IN THE COURT OF APPEALS OF IOWA

No. 3-930 / 12-1323
Filed January 23, 2014

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SCOTT ROBERT ROBINSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Michael J. Shubatt, Judge.

A defendant appeals his judgment and sentence for first-degree kidnapping, contending (1) the evidence was insufficient to support the jury's finding of guilt, (2) certain evidentiary rulings were incorrect, (3) a jury instruction was incorrect, (4) the trial information did not provide adequate notice of the crime, and (5) he was entitled to barrier-free access to his attorney during pretrial detention. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney General, Ralph Potter, County Attorney, and Christine O. Corken, Assistant County Attorney, for appellee.

Considered by Danilson, C.J., and Vaitheswaran and Doyle, JJ.

VAITHESWARAN, J.

Scott Robinson appeals his judgment and sentence for first-degree kidnapping in connection with the sexual assault of a woman. He contends (1) the evidence was insufficient to support the jury's finding of guilt, (2) certain evidentiary rulings were incorrect, (3) a jury instruction was incorrect, (4) the trial information did not provide adequate notice of the crime, and (5) he was entitled to barrier-free access to his attorney during pretrial detention.

I. Sufficiency of the Evidence

The jury was instructed that the State would have to prove the following elements of first-degree kidnapping:

> 1. On or about the 8th day of October, 2011, the defendant Scott Robinson confined [a woman].
> 2. The defendant did so with the specific intent to subject [the woman] to sexual abuse. The term "sexual abuse" is as set out in Instruction No. 20, and for purposes of this element may consist of Sexual Abuse in the Second or Third Degree.
> 3. The defendant knew he did not have the consent of [the woman] to do so.
> 4. As a result of the confinement [the woman] was sexually abused. The term "sexually abused "is as set out in Instruction No. 20, and for purposes of this element may consist of Sexual Abuse in the Second or Third Degree.

See Iowa Code § 710.1 (2007). The jury was further instructed on the meaning of the term "confined":

> Concerning element number 1 of Instruction Nos. 19 and 21, confinement 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. The confinement must have significance apart from the sexual abuse.

> In determining whether confinement exists, you may consider whether:
> 1. The risk of harm to [the woman] was increased.
> 2. The risk of detection was reduced.
> 3. Escape was made easier.

Robinson contends "any confinement was incidental to the underlying alleged sexual assault, and therefore, not confinement sufficiently distinct from the underlying offense of sexual assault necessary to satisfy the confinement elements of kidnapping." Viewing the evidence in the light most favorable to the State, as we must, we are persuaded that a reasonable juror could have found otherwise. *See State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984).

The jury could have found that the woman met Robinson at a bar and agreed to go to his apartment for an after-party. The woman began to get "creeped out" when no one else showed up. Robinson moved closer to her on the living room couch, put his arm around her and his hand on her leg, and leaned in to kiss her. At the same time, he grabbed her cell phone, which she had in hand to call for a ride, and threw it behind a chair. The woman "panicked," pushed Robinson off her, and asked for a drink. Robinson said he would get it after he went to the bathroom. After he left, the woman took her purse, unlocked the front door of the apartment, and went out, only to discover that her cell phone was still inside. She returned to the apartment to get the phone, leaving the front door open. Robinson, who had since come out of the bathroom, shut the front door, grabbed the woman by her hair, covered her mouth as she screamed, and dragged her through the hallway and into his bedroom. He closed the bedroom door and locked it, threw her onto the bed, got on top of her, still with his hand around her mouth, and forced her to perform oral sex. He flipped her onto her

back from a sitting position and was about to engage in vaginal sex when the police broke into the front door of the apartment and the locked bedroom door, having received a call from a downstairs neighbor about a possible problem.

A reasonable juror could have found from these facts that Robinson's confinement of the woman was "more than what is included in the commission of the crime of sexual abuse," as set forth in the jury instruction. *See State v. McGrew*, 515 N.W.2d 36, 39 (Iowa 1994) ("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."). Robinson closed the front door and presumably locked it, given the officer's need to forcibly open it. He physically moved the woman from the living room to the bedroom in a manner that prevented her from escaping and locked the bedroom door behind him. While the woman conceivably could have unlocked both doors, she was not in a position to do so because Robinson put his hand over her mouth and around her lower jaw and neck.

Finding sufficient evidence of confinement, we affirm the jury's finding of guilt.

II. Evidentiary Rulings

A. Admission of Photographs

The State sought and obtained the admission of two cell phone pictures Robinson took of his face and torso. On appeal, Robinson asserts the pictures "were not relevant to any material fact at issue."

