IN THE COURT OF APPEALS OF IOWA

No. 1-198 / 10-0831
Filed May 25, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID EUGENE MADDOX, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

Appeal from the judgment and sentence for convictions of kidnapping in the first degree, robbery in the first degree, and attempt to commit murder. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant Appellate Defender, and Nnawuihe Ukabilala, Student Intern, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, Matthew Wilber, County Attorney, and John Jacobmeier and Shelly Sedlak, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

SACKETT, C.J.

Defendant, David Maddox, appeals from the judgment and sentence for convictions of kidnapping in the first degree, robbery in the first degree, and attempt to commit murder. He contends the kidnapping conviction is not supported by sufficient evidence of confinement or removal that was not incidental to the underlying offenses of robbery or attempt to commit murder. He further contends counsel was ineffective in not moving in arrest of judgment when there was no proof of serious injury, an element of kidnapping in the first degree. We affirm in part, reverse in part, and remand.

I. Background Facts and Proceedings.

Defendant, co-defendant Jeremy Gibler, and the victim were riding around together on December 17, 2009, after having spent time together drinking at the home of Gibler's aunt and then going to the home of a person defendant knew. Defendant was driving, Gibler was in the back seat, and the victim was in the passenger's seat. At some point, defendant parked the car close to the Missouri River. As defendant got out and walked around the car, Gibler struck the victim in the head from behind. Defendant pulled the victim out of the car, then defendant and Gibler pulled the victim through trees and brush, down a slope to the rocks along the river. This area was not visible from the road. Once there, defendant and Gibler beat and kicked the victim. Gibler took what the victim had in his pockets. Then defendant lifted the victim by the neck of his shirt, said he knew the victim was a "snitch" or a "cop" and he was going to put him "in the river

where people like [him] go, people that talk to cops,"[1] and then threw the victim into the river. When the victim stood up in the waist-deep water, defendant threw a bowling-ball-size rock at him. In deflecting the rock with his hands, the victim ended up about shoulder-deep in the river. He moved with the current to a point where he could get out of the river. The victim walked nearly one and two-thirds miles in sub-freezing temperatures over a period of about forty-five minutes to a gas station, where the attendant called 911. The victim was treated at the hospital and released.

Defendant and Gibler were charged in January 2010 with kidnapping in the first degree, attempt to commit murder, and robbery in the first degree. Following a jury trial in April, both were found guilty of all charges. Defendant's motion in arrest of judgment and motion for new trial were denied. In May, the court sentenced defendant to life for the kidnapping conviction and terms of up to twenty-five years each on the robbery and attempted murder convictions. Defendant appealed.

II. Scope and Standards of Review.

Sufficiency-of-the-evidence claims are reviewed for correction of errors at law. *State v. McCullah*, 787 N.W.2d 90, 93 (Iowa 2010). A jury's verdict will be sustained if it is supported by substantial evidence. *State v. Vance*, 790 N.W.2d 775, 783 (Iowa 2010). Substantial evidence is evidence that would convince a rational jury the defendant is guilty beyond a reasonable doubt. *Id.* All the evidence is considered, both supporting and detracting, and is viewed in the light

[1] The victim was a confidential informant and had purchased drugs for the police in about twelve cases.

most favorable to the State. *State v. Serrato*, 787 N.W.2d 462, 465 (Iowa 2010). Evidence that merely raises suspicion, speculation, or conjecture is insufficient. *McCullah*, 787 N.W.2d at 93.

Ineffective-assistance claims are reviewed de novo. *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). To prevail in an ineffective-assistance-of-counsel claim, a defendant must show: "(1) counsel failed to perform an essential duty and (2) prejudice resulted." *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Failure to prove either element is fatal to the claim. *State v. Fountain*, 786 N.W.2d 260, 266 (Iowa 2010). When a defendant raises an ineffective-assistance-of-counsel claim on direct appeal, we may choose to reach the issue if the record is adequate to decide the claim, or we may preserve the claim for possible postconviction proceedings. *See State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

III. Merits.

Defendant does not challenge his convictions of robbery or attempted murder. Instead, he contends there was insufficient evidence of confinement or removal to support a conviction of kidnapping in any degree. He further contends counsel was ineffective in not moving in arrest of judgment of kidnapping in the first degree because there was no evidence of serious injury.

