defendant contends the jury should have been told:

1. No minimum period of confinement or distance of removal is required for conviction of kidnapping.
2. The period of confinement or distance of removal must exceed what is normally incidental to the commission of the underlying crime.
3. The confinement or removal must have significance independent from the underlying crime in one of the following ways:
   a. substantially increases the risk of harm to the victim,
   b. significantly lessens the risk of detection, or
   c. significantly facilitates escape following the consummation of the underlying offense.

Defendant contends the instruction was necessary because there was a question of whether the confinement substantially increased the risk of harm to the victim as the risk of harm was already substantial at the job site in that defendant hit her there and indicated a willingness to use weapons against persons seeking to intercede for her protection. Defendant also contends he did not increase his chances of not being detected. He advances he went to his former wife's job site in daylight hours and was observed there by a number of persons who witnessed the assault and entry in the car.

Defendant also contends he did not prevent his former wife from sounding an alarm. He contends, if the instruction had been given, there was a reasonable probability he would not have been found guilty of kidnapping in the second degree.

Established principles govern our review of defendant's Sixth Amendment claim that trial counsel was ineffective. Our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). Ineffective assistance is measured by whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93; *see Schertz v. State*, 380 N.W.2d 404, 408 (Iowa 1985). In examining counsel's conduct, we review de novo the totality of relevant circumstances, *State v. Yaw*, 398 N.W.2d 803, 805 (Iowa 1987), mindful of the presumption that counsel performed competently. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986). "Reasonableness under prevailing professional norms" is the standard by which we measure counsel's performance. *Strickland*, 446 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694.

The removal and confinement clearly went beyond that necessary to facilitate an assault. Defense counsel focused not on the confinement issue but on a diminished responsibility and insanity defense. Defendant has failed to meet the necessary burden to succeed on this issue.

AFFIRMED.