

IN THE COURT OF APPEALS OF IOWA

No. 0-675 / 10-0079
Filed December 8, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL DONTE MOSS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg,
Judge.

Michael Donte Moss appeals from the judgment and sentence entered
following his conviction of murder in the first degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa Wilson, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney
General, John P. Sarcone, County Attorney, and Steven Foritano and Justin
Allen, Assistant County Attorneys, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Doyle, JJ. Tabor, J.,
takes no part.

EISENHAUER, P.J.

Michael Donte Moss appeals from the judgment and sentence entered following his conviction of murder in the first degree. The State submitted three theories by which the jury could find Moss guilty of first-degree murder: felony murder by kidnapping, felony murder by robbery, and premeditated murder. The jury returned a general verdict finding Moss guilty. Moss contends his conviction must be vacated and the case remanded for new trial because there is insufficient evidence to support conviction on either theory of felony murder. Because we conclude sufficient evidence supports Moss's conviction under each theory charged, we affirm.

I. Background Facts and Proceedings. The following facts are not in dispute: On July 21, 2008, Moss and his friend, Nick Harris, went to Oakridge apartments in search of Andrew Hughes, who allegedly owed Moss \$200. The men located Hughes in an apartment known for drug activity. He appeared nervous to see Moss and stated he did not have the \$200 he owed Moss on his person, but suggested they go to his bank to get the money.

The three men went to the parking lot of the apartment complex where Hughes gave Moss the keys to his SUV after Moss stated, "I'm driving." The vehicle would not start with the key in the ignition, so Hughes had to hotwire the vehicle. Harris overheard Moss tell Hughes he had a gun. Moss also told Hughes if he did not have the money, he was going to beat Hughes up. Harris observed Hughes to be acting scared and nervous.

The men drove to First National Bank in Ankeny with Moss driving the vehicle, Harris sitting directly behind Moss in the backseat, and Hughes sitting in the passenger side of the front seat across from Moss. They pulled into the drive-through lane and Moss sent Hughes's driver's license to the teller and asked her for the balance on Hughes's account. After Hughes nodded his assent, the teller informed Moss the balance was \$4.50. Harris saw Moss give Hughes a furious look, although he said nothing. Appearing frightened, Hughes attempted to exit the vehicle and flee, but he got caught in the seatbelt.

With the passenger-side door partially open and Hughes entangled in the seatbelt, Moss began to speed away. Harris was shouting at Moss, "Let him out," but Moss continued driving at a high rate of speed. Harris could not see Hughes's location and asked Moss what happened to him, to which Moss replied, "I think he went under the car." During this time, Moss was repeatedly glancing at the side mirror located on the passenger side of the vehicle.

After a drive of approximately 1167 feet, Moss swerved the vehicle to the right and drove up over the curb. Hughes was dislodged from the seatbelt and left lying near the curb as Moss sped away. Although Hughes was still breathing and had a strong heart rate, his injuries were severe. He was declared brain dead two days later.

Moss drove the vehicle back to Des Moines where he abandoned it on Pennsylvania Avenue. He and Harris went their separate ways. Harris later went to the police and reported what had occurred.

Moss was arrested and on September 25, 2008, the State charged him with first-degree murder. Moss pled not guilty and waived his right to a speedy trial. His trial began on November 2, 2009. At the close of the State's evidence, he made a motion for judgment of acquittal, which the trial court denied.

The case was submitted to the jury. The jury instructions allowed it to convict Moss if they found him guilty of premeditated murder or felony murder with robbery or kidnapping as the underlying felonies. The jury returned a general verdict, which did not state which theory they adopted.

Moss filed motions for new trial and in arrest of judgment. After denying the motions, the court entered judgment against Moss and sentenced him to life imprisonment. Moss filed a timely appeal.

II. Scope and Standard of Review. We review a challenge to rulings on the sufficiency of the evidence for correction of errors at law. *State v. Hagedorn*, 679 N.W.2d 666, 668 (Iowa 2004). If there is substantial evidence to support the verdict, we will uphold a finding of guilt. *Id.* Evidence is substantial if a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.* at 668-69. In reviewing the sufficiency of the evidence, we consider all evidence, not just the evidence that supports the verdict. *Id.* at 669. We weigh that evidence in the light most favorable to the State.

To the extent Moss alleges his trial counsel was ineffective, our review is de novo. *State v. McBride*, 625 N.W.2d 372, 373 (Iowa Ct. App. 2001).