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action

more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401. Generally, relevant evidence is admissible, and irrelevant evidence is inadmissible. Iowa R. Evid. 5.402.

The State asserts that the pictures were relevant because they gave "the jury the context of the crime and the defendant's appearance that night." However, the pictures were not taken at the scene of the crime or in its immediate aftermath; they were taken hours before the woman encountered Robinson. The pictures had no bearing on any material fact and they should not have been admitted.

That said, the error in admitting them was harmless because the record already contained pictures of Robinson, and Robinson was in the courtroom. *See State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) ("[W]e will not find prejudice if the admitted hearsay is merely cumulative.").

B. Exclusion of Opinion Testimony

The defense sought to introduce the testimony of two witnesses who intended to opine about the woman's truthfulness. *See* Iowa R. Evid. 5.608(a) (stating "[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation" provided, in relevant part, that "[t]he evidence may refer only to character for truthfulness or untruthfulness"). The State filed a motion in limine in an effort to exclude the testimony. Following arguments, the district court granted the motion, reasoning that "a proper foundation" could not be laid for the testimony.

On appeal, Robinson contends "[t]he opinion testimony . . . was based upon recent personal knowledge of the witnesses and should have been allowed

by the district court." The State preliminarily counters that error was not preserved because Robinson failed to make an offer of proof. However, defense counsel thoroughly summarized the proposed testimony, making an offer of proof unnecessary. *See* Iowa R. Evid. 5.103(a)(2) (requiring an error in excluding evidence to a substantial right of a party and, "[i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer *or was apparent from the context within which questions were asked*" (emphasis added)).

Proceeding to the merits, we need not address whether a foundation for the testimony could have been laid because, even if the testimony was erroneously excluded, it was cumulative of a duly-admitted statement that the woman was a "compulsive liar." *See Hildreth*, 582 N.W.2d at 170.

III. Jury Instruction

Robinson challenges the jury instruction on confinement quoted above. Because the challenge was not preserved for review, he raises it under an ineffective-assistance-of-counsel rubric, which requires proof of the breach of an essential duty and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Robinson contends the jury instruction omitted several words that would have heightened the State's burden of proof. He maintains the State was required to prove that his actions *substantially* increased the risk of harm to the victim, *significantly* lessened the risk of detection, or *significantly* facilitated his escape. *See State v. Rich*, 305 N.W.2d 739, 745 (Iowa 1981) ("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.”).

This court addressed the same argument in *State v. Ripperger*, 514 N.W.2d 740, 750–51 (Iowa Ct. App. 1994). The court concluded that the instruction, as written, “appropriately conveyed the law.” *Ripperger*, 514 N.W.2d at 751. In light of this opinion, Robinson’s attorney did not breach an essential duty in failing to challenge the jury instruction.

IV. Trial Information

Robinson next asserts that the trial information did not give him sufficient notice of the first-degree kidnapping charge. In his view, his challenge implicates the subject matter jurisdiction of the court.

This court recently considered the same issue in *Neal v. State*, No. 12-1725, 2014 WL 69529, at *1 (Iowa Ct. App. Jan. 9, 2014) and *Frasier v. State*, No. 12-1957, 2014 WL 69671, at *2-3 (Iowa Ct. App. Jan. 9, 2014). As we stated in those opinions, the issue does not implicate the subject matter jurisdiction of the court and was waived.

To the extent Robinson attempts to raise the issue under an ineffective-assistance-of-counsel rubric, we note that the trial information cited the kidnapping statute and asserted Robinson “committed Kidnapping in the First Degree by kidnapping B.S. and intentionally subjecting her to sexual abuse.” This was sufficient notification of the charge. *See State v. Dalton*, 674 N.W.2d 111, 120 (Iowa 2004) (stating the defendant only need be “alert[ed] . . . generally to the source and nature of the evidence against him” (quotation marks and citation omitted)); *State v. Grice*, 515 N.W.2d 20, 22 (Iowa 1994) (“Generally an

information need not detail the manner in which the offense was committed.”). We conclude Robinson’s attorney did not breach an essential duty in failing to challenge the trial information.

V. Barrier-Free Access to Counsel

After being charged, Robinson was held in the Dubuque County Jail. The jailhouse visiting rooms were equipped with Plexiglas barriers separating visitors from detainees. The barriers had a mesh-covered hole to facilitate communication but did not have slots for exchanging documents. With regard to video surveillance of the room, a jail administrator testified there was a camera that “shoots into the attorney side from the hallway, but when the door is closed, you can’t see into the room.” He was unsure of whether a visiting room on the new side of the jail was subject to video surveillance.

