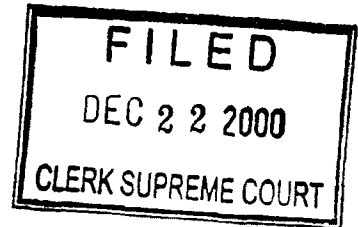


IN THE COURT OF APPEALS OF IOWA

No. 0-744 / 00-0387
Filed December 22, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

ERIC MEL THOMPSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, G.C. Abel,
Judge.

Eric M. Thompson appeals from the district court's judgment and sentence, following a jury trial, convicting him of first-degree kidnapping in violation of Iowa Code sections 710.1(3) and 710.2 (1999) and assault causing bodily injury in violation of sections 708.1(1) and 708.2(2). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Christen C. Odell, Assistant Attorney General, Richard Crowl, County Attorney, and Jeffrey TeKippe, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Mahan, J., and Habhab, S.J.*

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

MAHAN, J.

Eric M. Thompson appeals from the district court's judgment and sentence, following a jury trial, convicting him of first-degree kidnapping in violation of Iowa Code sections 710.1(3) and 710.2 (1999) and assault causing bodily injury in violation of sections 708.1(1) and 708.2(2). He contends the district court erred in (1) permitting the victim to testify by closed-circuit television deposition out of his presence in violation of Iowa Code section 915.38, (2) finding sufficient evidence to support submitting the offense of first-degree kidnapping to the jury, and (3) finding substantial evidence in the record to support submitting instructions on serious injury as an alternate means of committing first-degree kidnapping. We affirm.

The victim is ten years old and the friend of Thompson's daughter. On October 15, 1999, Thompson called the victim's mother and offered to drive the victim to his parent's home so she could play with his daughter. The victim agreed and her mother consented. Thompson picked up the victim at her home in his pickup truck.

While en route, Thompson told the victim he knew a shortcut and took the next exit off of the interstate. He drove down several back roads to an area next to a pond and a harvested field of corn. Thompson told the victim they were going to go "four-wheeling" in the field and instructed her to sit on his lap. Thompson took his shorts and underwear down and took the victim's pants and underwear off. He instructed her to lie down on the seat of the truck. She punched and kicked him, giving him a bloody nose. Thompson slapped and

choked the victim, causing a cut or scratch under her eye. He fondled her vagina with his fingers, causing bruising and a small tear. Thompson had the victim put her mouth on his penis. He threatened to kill her if she told anyone what he had done.

Thompson drove back to the interstate, stopped at McDonald's, and continued toward his parent's home. As they neared their destination, Thompson again drove down back roads and stopped at a wooded area. He instructed the victim to get out of the car and sit on a log. Thompson removed his shorts and underwear and had the victim put her mouth on his penis. He masturbated until he ejaculated. Semen fell on the victim's hair and clothes. Thompson got dressed, and he and the victim continued their trip to his parent's house.

No one was at the house when they arrived. The victim was bleeding from the small tear near her vagina. Blood stained the seat in the pickup truck. When she told Thompson her underwear was blood-soaked, he told her to take it off and give it to him. He instructed her to give him her t-shirt, which also had blood on it.

Thompson's parents returned a short time later. They had not been expecting Thompson. Thompson's wife and daughter arrived sometime later. Thompson's daughter and the victim played for the remainder of the afternoon. Thompson called the victim's mother and told her the victim injured herself falling off a tree swing. They all went out to eat together, and Thompson's wife and mother drove the victim home.

When she arrived home, the victim's mother noticed the missing underwear and the blood on the inside of her jeans. The victim told her parents Thompson would kill her if she told them what happened. Her parents took her to an emergency room where she was examined by doctors and interviewed by police. Evidence was gathered and photos of her injuries were taken. The next day, police retraced Thompson's route with the victim. She accurately pointed out geographical landmarks and the two secluded locations where Thompson sexually abused her.

Officers executed a search warrant, seized evidence, and arrested Thompson. They discovered the victim's t-shirt in a paper bag in Thompson's Jeep. They found the victim's blood-soaked underwear stuffed in a gas can. DNA testing of bloodstains in Thompson's pickup matched the victim's blood profile. Semen samples taken from the victim's clothes matched Thompson's DNA profile.