III. Analysis. Moss claims there was insufficient evidence to support his conviction under either of the felony-murder theories. He does not dispute there

is sufficient evidence to support his conviction of premeditated murder. However, because a general verdict of guilty was returned, we are unable to determine which of the State's theories of murder the jury accepted. Therefore, reversal is required unless we determine the evidence was sufficient to convict Moss under both the theories of felony murder by robbery and felony murder by kidnapping. See *State v. Williams*, 674 N.W.2d 69, 71 (Iowa 2004).

For a felony-murder conviction, the State must prove defendant was participating in the underlying felony. *Conner v. State*, 362 N.W.2d 449, 455 (Iowa 1983). Our analysis focuses on whether there is substantial evidence Moss committed the offenses of robbery and kidnapping.

A. Felony Murder by Robbery. Moss first contends there is insufficient evidence to support a conviction of felony murder by robbery because the State failed to prove he took property belonging to Hughes with the intent to permanently deprive him. He also contends there is insufficient evidence to show he did so while committing an assault, threatening or placing Hughes in fear of immediate serious injury, or threatening to commit a forcible felony.

A person commits robbery when they have the intent to commit a theft, and in furtherance of that theft, they do any of the following acts:

1. Commits an assault upon another.
2. Threatens another with or purposely puts another in fear of immediate serious injury.
3. Threatens to commit immediately any forcible felony.

Iowa Code § 711.1 (2007). One of the elements of theft is the intent to deprive the owner of the property. *Id.* § 714.1(1). Such intent to deprive requires more than a temporary dispossessing of another's property, although a deprivation is

not necessarily a permanent thing. *State v. Berger*, 438 N.W.2d 29, 31 (Iowa Ct. App. 1989). It means to permanently withhold, or to withhold for so long, or under such circumstances, that its benefit or value is lost; or the property is disposed of so that it is unlikely the owner will recover it. *Id.*

Proof that the defendant acted with the specific purpose of depriving the owner of his property requires a determination of what the defendant was thinking when an act was done. *State v. Schminkey*, 597 N.W.2d 785, 789 (Iowa 1999). When determining criminal intent, the condition of the mind at the time the crime is committed is rarely susceptible of direct proof but depends on many factors. *State v. Venzke*, 576 N.W.2d 382, 384 (Iowa Ct. App. 1997). It may be inferred from outward acts and attending circumstances. *Id.*

Moss argues there is insufficient evidence to support a finding he intended to permanently deprive Hughes of his vehicle. He notes he drove the vehicle back to Des Moines and then abandoned it; he did not intentionally wreck the vehicle, sell it, or do anything else that would have prevented its eventual return to Hughes. We agree there is insufficient evidence to support a finding Moss intended to permanently deprive Hughes of the vehicle.

He also argues there is insufficient evidence by which to find he intended to permanently deprive Hughes of his wallet or any contents within. Hughes's wallet was located inside the vehicle and there is no evidence to show Moss took anything out of the wallet. The evidence is also insufficient to find Moss took Hughes's wallet or its contents with the intent to permanently deprive him of it.

Moss claims the \$200 he was attempting to recover from Hughes does not provide a basis to support a robbery finding. He argues there was evidence from which a jury could find the debt was legitimate. However, the claim-of-right defense is unavailable against charges of burglary and robbery, which involve violent reclamation of property. *State v. Miller*, 622 N.W.2d 782, 785-87 (Iowa Ct. App. 2000). We conclude substantial evidence supports a finding Moss intended to permanently deprive Hughes of \$200: Moss went to the apartment complex intended to find Hughes to recover the money; he made statements to Hughes that he better have the money or better not be lying about having the money; when Hughes told Moss that the money was in the bank, Moss informed him he would drive the vehicle to the bank; and Moss threatened to beat Hughes up if he did not have the money.

Moss argues the evidence also does not support a finding he committed an assault upon Hughes, threatened Hughes with or purposely put him in fear of immediate serious injury, or threatened to commit a forcible felony against him in furtherance of collecting the \$200. We disagree. Harris overheard Moss make repeated statements to Hughes, warning that Hughes better have the money or he would be beaten up. Harris testified that Hughes appeared scared from the time Moss first located Hughes up until they arrived at the bank. Harris also overheard Moss say something to Hughes about a gun. There is substantial evidence by which a reasonable factfinder could find Moss purposely put Hughes in fear of immediate serious injury in furtherance of his attempt to obtain the money.