Before trial, Robinson filed a “Motion for Order for Barrier-Free Contact Between Counsel and Defendant.” Following a hearing, the district court denied the motion “to the extent it seeks a standing order that the jail allow for barrier-free contact for every meeting, regardless of purpose.” The court imposed the following caveat: “[I]f Defendant requires barrier-free contact for a specific meeting for a specific reason, and that access is refused by the jail, he may make application for an expedited hearing before the undersigned.” There is no indication in the record that Robinson made such an application.

Robinson contends he “was denied his federal and state constitutional right and his statutory right to counsel and meaningful access to the courts when the government would not allow him barrier-free access to his attorney.” He cites Iowa Code section 804.20, titled “Communications by Arrested Persons,” which

affords arrestees the right to consult an attorney "alone and in private." He also cites the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 10 of the Iowa Constitution. He seeks reversal and remand for a new trial.

The Iowa Supreme Court addressed the issue of barrier-free attorney/client contact in *State v. Walker*, 804 N.W.2d 284 (Iowa 2011). Although the opinion was decided under section 804.20, the court found a constitutional overlay as follows:

> Section 804.20 applies in some situations in which the constitutional right to counsel has attached. Accordingly, we interpret the statutory terms "see and consult confidentially . . . alone and in private" to provide the same privacy afforded jailhouse visits under the Sixth Amendment. This approach makes sound policy sense and would conform to the presumption of statutory constitutionality and our mandate to construe statutes in a fashion to avoid a constitutional infirmity where possible.

Walker, 804 N.W.2d at 293–94 (quotation marks and citation omitted); *see also Wemark v. State*, 602 N.W.2d 810, 815 (Iowa 1999) ("While the attorney-client privilege is not derived from the constitution, violation of the privilege may implicate the Sixth Amendment right to counsel."); *State v. Coburn*, 315 N.W.2d 742, 748 (Iowa 1982) ("The right of privacy between attorney and client is well recognized and jealously guarded."). The *Walker* court held:

> Walker's section 804.20 right to "see and consult [with his attorney] alone and in private" was violated when the Ankeny police rejected Rothman's request for a different room and restricted his consultation with Rothman to the videotaped booth with a solid glass partition separating the attorney and client, without any case-specific safety or security reason to justify those measures. The remedy for this violation is suppression of the breath-test results, regardless of prejudice or lack thereof.

804 N.W.2d at 296. The court stated, "[p]rejudice is presumed upon a violation of section 804.20." *Id.* Accordingly, the court afforded Walker the remedy of suppression despite the absence of a showing that jail officers overheard a privileged conversation. *Id.* The court acknowledged, however, that a showing of prejudice might be required in the Sixth Amendment context. *Id.* (noting *Coburn*'s required showing of prejudice was based on the fact that it "was decided under the Sixth Amendment").

Assuming without deciding that section 804.20 applies to pretrial detainees, *Walker* would require barrier-free contact between the detainees and their attorneys. Robinson's attorney made a professional statement that none of the three visiting rooms in which he met Robinson permitted barrier-free contact. The jail administrator did not dispute this statement. It is clear, therefore, that if section 804.20 applies, the provision was violated.

What is less clear is the remedy for such a violation. In *Walker*, the defendant sought and obtained an order suppressing the results of a breath test taken at the jail. *Id.* Robinson did not and does not seek suppression of any evidence. He asks for a new trial. While we recognize Robinson need not make a showing of prejudice under section 804.20, he has pointed us to no authority that would automatically entitle him to a reversal of his conviction and a remand for a new trial upon a bare showing that a room in which he consulted with counsel was equipped with a barrier. Absent such authority, we decline to impose this remedy.

Turning to the claimed constitutional violations, we again assume without deciding that Robinson's Sixth Amendment right to counsel and access to the

courts and his concomitant rights under the Iowa Constitution encompass barrier-free consultations with his attorney. In this context, Robinson had to make a showing of prejudice. *Coburn,* 315 N.W.2d at 748 ("Having failed to show any conversations between attorney and client were overheard, defendant has, of course, also been unable to show transmission of any information to the prosecutor. Accordingly, we find no violation of defendant's constitutional rights."). Robinson made no such showing. Accordingly, he is not entitled to a reversal and a remand for a new trial.

We affirm Robinson's judgment and sentence for first-degree kidnapping.

AFFIRMED.