A. Confinement or Removal. Defendant contends the State failed to prove confinement or removal that was not incidental to the commission of an underlying offense. Iowa Code section 710.1 (2009) defines kidnapping:

> A person commits kidnapping when the person either confines a person or removes a person from one place to another, knowing that the person who confines or removes the other person has neither the authority nor the consent of the other to do so; provided, that to constitute kidnapping the act must be accompanied by one or more of the following:
>
> 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.

In examining the statutory terms "confines" and "removes" our supreme court

> conclude[d] that our legislature, in enacting section 710.1, intended the terms "confines" and "removes" to require *more than the confinement or removal that is an inherent incident of commission of the crime* of sexual abuse. Although no minimum period of confinement or distance of removal is required for conviction of kidnapping, *the confinement or removal must definitely exceed that normally incidental to the commission* of sexual abuse. Such confinement or removal *must be more than slight, inconsequential, or an incident inherent in the crime* of sexual abuse so that it has a significance independent from sexual abuse. Such confinement or removal may exist *because it substantially increases the risk of harm to the victim, significantly lessens the risk of detection, or significantly facilitates escape following the consummation of the offense.*

State v. Rich, 305 N.W.2d 739, 745 (Iowa 1981) (emphasis added).

Defendant asserts any confinement and removal of the victim to the riverbank was merely incidental to the robbery and the attempt to commit murder by drowning the victim. He argues there was no way to drown the victim in the river without first taking him from the car to the riverbank. Since the decision in *Rich*, Iowa courts have applied that analysis to a wide variety of factual situations. Defendant points to six cases in support of his argument.

In *Holmes v. State*, 775 N.W.2d 733, 737 (Iowa Ct. App. 2009), the defendant ordered the victim into a deep ditch covered with tall grass alongside an isolated gravel road. We concluded that "substantially increased the risk of harm to [the victim] and significantly lessened the risk of detection for Holmes." *Holmes*, 775 N.W.2d at 737. In those circumstances, a jury could find Holmes confined the victim without her consent, a "key element" of kidnapping in the first degree. *Id.* at 736.

In *State v. McGrew*, 515 N.W.2d 36, 39 (Iowa 1994). McGrew bound the victim in her bedroom and sexually assaulted her over a period of hours. Paraphrasing *Rich*, the court stated the "confinement must be *significantly independent* of the confinement incident to the commission of the underlying crime." *McGrew*, 515 N.W.2d 39 (emphasis added). The court concluded McGrew's actions "substantially increased the risk of harm . . . and significantly lessened the risk of detection." *Id.* Either finding would support a conclusion that the period or degree of confinement exceeded that normally incidental to the sexual abuse committed. *Id.* at 39-40.

In *State v. Newman*, 326 N.W.2d 788, 790 (Iowa 1982), Newman convinced the victim to get into his car by showing her a badge and identifying himself as a police officer. He then drove her, against her wishes to a city park where he assaulted her sexually in the car. *Newman*, 326 N.W.2d at 790. The court noted that "where the confinement or asportation of the victim *had no significance independent of* the actual assault" the legislature did not intend the kidnapping statute to apply. *Id.* at 791 (emphasis added). The court found

substantial evidence Newman's removal and confinement "were more than incidental" to the assaults. *Id.*

In *State v. Marr*, 316 N.W.2d 176, 177-78 (Iowa 1982), Marr grabbed the victim in front of her apartment building, then threw her to the ground about ten to fifteen feet around the side of the building and assaulted her. The court concluded the State failed to prove "the confinement or removal *definitely exceeded that normally incidental to the commission* of sexual abuse." *Marr*, 316 N.W.2d at 179 (emphasis added).

