IN THE COURT OF APPEALS OF IOWA

No. 6-957 / 06-0343
Filed March 14, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID ERROL WILLOCK,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

David Willock appeals his judgment and sentences for first-degree kidnapping, first-degree burglary, and first-degree robbery. **CONDITIONALLY AFFIRMED AND REMANDED.**

John J. Bishop, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

Heard by Mahan, P.J., and Vaitheswaran and Eisenhauer, JJ.

VAITHESWARAN, J.

Three masked intruders entered the Waterloo residence of Sami Stamatiades. They duct-taped Stamatiades's mouth, hands and ankles and carried her downstairs to the living room. They hit her head with a gun, punched her in the face, and sexually assaulted her in the living room. Then they carried Stamatiades upstairs and sexually assaulted her again. The intruders left with cash, a leather computer bag, and jewelry.

The State charged David Willock with first-degree kidnapping, first-degree robbery, and first-degree burglary, as well as other crimes not at issue in this appeal. Iowa Code §§ 710.1(3), (4), 710.2, 711.2, 713.3 (2003). Willock moved to suppress evidence obtained in a search of his brother's home. The district court denied the motion. Following trial, a jury found Willock guilty. On appeal, our court reversed the judgment and sentences and remanded the case for a new trial.[1]

On remand, Willock renewed his motion to suppress. It was again denied. Following the second trial, a jury found Willock guilty on all three counts. Willock filed a motion for new trial and a motion in arrest of judgment. The district court verbally denied the motions and this appeal followed.

In this second appeal, Willock challenges the district court's rulings on (1) his motion for new trial, (2) his motions to suppress, (3) his hearsay objections, (4) his objection to the details of a witness's prior conviction, (5) a jury instruction, and (6) the sufficiency of the evidence.

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[1] Our court concluded several counts should have been severed from others. *See State v. Willock*, No. 03-1944 (Iowa Ct. App. Dec. 22, 2004).

I. Motion for New Trial

Willock's motion for new trial raised several grounds for reversal. Among them was an assertion that "the verdicts were contrary to the law and evidence." *See* Iowa R. Crim. P. 2.24(2)(*b*)(6). The district court verbally overruled the motion in its entirety.

On appeal, Willock contends there is "immense" credible evidence that would militate in favor of a new trial. The district court did not address this contention and did not allude to or apply the weight-of-the-evidence standard prescribed by our highest court for this type of challenge. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). Therefore, we vacate the district court's ruling as it pertains to Willock's contention that the verdict was "contrary to the law and evidence" and we remand solely for the purpose of allowing the court to rule on the motion using the weight of the evidence standard.[2]

II. Suppression Rulings

David Willock lived in the same house as his brother, Richard. Muscatine law enforcement authorities obtained a search warrant for the house to investigate possible identity theft by Richard. The warrant listed "notes, receipts, ledgers, [and] documents" relating to the person whose identity was claimed to have been stolen and relating to the fraudulent purchase of a vehicle in that person's name. The warrant made no mention of the crimes for which David Willock was being investigated. However, Muscatine authorities knew of that

[2] Willock does not specifically argue that the district court failed to apply the *Ellis* standard. However, his argument that the verdict was contrary to the law and evidence was sufficient to trigger review under that standard.

investigation and invited Waterloo and Cedar Falls police to assist with the search.

During the search, a Waterloo detective found a Wal-Mart receipt showing purchases of duct tape and ski masks. The receipt was in the bedroom of Richard Willock. The receipt was photographed, and a copy of the photograph was admitted at trial. This evidence became the subject of David Willock's motions to suppress.[3]

On appeal from the denial of those motions, Willock argues that the warrant held by Muscatine police was "mere subterfuge used by Cedar Falls and Waterloo law enforcement to avoid the warrant requirement." Because Willock alleges he was deprived of a constitutional right, our review is de novo. *State v. Bolsinger*, 709 N.W.2d 560, 565 (Iowa 2006).

Reviewing the record under that standard, we find support for the district court's balanced fact findings. As the court stated, Muscatine authorities obtained a search warrant in furtherance of their own independent investigation. They invited Cedar Falls and Waterloo authorities to come along as a "professional accommodation to help expedite their investigations." The Waterloo detective found the Wal-Mart receipt on top of a dresser.

Based on these fact findings, the district court concluded that the Muscatine warrant was valid. The court also concluded Muscatine authorities had the right to call in other law enforcement personnel for assistance and the Waterloo detective's presence in the house was lawful. Finally, the court

[3] Guns were also found, but Willock's counsel advised the court considering his first suppression motion that he did not intend to challenge the admission of photographs of the guns.

concluded the seizure of the receipt was justified under the plain view exception to the warrant requirement. On remand, the district court adopted the findings in the first ruling and relied on the law cited by the court in that ruling.