The State originally charged Thompson with first-degree kidnapping, second-degree sexual abuse, and attempted murder. The State filed an amended trial information on January 14, 2000, charging Thompson with count I: kidnapping in the first degree, in violation of Iowa Code sections 710.1(3) and 710.2; and count II: attempt to commit murder, in violation of Iowa Code section 707.11 (1999). Following a hearing before trial, the trial court granted the State's pretrial motion pursuant to Iowa rule of criminal procedure 12, permitting the victim to testify via videotaped deposition outside the presence of the defendant.

A jury found Thompson guilty of first-degree kidnapping and assault causing bodily injury, a lesser included offense of attempted murder. The court merged the assault conviction with the kidnapping conviction for purposes of sentencing. The court sentenced Thompson to life in prison and required him to register as a person convicted of a sexually violent offense, pursuant to Iowa Code Chapter 692A. Thompson appeals.

Victim's Testimony. We review Thompson's claimed violation of the Confrontation Clause de novo. *State v. Jefferson*, 574 N.W.2d 268, 271 (Iowa 1997).

Thompson argues the court failed to abide by the procedures outlined in Iowa Code section 915.38, thereby denying his constitutional right to confront witnesses. Specifically, he argues section 915.38(2) requires the court to make a finding the child was unavailable to testify at trial. He contends the State neither pled nor alleged the victim was unavailable to testify, and the court made no such finding. Therefore, Thompson argues, the videotaping of her testimony was improper. Further, he contends the State failed to present substantial evidence examining the victim in Thompson's presence would have significantly traumatized her any more than requiring her to testify in court but outside Thompson's presence.

The State's interest in protecting child witnesses from the trauma of testifying in certain cases may be sufficiently important to outweigh, at least in some cases, the defendant's right to face his accusers in court. *Maryland v. Craig*, 497 U.S. 836, 853, 855, 110 S. Ct. 3157, 3167, 1369, 111 L. Ed. 2d 666,

683, 685 (1990). To find the requisite showing of necessity by the State, the trial court must find: (1) the procedure is necessary to protect the welfare of the child; (2) the child would be traumatized, not by the courtroom generally, but by defendant's presence; and (3) the emotional distress suffered by the child witness in the presence of defendant would be more than *de minimus*. *Craig*, 497 U.S. at 855-56, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685. If the trauma that will result from testifying in defendant's physical presence impairs or handicaps a child's ability to communicate, protective measures must be adopted. *State v. Rupe*, 534 N.W.2d 442, 444 (Iowa 1995).

Iowa Code section 915.38 provides:

The court may . . . order that the testimony of a minor . . . be taken by recorded deposition for use at trial. . . . In addition to requiring that such testimony be recorded by stenographic means, the court may on motion and hearing, *and upon a finding that the minor is unavailable as provided in Iowa rules of evidence 804(a)*, order the videotaping of the minor's testimony for viewing in the courtroom by the court. The videotaping shall comply with the provisions of rule of criminal procedure 12(2)(b), and shall be admissible as evidence in the trial.

Iowa Code § 915.38(2) (emphasis added). Contrary to Thompson's contention, the plain language of the statute does not require the State allege the minor's unavailability in its motion pursuant to the statute. A witness is "unavailable," according to Iowa rule of evidence 804, when she ". . . is unable to be present or testify at the trial or hearing because of death or then existing physical *or mental illness or infirmity*." Iowa R. Evid. 804(a)(4) (emphasis added).

At the hearing on State's pretrial motion pursuant to Iowa rule of criminal procedure 12, the State presented the expert testimony of Coleen Cusick, the

victim's therapist and Linda Madison, a licensed psychologist. Cusick testified the victim showed signs of post traumatic stress disorder (PTSD) and "definitely" suffered mental damage from the sexual assault. The victim told Cusick that during the assault, Thompson threatened to kill her if she told anyone what he did. As of the hearing date, the victim remained unable to discuss the assault with her parents. The victim described to Cusick "huge fears of having to face [Thompson] in a courtroom setting." The victim "feels the threat to her life is very real." Cusick testified the victim would be further traumatized if she had to face Thompson in the courtroom. She explained, "It would really impact her ability to give the information she needs to. . . . I think that she would freeze. I think she would shut down. I think that fear would overtake her."