In *State v. Ripperger*, 514 N.W.2d 740, 743 (Iowa Ct. App. 1994), Ripperger broke into the victim's house, bound and blindfolded her, and raped her. Ripperger objected to a jury instruction that provided:

> In determining whether confinement or removal, or both, exists, you must consider whether:
>
> 1. The risk of harm to [the victim] was increased;
> 2. The risk of detection was reduced; and
> 3. Escape was made easier.

Ripperger, 514 N.W.2d at 750. Noting "the confinement or removal necessary to sustain a conviction *must be more than 'incidental' to* the commission of the underlying offense" we concluded the jury instruction "appropriately conveyed the law." *Id.* (emphasis added).

Defendant argues the confinement or removal of the victim did not exceed what was inherent in the underlying felonies, but was merely incidental to them. He contends the "acts from the vehicle to the river were all carried out as part of the attempted murder and the robbery." He asserts the "robbery took place as a part of the attempted murder," as Gibler was going through the victim's pockets as they were assaulting him. "Without the attempt to throw [the victim] into the

river, there would have been no movement from the car to the river." He argues the State "should not be allowed to bootstrap a kidnapping conviction to the underlying offenses." *See McGrew*, 515 N.W.2d at 39 ("We did not and do not believe the legislature intended to afford prosecutors the option of bootstrapping convictions for kidnapping, carrying life sentences, on to charges for crimes for which the legislature provides much less severe penalties.").

The State separates the underlying offenses in its argument. It first argues the removal from the car to the bank of the river was not incidental to the robbery because Gibler and the defendant could have robbed the victim on the spot when the pulled him from the car. Instead, they forced the victim "to a secluded area, screened by trees, brush, and the slope of the land itself, and committed the robbery at that location." *See Holmes*, 775 N.W.2d at 737 (ordering the victim into a deep ditch covered with tall grass alongside an isolated road substantially increased the risk of harm and significantly lessened the risk of detection).

Concerning the attempt to commit murder, which necessitated removing the victim to the bank of the river in order to throw him in, the State argues the standard is not what is inherent in or incidental to the attempt to commit murder as it was done in this case, but whether the confinement or removal exceeds what is "*normally* incidental to the underlying crime," *State v. Siemer*, 454 N.W.2d 857, 864 (Iowa 1990) (emphasis added), or what is "necessarily inherent in the *type of crime* committed." *State v. Misner*, 410 N.W.2d 216, 226 (Iowa 1987) (emphasis added). The State argues a rational jury could find the crime of

attempt to commit murder "normally" involves little or no confinement or removal, but just a weapon.

In *Siemer*, a mother's boyfriend locked her young son in a basement room and tortured him over a period of months. *Siemer*, 454 N.W.2d at 858. Siemer argued the confinement, handcuffing the child to his bed for three months, *was* the abuse, so could not support a separate kidnapping conviction. *Id.* at 864. The court stated the rule from *Rich* as

> the State must establish confinement that exceeds what is normally incidental to the underlying crime . . . by proof the confinement "substantially increases the risk of harm to the victim, significantly lessens the risk of detection, or significantly facilitates escape following the consummation of the offense."

Id. (quoting *Rich*, 305 N.W.2d at 745). In affirming the kidnapping conviction, the court found substantial evidence "to support a finding of confinement which *exceeds that normally incidental to the underlying crime* of child abuse." *Id.* at 865 (emphasis added).

In *Misner*, the defendant was one of several inmates participating in a prison uprising during which several guards were taken hostage. *Misner*, 410 N.W.2d at 217. Misner argued the confinement and movement of the guards were part of the underlying insurrection and assault charges and did not support a kidnapping conviction. *Id.* at 221. The State argued the kidnapping was the primary crime, not the fallout from the other criminal activities, so the "merely incidental" rule adopted in *Rich* does not apply. *Id.* The supreme court's discussion is instructive.