Iowa law supports the district court's rulings on the motions to suppress. As our highest court has stated, the seizure of an object found in plain view is justified where (1) the intrusion of the police was lawful and (2) the incriminating nature of the object was immediately apparent. *State v. Chrisman*, 514 N.W.2d 57, 60 (Iowa 1994). There is no question that the presence of the Waterloo detective in Robert Willock's home was lawful and that the receipt was in plain view.

Our inquiry could end here, but both Willock and the State also cite federal authorities relating to pretextual searches. *See United States v. Johnson*, 707 F.2d 317, 320-21 (8th Cir. 1983); *United States v. Wright*, 641 F.2d 602, 605 (8th Cir. 1981); *United States v. Sanchez*, 509 F.2d 886, 889 (6th Cir. 1975). These opinions are inapposite. All relied on an articulation of the plain view exception to the warrant requirement that was rejected in *Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). There, the United States Supreme Court stated "inadvertence" was not a necessary predicate to application of the plain view exception. *Horton*, 496 U.S. at 130, 110 S. Ct. at 2304, 110 L. Ed. 2d at 118-19. The court specifically stated,

> [t]he fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement.

Id. at 138, 110 S. Ct. at 2309, 110 L. Ed. 2d. at 124. The court concluded, "if the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more." *Id.* at 140, 110 S. Ct. at 2310, 110 L. Ed. 2d at 125. This opinion clarifies that the focus is not on the officer's intent prior to executing the search. Instead, the focus is on the warrant requirement or a valid exception to the warrant requirement. Because the cited federal opinions have a broader focus, we find them unpersuasive.

We affirm the district court's denials of Willock's motions to suppress.

III. Claimed Hearsay Testimony

Waterloo police officers questioned Stamatiades several times. Initially, she did not tell them that she suspected David Willock was involved in the crimes. Stamatiades later told her brother and uncle that a person named David from Iowa City might have been involved. Stamatiades's uncle, Adam Williams, testified about this conversation over defense counsel's objection. Similarly, one of Stamatiades's friends, Lindsay Bakken, testified over objection that Stamatiades told her she thought David was one of the individuals involved.

On appeal, Willock contends the district court erred in admitting this testimony. Our review is for prejudicial error. *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998). "[P]rejudice is not established where substantially similar evidence has been admitted but not objected to." *State v. Rice*, 543 N.W.2d 884, 887 (Iowa 1996).

Here, substantially similar evidence was admitted into the record without objection. Before Bakken testified, Stamatiades recounted a conversation she

had with Bakken following the home invasion. In that conversation, Stamatiades mentioned that one of the voices in the home sounded like the voice of Willock. Her testimony was as follows:

> We were upstairs putting my room back together and a couple of my aunts and Lindsay and I were all up there cleaning it up and we were talking and I just said to Lindsay, "You know, I might have been through a big ordeal, but I just swear to you it sounded just like Dave's voice."

Willock did not object to this testimony.[4] This evidence is virtually identical to the challenged testimony of both Bakken and Williams. For this reason, we conclude Willock cannot establish he was prejudiced by the admission of Bakken's and Williams's testimony.

IV. Evidence Concerning Defense Witness's Prior Deferred Judgment

Willock's brother, Richard, testified for the defense. On direct examination, he stated he was charged in an identity theft case. The record also indicates the conviction on that charge "was expunged or deferred, so there's nothing on [his] record." On cross-examination, the State inquired into the facts underlying the identity theft charge. Willock objected to this line of questioning, noting that it was inappropriate to question a witness about a deferred judgment. The district court ruled that "[i]t was brought up on direct, so it's fair game."

On appeal, Willock maintains that the court abused its discretion in permitting this line of questioning. The State counters that Willock waived error on this issue by questioning Richard Willock about his conviction during direct examination. We are not persuaded by the State's waiver argument. Willock is

[4] He was obligated to do so, as the district court did not issue a definitive ruling on his motion in limine. *State v. Delaney*, 526 N.W.2d 170, 177 (Iowa Ct. App. 1994).

not challenging the State's cross-examination about the fact of the conviction but the State's cross-examination about the details underlying the conviction. This issue was not waived.

Turning to the merits, the Iowa Supreme Court has stated,

> it is permissible, for impeachment purposes, to inquire into the specific nature of a witness' prior felony conviction that is otherwise allowable . . . , provided the probative value of such inquiry is not outweighed by the prejudicial impact to the defendant.

