

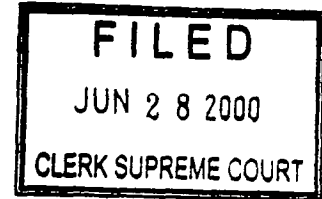
IN THE COURT OF APPEALS OF IOWA

No. 0-301 / 99-0256
Filed June 28, 2000

**STATE OF IOWA,
Plaintiff-Appellee,**

vs.

**CHESTER GREENUP,
Defendant-Appellant.**



Appeal from the Iowa District Court for Polk County, Larry J. Eisenhower,
Judge.

On appeal from his conviction and sentence for first-degree kidnapping,
the defendant contends the evidence is insufficient to support the conviction. He
also contends his counsel was ineffective for opening the door to the State's
questioning of whether he was a violent man and for failing to object to the
evidence of the victim's prior kidnapping. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney
General, John P. Sarcone, County Attorney, and George Kamas, Assistant
County Attorney, for appellee.

Heard by Sackett, C.J., and Vaitheswaran, J., and Habhab, S.J.

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

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SACKETT, C.J.

Defendant-Appellant, Chester Greenup, appeals his conviction for first-degree kidnapping, in violation of Iowa Code sections 710.1 and 710.2 (1997). Defendant contends: (1) there is insufficient evidence to support his conviction; and (2) his trial counsel was ineffective. We affirm.

On June 8, 1998, eighty-four-year-old Dixie Burdic stopped in Des Moines overnight while on her way to visit a friend in Fresno, Iowa. Later that evening Burdic did not feel well and about midnight she drove to Lutheran Hospital. She parked in the emergency parking lot. While she was walking to the hospital the defendant grabbed her and threw her into the backseat of her car. Defendant then got into Burdic's car and drove away.

Defendant asked Burdic if she had any money and she gave him approximately \$150. Defendant then drove to Wayne and Cleveland Streets in Des Moines. Defendant got in the back seat with Burdic and sexually assaulted her. Defendant then pulled Burdic out of her car and drove away. Burdic testified from the time she was confronted by defendant in the hospital parking lot until the time she was left by the railroad tracks approximately fifteen to thirty minutes had passed.

Defendant contends there is insufficient evidence to support a conviction for first-degree kidnapping. Specifically he alleges the removal or confinement of Burdic was merely incidental to the other crimes and there was no evidence to prove he had the specific intent to commit sexual abuse during the confinement or removal.

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Our review of sufficiency-of-evidence challenges is for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). The jury's findings of guilt are binding on appeal if supported by substantial evidence. *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998); *State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984). Substantial evidence is such evidence as could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Allen*, 348 N.W.2d at 247. In deciding whether there is such substantial evidence, we view the evidence in the light most favorable to the State. *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993).

Defendant was convicted under Iowa Code section 710.1 and 710.2. The acts of confinement and the intent to commit sexual abuse must coexist for some period of time to constitute kidnapping. Iowa Code § 710.1 (1997); *State v. Wilcoxon*, 549 N.W.2d 304, 305-306 (Iowa App.1996) (citing no minimum period of confinement or distance of removal is required for conviction of kidnapping). The element of intent is seldom susceptible to proof by direct evidence. *State v. Finnel*, 515 N.W.2d 41, 42 (Iowa 1994). Rather, proof of intent usually depends on circumstantial evidence and inferences drawn from such evidence. *Id.* The fact finder may determine intent by such reasonable inferences and deductions as may be drawn from facts proved by evidence in accordance with common experiences and observation. *State v. Howard*, 404 N.W.2d 196, 198 (Iowa App.1987). The requirement of proof beyond a reasonable doubt is satisfied if it is more likely than not that the inference of intent is true. *Finnel*, 515 N.W.2d at 42.

In order to "confine" another person in violation of Iowa Code section 710.1, the confinement must exceed what is inherently incident in the underlying felony. This is called the "incidental rule." *State v. McGrew*, 515 N.W.2d 36, 39 (Iowa 1994); *State v. Rich*, 305 N.W.2d 739, 745 (Iowa 1981). "No minimum period of confinement is required to convict a defendant of kidnapping." *McGrew*, 515 N.W.2d at 39. The confinement must, however, be "significantly independent of the confinement incident to the commission of the underlying crime." *Id.* Confinement reaches the level required for section 710.1 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.* If the defendant merely "seizes" the victim during the commission of the crime, this does not rise to the level of confinement required for kidnapping. *State v. Mead*, 318 N.W.2d 440, 445 (Iowa 1982).

The policy behind the incidental rule is that confinement against the victim's will is often an attendant circumstance in the commission of many of the underlying crimes in section 710.1. *McGrew*, 515 N.W.2d at 39; *Mead*, 318 N.W.2d at 445; see also Natalie A. Kanellis, Note, *Kidnapping in Iowa: Movements Incidental to Sexual Abuse*, 67 Iowa L.Rev. 773, 780 (1982). The legislature did not intend to "afford prosecutors the option of bootstrapping convictions for kidnapping, carrying life sentences, onto charges for crimes for which the legislature provides much less severe penalties." *McGrew*, 515 N.W.2d at 39.

Defendant confined Burdic for a longer period of time than was necessary to commit the sexual assault and theft. Burdic was not free to leave the car for

some fifteen to thirty minutes while defendant was driving with her in the backseat. Defendant substantially increased the risk of harm to Burdic by leaving her in an unfamiliar area of Des Moines. Defendant had the opportunity to commit all of these offenses in the hospital parking lot. Forcing Burdic into her car and driving her to another location is indicative of intent to avoid detection and facilitate escape.

Sexual abuse occurs when a sex act is performed against the will of the other. Iowa Code § 709.1 (1997). Burdic's testimony established an act of sexual abuse took place in the backseat of her car. The State is not required to supply corroborating evidence of her testimony. Iowa R. Cr. P. 20(3); Iowa Code § 709.6. There is substantial evidence to support a finding that defendant sexually abused Burdic. Therefore, the jury could reasonably infer defendant had formed the intent to sexually abuse Burdic. There is substantial evidence to support a finding that defendant confined Burdic at the time of the sexual abuse and that he had formed the requisite intent to commit the sexual abuse during the confinement.

Defendant also contends his trial counsel was ineffective. Specifically he contends counsel was ineffective for: (1) "opening the door" on the subject of defendant's character by asking him on direct exam whether he was a violent man; and (2) failing to object to evidence of an unrelated, prior kidnapping of the victim. Ordinarily, we reserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). However, we will resolve ineffective-assistance-of-counsel claims on

direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998).

The defendant and State agree these claims should be preserved for postconviction relief if the record is inadequate. We feel the record is inadequate to properly rule on an ineffective assistance of counsel claim. For these reasons, we affirm defendant's conviction and reserve his ineffective assistance of counsel claims for postconviction relief proceedings, if any are brought.

AFFIRMED.