IN THE COURT OF APPEALS OF IOWA

No. 0-451 / 09-0743
Filed October 6, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICAH SHERIF MATTHEWS,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Douglas S. Russell, Judge.

The defendant appeals his judgment and sentence for first-degree kidnapping. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Janet M. Lyness, County Attorney, and Elizabeth A. Beglin, Assistant County Attorney, for appellee.

Heard by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

VAITHESWARAN, P.J.

This appeal arises from Micah Matthews's early-morning entry into a woman's Iowa City home, his attempt to obtain money at her home and bank, and his sexual assault of the woman. The district court found Matthews guilty of first- and second-degree kidnapping, first-degree sexual abuse, and first-degree burglary, but found that because first-degree sexual abuse was a lesser-included offense of first-degree kidnapping, it merged with the first-degree kidnapping count.

On appeal, Matthews contends (1) there was insufficient evidence to support the court's finding of guilt on the first-degree kidnapping count, and (2) his trial attorney was ineffective in failing to file a motion to suppress certain evidence.[1]

I. Sufficiency of the Evidence—First-Degree Kidnapping

Sufficiency-of-the-evidence claims are reviewed for correction of errors at law. *State v. Johnson*, 770 N.W.2d 814, 819 (Iowa 2009). If the court's findings are supported by substantial evidence, those findings will not be disturbed on appeal. *Id.*

The district court set forth the elements of first-degree kidnapping as follows:

> 1. On or about the 5th day of June 2007, the Defendant
>   a. confined [R.F.]; OR
>   b. removed [R.F.] from her home . . . ; OR removed [R.F.]

[1] Matthews does not challenge the court's findings of guilt on the second-degree kidnapping and first-degree burglary counts and only challenges the findings on the sexual-abuse count in the event we overturn the first-degree kidnapping count with which it merged.

from the UICCU [bank] in Iowa City, Iowa; OR
c. secretly confined [R.F.]
2. The Defendant did so with the specific intent to subject [R.F.] to sexual abuse.
3. The Defendant knew he did not have the consent of [R.F.] to do so.
4. As a result of the confinement or removal, [R.F.] suffered
a. a serious injury; OR
b. was sexually abused.

See also Iowa Code § 710.1 (2007) (setting forth elements of first-degree kidnapping). The court additionally stated,

> "Confinement" or "removal" requires more than what is included in the commission of the crime of sexual abuse. A person is "confined" when her freedom to move about is substantially restricted by force, threat or deception. The person may be confined either in the place where the restriction began or in a place to which she has been removed. No minimum time of confinement or distance of removal is required. It must be more than slight. In determining whether confinement or removal exists, the Court may consider whether:
> 1. The risk of harm to [R.F.] was increased.
> 2. The risk of detection was reduced.
> 3. Escape was made easier.

The court found in relevant part that Matthews

> confined [R.F.] in her home at gunpoint and then removed her to the University of Iowa Community Credit Union ATM. Thereafter, he confined her in the automobile at gunpoint and removed her from the credit union to her home where he continued to confine her. He removed her back to the home and confined her there with the specific intent to subject her to sexual abuse as he said at the ATM he would. He did not have the consent of [R.F.] to confine or remove her or to commit sexual abuse upon her. This is clear from [R.F.]'s actions and from his own actions. As a result of the removal to and confinement in her home after the ATM visit, [R.F.] suffered a serious injury inflicted by the Defendant and was sexually abused by him.

A. Specific Intent. Matthews first argues the evidence did not show he "removed [R.F.] from the ATM to her home with the specific intent to commit

sexual abuse." He asserts his intent was rather "to obtain money." A rational fact-finder could have found otherwise.

Matthews entered R.F.'s home and bedroom, pointed a gun at her, and demanded $500. When R.F. told him she did not have that much cash in the house, he responded, "Well then, I'm going to have to . . . fuck you." At some point during this period, he also ran his hand up R.F.'s leg and thigh.

Matthews ordered R.F. to drive him to a nearby bank. She drove to the bank at gunpoint and unsuccessfully attempted to withdraw $500 from an ATM machine. Matthews said, "I'll have to fuck you now," and made R.F. drive back to her house.

Once there, R.F. ran into the house and locked the door behind her. Matthews kicked the door open, grabbed R.F., and told her to go to her bedroom. When R.F. refused, Matthews used his gun to hit her on her head. R.F. lost consciousness. She regained consciousness briefly, saw that Matthews was sexually assaulting her, and lost consciousness again.

A reasonable fact-finder could have found this evidence sufficient to prove that Matthews "removed [R.F.] from the ATM to her home with the specific intent to commit sexual abuse."