State v. Willard, 351 N.W.2d 516, 519 (Iowa 1984). *Cf. State v. Birth*, 604 N.W.2d 664, 665 (Iowa 2000) (holding evidence of witness's conviction was appropriate impeachment evidence where probation was not complete and deferred judgment was not yet expunged).

Applying this balancing standard, we conclude that, while the details of Richard Willock's crime carried minimal probative value, the prejudicial impact was blunted by earlier testimony of a similar nature. Specifically, a law enforcement officer testified about the charges against Richard Willock. He mentioned the name of the well-known complainant, minimizing the impact of that name when it was raised again during cross-examination of Richard Willock.

We recognize that the officer's testimony was not admitted for the truth of the matter asserted but to explain the course of the investigation. Nevertheless, the fact that the jury was aware of the details of Richard Willock's deferred judgment before he was cross-examined minimizes the prejudicial effect of that cross-examination.

Additionally, the district court removed a jury instruction that would have allowed the jury to consider this conviction in assessing Richard Willock's credibility. The court stated,

> For the record, [instruction] 22 has been removed and it was uniform 200.36, that was a comment upon the witness Richard Willock and it called for the jury to assess his credibility. The evidence reflects, I believe, that Mr. Willock pled and received a deferred judgment and apparently successfully completed his term of probation on a charge of identity theft. He indicated that it was an aggravated misdemeanor. Ordinarily under Rule of Evidence 609 because it involves theft or dishonesty, it would be something that could be instructed upon, but since he received a deferred judgment and successfully completed his term of probation on that supervision, I have taken [instruction] 22 out.

For these reasons, we conclude the district court did not abuse its discretion in allowing the State to cross-examine Richard Willock about the details of Richard Willock's deferred judgment.

V. Jury Instruction on the Removal Alternative of Kidnapping

Iowa Code section 710.1 states that "[a] person commits kidnapping when the person either confines a person or removes a person from one place to another . . . ." Iowa Code § 710.1. The district court instructed the jury that the State would have to prove Willock "confined Sami Stamatiades or removed her from her bedroom to the first floor of her home." Willock takes issue with the portion of this instruction that permitted the jury to find he removed Stamatiades. Our review of this instruction is for correction of errors of law. *In re Detention of Crane*, 704 N.W.2d 437, 438 (Iowa 2005).

We believe there was substantial evidence to support the removal alternative. The intruders transferred Stamatiades from the second floor to the first floor. A jury could have found this removal lessened the risk of detection, as

Stamatiades's children were upstairs. Because there was substantial evidentiary support for this alternative, the district court did not err in instructing the jury as it did.

VI. Sufficiency of the Evidence of First-Degree Kidnapping

Willock challenges the sufficiency of the evidence to support the jury's finding of guilt on the first-degree kidnapping count. He argues, "[n]o rational trier of fact could have found substantial evidence to prove that the confinement in this case was significantly independent of the confinement incident to the commission of the underlying crimes of robbery, burglary, and sexual abuse." Our review is for errors at law. *State v. Leckington*, 713 N.W.2d 218, 221 (Iowa 2006).

Willock is correct that the confinement required of kidnapping must be significantly independent of the confinement incident to the commission of the underlying crime. *State v. McGrew*, 515 N.W.2d 36, 39 (Iowa 1994). "The rationale behind the 'incidental rule' arises from our recognition that confinement of a victim, against the victim's will, is frequently an attendant circumstance in the commission of many other crimes, notably robbery and sexual abuse." *Id*.

A jury could have found that this requirement was satisfied. The intruders duct-taped Stamatiades's mouth, wrists and ankles and threatened her. Our court concluded that similar types of action supported the confinement element of a kidnapping charge. *State v. Tryon*, 431 N.W.2d 11, 14 (Iowa Ct. App. 1988). Additionally, the intruders confined Stamatiades for several hours. *See State v. Davis*, 584 N.W.2d 913, 916 (Iowa Ct. App. 1998) (stating "it is more likely that a confinement which lasts beyond the time period it takes to commit the underlying

crime is kidnapping."). And, Stamatiades testified that she was scared for her life. *Id*. (considering "whether the victim felt her life in danger"). She also testified that the intruders turned on the stereo to drown out her screams. *Id.* at 917 (stating defendant "took specific attempts to seclude Smith and cut off her contact with others"). Finally, they moved her away from the floor where her children slept, a factor the district court found significant, as do we. *Id.*

We conclude there was sufficient evidence to establish that the confinement exceeded what was inherent in the underlying crimes. *Id.* Accordingly, we affirm the district court on this issue.

VII. Disposition

We conditionally affirm Willock's judgment and sentence but remand for consideration of the new trial motion, using the weight-of-the-evidence standard.

CONDITIONALLY AFFIRMED AND REMANDED.