When viewed in the light most favorable to upholding the verdict, we conclude substantial evidence supports a finding of guilt on the felony murder by robbery charge.

B. Felony Murder by Kidnapping. Moss contends there is insufficient evidence to establish the kidnapping underlying his second felony murder charge. He argues the evidence is insufficient to show he confined or removed Hughes without his consent. He also argues there is insufficient evidence to show he confined or removed Hughes with the intent to inflict serious injury.

A person commits kidnapping when they confine or remove a person from one place to another without the consent to do so. Iowa Code § 710.1. To constitute kidnapping, one or more of the following must also be present:

1. The intent to hold such person for ransom.
2. The intent to use such person as a shield or hostage.
3. The intent to inflict serious injury upon such person, or to subject the person to a sexual abuse.
4. The intent to secretly confine such person.
5. The intent to interfere with the performance of any government function.

Id.

We first address Moss's claim there is insufficient evidence to establish he confined or removed Hughes.

A defendant "confines" another person in violation of our kidnapping statute only if the confinement definitely exceeds the confinement that is an inherent incident of the underlying felony. No minimum period of confinement is required to convict a defendant of kidnapping. Rather, the confinement must be significantly independent of the confinement incident to the commission of the underlying crime. Such confinement may exist 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.

State v. McGrew, 515 N.W.2d 36, 39 (Iowa 1994) (citations omitted).

Moss claims Hughes voluntarily accompanied him to the bank, giving him the keys to the vehicle and hotwiring it when it failed to start. He argues there was opportunity for Hughes to leave the scene, but he did not. We conclude there is substantial evidence to support a finding Hughes's actions were not voluntary. Moss made several threats to physically harm Hughes if he did not have the \$200. When Hughes stated the money was in the bank, Moss replied, "I'm driving." It was only after these statements were made that Hughes handed the keys to Moss. In his deposition, Harris recalled Moss informed Hughes he had a gun. A reasonable factfinder could determine Hughes believed Moss did have a gun and acted in accordance with that belief. If Hughes's actions were procured under the threat of violence, they were not voluntarily undertaken. See *State v. Mott*, 759 N.W.2d 140, 146 (Iowa Ct. App. 2008) (finding sufficient evidence of removal where the victim did not voluntarily accompany the defendant back to his house but did so under threats of continued violence).

Moss also claims the evidence was insufficient to prove he confined or removed Hughes with the intent to inflict serious injury. This issue was not raised in his motion for judgment of acquittal and therefore is not preserved for our review. *State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008). Moss asks this court to consider this claim as an ineffective-assistance-of-counsel claim.

To establish an ineffective assistance of counsel claim a defendant must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). The defendant

has the burden of proving both elements of his ineffective assistance claim by a preponderance of the evidence. *Ledezma v. State*, 626 N.W.2d 134, 145 (Iowa 2001). The test of ineffective assistance of counsel focuses on whether counsel's performance was reasonably effective. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Ordinarily we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction relief proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Scalise*, 660 N.W.2d 58, 62 (Iowa 2003). We will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *Id.*

Moss claims the evidence does not establish he had the requisite intent inflict serious injury when the men left the apartment building. Rather, he argues his primary goal was to obtain money from Hughes. Although getting the \$200 from Hughes may have been Moss's primary goal, his statement to Hughes at the time they left for Ankeny show he was contemplating harming Hughes if the money was not obtainable.

Even assuming Moss did not have the specific intent to inflict serious injury on Hughes when they left the apartment complex, he had the intent when he drug Hughes approximately three blocks while he was trapped in the seatbelt. Moss argues this removal was incident to the underlying intent to injure. As the State notes, while some confinement is normally incidental to assault with intent to inflict serious injury, the confinement here was far greater than the mere moments an assault would ordinarily take place. Had Moss stopped the vehicle

after one-hundred feet, an assault with intent to inflict serious injury would have occurred. Here, he continued for 1167 feet. This time period was not merely incidental to the underlying crime. Because there was substantial evidence by which Moss could have been found to have the specific intent to inflict serious injury, trial counsel was not ineffective in failing to raise this issue in Moss's motion for judgment of acquittal.

When viewed in the light most favorable to upholding the verdict, we conclude substantial evidence supports a finding of guilt on the felony murder by kidnapping charge.

C. Summary. Because substantial evidence supports conviction under all three theories submitted to the jury, Moss's conviction of murder in the first degree is affirmed.

AFFIRMED.