B. Nature of Confinement. Matthews next argues "any confinement which occurred during the sexual abuse was only incidental to the sex act itself." He is correct that the confinement or removal required of kidnapping must be significantly independent of the confinement incidental to the commission of the sexual abuse. *See State v. McGrew*, 515 N.W.2d 36, 39 (Iowa 1994); *State v.*

Rich, 305 N.W.2d 739, 745 (Iowa 1981). He is incorrect that the record lacks substantial evidence to support this requirement.

R.F. was confined for more than two hours.[2] *See State v. Davis*, 584 N.W.2d 913, 917 (Iowa Ct. App. 1998) (noting the victim "was confined for at least thirty minutes before the act and at least that after the sexual abuse"); *cf. State v. Marr*, 316 N.W.2d 176, 178 (Iowa 1982) (noting attack lasted only two or three minutes before it was interrupted by the victim's husband). The attack took place early in the morning in R.F.'s home, which "increased her risk of harm and lessened the risk of detection." *See McGrew*, 515 N.W.2d at 40. When Matthews first entered R.F.'s bedroom, he made sure no one else was in the house, stating, "Cause if there is I'll kill them." *See Davis*, 584 N.W.2d at 917 (stating defendant "took specific attempts to seclude [the victim] and cut off her contact with others"). Matthews held R.F. at gunpoint and used the gun in an effort to get R.F. to the bedroom after they returned from the bank. *See id.* at 916 (considering "whether the victim believed her captor possessed a weapon and whether the victim felt her life in danger"). Matthews tied R.F.'s hands and feet behind her and put a gag in her mouth.[3] *See Rich*, 305 N.W.2d at 745–46 (stating the binding of a victim's hands is "not necessary to the commission of the sexual abuse and is not a normal incident of that offense"); *State v. Tryon*, 431 N.W.2d 11, 14 (Iowa Ct. App. 1988) (stating defendant's binding of woman was significantly independent of sexual abuse). A reasonable fact-finder could have

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[2] R.F. believed Matthews broke into her house around 4:00 a.m. ATM receipts showed transactions were attempted at 4:56 a.m. and 5:04 a.m. The bank's surveillance camera showed her car leaving the ATM at 5:10 a.m. R.F.'s 911 call was made at 6:21 a.m.

[3] While R.F. testified these actions were taken after the sexual abuse ended, there is some evidence that Matthews may have bound R.F. before or during the assault.

found this evidence sufficient to establish that the confinement exceeded what was inherent in the crime of sexual abuse.

We affirm the district court's finding of guilt on the first-degree kidnapping count.

II. Ineffective Assistance of Counsel

In a pro se filing, Matthews argues he was "forced to give a DNA sample." He maintains his "original arrest [for an unrelated crime] was illegal and without probable cause," requiring suppression of "any evidence seized or taken in violation of the Fourth Amendment." Because his trial attorney did not file a motion to suppress the DNA evidence, he raises this issue under an ineffective-assistance-of-counsel rubric.[4]

To prevail, Matthews must show that trial counsel breached an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Our review is de novo. *State v. Nitcher*, 720 N.W.2d 547, 553 (Iowa 2006).

As a preliminary matter, we note the record is adequate to decide this issue. *See State v. Taylor*, 689 N.W.2d 116, 134 (Iowa 2004). That record reveals the following facts. R.F. underwent a sexual assault exam. Employees of the Iowa Department of Criminal Investigation (DCI) extracted DNA from the sexual assault evidence collection kit as well as a telephone cord at the scene. The DNA from both sources was used to develop a "DNA profile" of the suspect. Police subsequently obtained DNA samples from eight suspects, none of which

[4] Matthews's trial attorney filed a motion to suppress Matthews's post-arrest statement to officers but did not move to suppress the DNA evidence.

matched the profile. The DCI then entered the profile into a computer database managed by the FBI. The profile matched that of Matthews.

Police obtained a search warrant to secure a DNA sample from Matthews. The warrant was executed at the same time as an arrest warrant for an unrelated crime. The sample obtained from Matthews was compared to the previously obtained profile. A DCI employee opined that Matthews's DNA matched the profile.

These facts clarify that the DNA sample obtained from Matthews following his arrest was pursuant to a separate search warrant and not pursuant to an arrest warrant for the unrelated crime, as Matthews contends. Matthews does not challenge the validity of the search warrant. Accordingly, as the DNA sample was obtained pursuant to an unchallenged warrant, trial counsel did not breach an essential duty in failing to file a motion to suppress the sample. *See State v. Peck*, 238 N.W.2d 785, 788 (Iowa 1976) (rejecting challenge to suppression ruling where "[d]efendant has not asked that we pass judgment on the validity of the search warrant" on the ground the warranted search was poisoned by an initial intrusion); *see also State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009) ("[C]ounsel has no duty to raise an issue that has no merit.").

We affirm Matthews's judgment and sentence for first-degree kidnapping and reject his ineffective-assistance-of-counsel claim.

AFFIRMED.