Linda Madison conducted a psychological evaluation of the victim. She testified the victim's high degree of anxiety and moderate depression were signs she had been traumatized by the sexual assault. If forced to testify in front of Thompson, the victim "could become flustered and not give adequate or accurate answers." The victim made spontaneous comments to Madison that she wished Thompson could be "locked up so she couldn't have contact with him."

After hearing the testimony of the State's experts, the district court found as follows:

Licensed therapist Coleen Cusick clinically examined the victim and concluded that she has suffered mental trauma and forcing her to testify in the presence of the Defendant would inflict additional trauma causing her to "freeze" and "shutdown" to the point that fear would overtake her. Licensed psychologist Lynda [sic] Madison also examined the victim and testified at hearing that she suffers a high degree of anxiety. Madison highly recommended that anything to reduce trauma to the victim during trial would be in her

best interest. In light of the evidence presented, the Court finds that this matter presents a situation where deposition testimony of the victim is appropriate.

The findings of the district court meet the three-prong test of *Craig* and amount to a finding of “unavailability.” The district court’s findings indicate it determined the victim was “unavailable” due to her then-existing mental condition. We affirm the district court on this issue.

Sufficiency of the Evidence. We review Thompson’s challenge to the sufficiency of the evidence for errors at law. Iowa R. App. P. 4. The standards governing a challenge to the sufficiency of the evidence are well established:

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the state, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. Direct and circumstantial evidence are equally probative so long as the evidence raises “a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture.” It is necessary to consider all the evidence in the record and not just the evidence supporting the verdict to determine whether there is substantial evidence to support the charge. Substantial evidence means evidence which would convince a rational factfinder [sic] that the defendant is guilty beyond a reasonable doubt.

State v. Mills, 458 N.W.2d 395, 397 (Iowa App. 1990) (quoting *State v. Wheeler*, 403 N.W.2d 58; 60 (Iowa App. 1987)).

Thompson contends the detours taken from the most direct route to his parent’s home and the amount of time the victim was restrained were incidental to the sexual abuse committed on the victim. Therefore, he argues, the trial court should have granted his motion for directed verdict. We disagree.

“Confinement,” for the purposes of our kidnapping statute, requires more than a confinement or removal that is merely an incident of the commission of

sexual abuse. *State v. Ristau*, 340 N.W.2d 273, 275 (Iowa 1983). No minimum period of confinement or distance of removal is required, but it must exceed what is normally incidental to the commission of the sexual abuse. *State v. Wilcoxon*, 549 N.W.2d 304, 306 (Iowa App. 1996). In addition, the confinement or removal must have significance independent from the act of sexual abuse itself in one of the following ways: (a) substantially increase the risk of harm to the victim; (b) significantly lessen the risk of detection; or (c) significantly facilitate escape following the consummation of the sex abuse offense. *Id.*

Thompson took the victim to secluded areas approximately forty miles apart, thereby reducing the risk of detection. The duration of confinement and the distance traveled were longer than the time required to commit the sexual abuse. The remoteness of the areas increased the risk of harm to the victim, as she was too young to drive or otherwise escape. The evidence of extended confinement and removal supports the first-degree kidnapping conviction. We affirm the district court on this issue.

Jury Instruction. We review Thompson's challenge to the sufficiency of the evidence to support submission of a jury instruction for correction of errors at law. Iowa R. App. P. 4. Thompson argues the court erred in finding substantial evidence in the record to support submitting instructions on "serious injury" as an alternate means of committing first-degree kidnapping. He contends the symptoms described by therapists at trial do not constitute serious injury as defined in the jury instructions.

The State's experts, Cusick and Madison, testified at trial that the victim suffers from post traumatic stress disorder (PTSD), a mental diagnosis. The PTSD symptoms were caused by Thompson's sexual abuse and threats against her life. She began therapy shortly after the incident, and will continue long-term. At the time of trial, her therapist Cusick could not provide a date when treatment might end. Her mental condition impairs her on a daily basis, and will probably continue to do so well into the future, especially given the fact her trauma was exacerbated due to her young age.

The evidence of the victim's mental and emotional status demonstrates she suffers from "serious injury," defined in the jury instructions as follows: "a disabling mental illness; or condition which cripples, incapacitates, weakens or destroys a person's normal mental functions. . . ." Sufficient evidence supports the trial court's submission of the "serious injury" alternative to the jury. We affirm the trial court on this issue.

AFFIRMED.