> The conflict between the State and Misner arises from the difficulty in clearly identifying when a kidnapping occurs and is properly charged. At one extreme is the classic kidnapping case in

> which an individual is abducted for the express purpose of holding the person for ransom or as a hostage. In such cases kidnapping is the central crime and any confinement or movement is sufficient to support the charge. The "merely incidental" rule can have no role when there is no underlying crime.
>
> At the other extreme is the case in which a person is moved or confined wholly as part of a murder, sexual abuse, or other crime. In such cases the movement or confinement has no independent significance, but rather is only that confinement or movement necessarily inherent in the type of crime committed. We conclude the *Rich* principles prevent kidnapping charges from being prosecuted in such cases.
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> Between these extremes, we have cases such as this one. Here, the confinement and movement occurred as part of a ninety-minute uprising. A number of charges were brought as a direct result of the disturbance. At trial, Misner argued any confinement was merely incidental to the insurrection and could not support an independent kidnapping charge. There was substantial evidence to support this claim.
>
> On the other hand, the State at trial argued the central purpose of the uprising was to take hostages and to disrupt state activities and that the other crimes of assault and insurrection were merely incidental to the kidnapping. The State contended in trial court that because the kidnappings were themselves the central purpose of the uprising the jury should be instructed any movement or confinement was sufficient to support the charges of kidnapping. The record contained substantial evidence to support the State's view.
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> In cases like this that fall on neither end of the continuum, a jury reasonably could find either (1) that the confinement or movement was merely incidental to some other underlying crime; (2) that some underlying crime was involved but the confinement or movement had significance independent of that charge and thus kidnapping was supported; or (3) that kidnapping was itself the central crime and did not simply arise in the course of other criminal activity.

Id. at 223.

The case before us is one of the many "that fall on neither end of the continuum," but in which a reasonable jury could find the either that the movement and confinement was merely incidental to the attempted murder and robbery or that the movement or confinement had significance independent of

those charges—such as substantially increasing the risk of harm to the victim, significantly lessening the risk of detection, or significantly facilitating escape. *See Rich*, 305 N.W.2d at 745. Because substantial evidence in the record supports the inference the removal and confinement had "significance independent" of the underlying robbery or attempt to commit murder charges, we affirm the conviction of kidnapping. Defendant's second claim relates to the proper degree of kidnapping.

B. Serious Injury. Defendant contends counsel was ineffective in not challenging the sufficiency of the evidence the victim suffered a "serious injury" by raising that claim in the motion in arrest of judgment. Iowa Code section 702.18(1) defines serious injury:

> 1. "Serious injury" means any of the following:
> a. Disabling mental illness.
> b. Bodily injury which does any of the following:
> (1) Creates a substantial risk of death.
> (2) Causes serious permanent disfigurement.
> (3) Causes protracted loss or impairment of the function of any bodily member or organ.

"[A] substantial risk of death means more than just any risk of death but does not mean that death was likely." *State v. Anderson*, 308 N.W.2d 42, 47 (Iowa 1981). If there is a real hazard or danger of death, a "serious injury" is established. *Id.*

The hospital report of the victim's injuries show a concussion, cuts, abrasions, and bruises from being beaten and thrown in the river. When the victim arrived at the gas station after walking in sub-freezing temperatures in wet clothes for about forty-five minutes, he was "so cold he could barely talk" to the attendant at the station. His treating physician testified "his body temperature was mildly hypothermic and he was shivering."

In closing arguments, the State argued, "Now we need specific intent to cause serious injury. Okay." Concerning serious injury, the State described how the victim was dragged to the river and thrown in. Then the State argued, "So, do we have specific intent to inflict serious injury, ladies and gentlemen? Yes."

Defense counsel focused on the "relatively unremarkable" injuries noted in the hospital records and the way the doctor's testimony was "loaded with ifs," such as

> if he was assaulted and if he was hit in the head with a rock and if he was in the water a long time and if he took a long time to get to the gas station, then it could have caused his death.

Counsel argued further that the victim's time in the hospital was relatively brief, less than two hours, and "he didn't bother to follow up anything after that. So I think that talks about the type of injuries he actually suffered."

To prevail, defendant must show counsel breached an essential duty and prejudice resulted. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Concerning duty, defendant argues the closing arguments show defense counsel clearly was aware of the lack of evidence of serious injury, yet failed to move in arrest of judgment for the kidnapping charge on that basis. He further argues counsel should have known the general motion for judgment of acquittal he made was not specific enough to preserve error on the sufficiency-of-the-evidence claim. *See State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005) (noting when a motion for judgment of acquittal does not make reference to the specific elements of the crime on which the evidence was claimed to be insufficient, it does not preserve the sufficiency-of-the-evidence issue for review). Concerning

prejudice, defendant contends he was denied the opportunity to have the district court consider the issue and he was convicted of a crime he did not commit.

The State argues the bodily injury "constituted a serious injury, as it created a real danger [the victim] would die as a result of being beaten and thrown into the river in a remote area where there was no help close at hand." The State focuses on the "risk" of death. However, the statutory language requires a "substantial risk" of death. *See* Iowa Code § 702.18(1)(b)(1). As noted above, substantial risk is "more than just any risk" but does not require "that death was likely." *Anderson*, 308 N.W.2d at 47 (concluding a severe beating to the head of an elderly victim supported a jury finding of a substantial risk of death (even though a doctor estimated the risk at ten percent)). "If there is a real hazard or danger of death, a 'serious injury' is established." *State v. Carter*, 602 N.W.2d 818, 820 (Iowa 1999) (finding sufficient evidence of a serious injury where the victim's trachea had been cut in half).

We conclude the evidence of the victim's injuries and attendant circumstances does not support the conclusion the injuries "create[d] a substantial risk of death." *See* Iowa Code § 702.18(1)(b)(1). The treating physician testified the injuries combined with the circumstances of being in the icy river and walking in sub-freezing temperatures could have caused a substantial risk of death if certain other circumstances had been present, such as staying in the river longer or being hit in the head with a rock. This is insufficient to meet the statutory definition of serious injury.

The jury convicted defendant of kidnapping. The serious-injury determination goes only to whether the State proved all the elements to raise the offense to kidnapping in the first degree. Serious injury is an element of kidnapping in the first degree, a class A felony. Iowa Code § 710.1. Without proof of serious injury, the degree of kidnapping would be third degree, a class C felony. Iowa Code § 710.4. Kidnapping in the first degree and kidnapping in the third degree are not separate offenses; they are different degrees of kidnapping. *Cf. State v. Stump*, 254 Iowa 1181, 1201, 119 N.W.2d 210, 22122 (1963) (discussing conviction of the offense of murder as distinguished from degrees of murder). Because there was not sufficient evidence to support a finding of serious injury, defense counsel should have specifically challenged that lack through a motion that would have given the district court the opportunity to address the issue. Because counsel did not specifically raise the issue, defendant was sentenced based on a degree of kidnapping not supported by the evidence. Defendant has demonstrated both failure to perform an essential duty and prejudice. *See Maxwell*, 743 N.W.2d at 195.

Because the evidence supports defendant's conviction of kidnapping, but not in the first degree, we reverse the entry of judgment and sentence for kidnapping in the first degree and remand for entry of judgment and sentence for kidnapping in the third degree. *See State v. Morris*, 677 N.W.2d 787, 788-89 (noting the jury verdict on the greater offense necessarily included the lesser offense, and "In such instances, we have approved entering an amended judgment of conviction with respect to the lesser-included offense"); *see also*

State v. Pace, 602 N.W.2d 764, 774 (Iowa 1999) (reversing the entry of judgment and sentence for burglary in the first degree and remanding for entry of judgment and sentence for burglary in the second degree).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.