

IN THE COURT OF APPEALS OF IOWA

No. 9-231 / 08-1170
Filed May 6, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ADDISON TRE HAWK,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire,
Judge.

Defendant alleges counsel was ineffective in failing to make specific
objections concerning the sufficiency of the evidence. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, and Michael J. Walton, County Attorney.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

EISENHAUER, J.

In June 2008, a jury found Addison Tre Hawk guilty of kidnapping in the third degree and sexual abuse in the third degree. The State's evidence showed Hawk was in placement at a residential youth facility. After seeking health-care treatment one evening, Hawk returned to the isolated, basement medical office, forced the sole healthcare worker into a storage room, and assaulted her. At sentencing, the court ordered Hawk to serve an indeterminate ten-year sentence on the kidnapping charge and merged the sexual abuse sentence into the kidnapping sentence. Hawk appeals alleging his counsel was ineffective.

In order to prevail on his claims of ineffective assistance of counsel, Hawk must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. See *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). Hawk's inability to prove either element is fatal. See *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). We evaluate the totality of the relevant circumstances in a de novo review. *Lane*, 726 N.W.2d at 392. Courts generally presume counsel is competent and will not second-guess a reasonable trial strategy. *State v. Davis*, 584 N.W.2d 913, 918 (Iowa Ct. App. 1998). We can resolve the issue on direct appeal when the record is adequate to determine Hawk will be unable to establish one or both elements. See *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003). Here the record is adequate to resolve Hawk's appeal.

At the close of the State's case, Hawk's attorney moved for directed verdict:

I would ask the court to direct a verdict of acquittal based upon the evidence that was submitted by the State's – in the State's case in

chief. We do not believe that they have presented enough prima facie case to allow this case to go the jury.

Counsel's motion was too vague to alert the court to a specific complaint. Therefore, we look to Hawk's complaints on appeal to determine if trial counsel breached any duty. *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996).

I. Kidnapping Conviction.

First, Hawk argues counsel was ineffective in failing to specifically object to the sufficiency of the evidence to establish kidnapping on the grounds his confinement of the victim was incidental to the sexual assault.

The confinement required to support a conviction for kidnapping must be more than slight, inconsequential confinement, and it must not be merely incidental to the underlying felony.¹ See *State v. Rich*, 305 N.W.2d 739, 745 (Iowa 1981). There is, however, "no minimum period of confinement or distance of removal . . . required for conviction of kidnapping." *Id.* Additionally, the mere seizure of the victim during the commission of the crime does not necessarily rise to the level of confinement required for kidnapping. *State v. Mead*, 318 N.W.2d 440, 445 (Iowa 1982) (holding the defendant's act of grabbing victim from behind and briefly holding a knife to her throat was a seizure, not a confinement, prior to purse snatching).

In deciding whether the evidence supports independently significant confinement, as opposed to a seizure, Iowa courts analyze five factors: (1) the character of the confinement; (2) the length of time involved; (3) the location of

¹ Because the State cites no authority for its argument the "incidental rule" does not apply to the third-degree level of kidnapping, the argument is waived. Iowa R. App. P. 6.14(1)(c).

the confinement; (4) the nature of the threat to the victim; and (5) “whether the defendant significantly facilitates escape for his victim following the commission of the underlying offense.” *Davis*, 584 N.W.2d at 916-17.

We first analyze the character of the confinement. The act of sexual abuse was Hawk pinning down the victim and ejaculating after “one really long thrust.” The victim was not confined by Hawk for only the short time it took to commit this act, however. Before the incident Hawk grabbed the victim in the doorway of the examination room and forcefully moved her through the ten-foot-long examination room and into the back storage room. She testified, “he grabbed me, and I don’t know if he picked me up off the floor completely or . . . if my feet were still on the floor, but he dragged me . . . all the way through.”

When they reached the doorway of the storage room, the victim was able to reach her arm out and she clung onto the storage room’s door jam. However, Hawk “broke my grip free.” While in the storage room, the victim tried to convince Hawk to release her, attempted to use the phone, felt she was suffocating, was in considerable pain, feared and begged for her life, and lost consciousness during Hawk’s restraint. After the sexual act, as the victim tried to breathe and “was struggling,” Hawk continually used his body weight to hold her on the floor. Therefore, the character of the victim’s confinement exceeded what is inherent in the underlying sexual abuse. See *Rich*, 305 N.W.2d at 745-46 (holding the binding of the victim’s hands behind her back was not necessary to commit sexual abuse or a normal incident of that offense).

Not only did the character of these events exceed what inherently accompanies sexual abuse, but the time of the confinement did as well. It is more likely that a confinement which lasts beyond the time period it takes to commit the underlying crime is kidnapping. See *State v. McGrew*, 515 N.W.2d 36, 39 (Iowa 1994). Here the victim was confined when Hawk grabbed her in the examination room doorway, forced her across the examination room, pushed her on top of a storage room cart, and held her there. Next, Hawk forced the victim to the floor and they both lay on their sides with Hawk holding her down. “And at that point we just laid there for a little bit. And I was able to calm myself enough to talk to him.” As the victim and Hawk talked, she tried to convince Hawk to let her use the phone.

Most of that time I was able to talk to him. And I was calm, and I said, I’m just going to reach up and I’m going to get that phone. And he was kind of letting me. He let me get to my knees. And I was on my knees and reaching up around the corner to get to the phone, and that’s when he made some kind of “rargh” sound and threw me down to the ground. And I landed very, very hard, right on my chin and a little bit on my elbow. And it was all of my weight with him on top of me.

This was followed by at least twenty more minutes of restraint and struggle, which exceeded the time necessary for Hawk to commit his sexual abuse.

The third factor is whether the defendant has selected a secluded location in which to confine the victim. “Secluding the victim lessens the risk of detection and further increases the risk of harm to the victim.” *Davis*, 584 N.W.2d at 916. Hawk took specific steps to seclude the victim and cut off her contact with others. Hawk first grabbed the victim in the doorway of the healthcare office and then moved her through the examination room to the more secluded storage room.

His actions indicate he sought the seclusion of the storage room as a means of avoiding detection. The victim testified she was generally alone in the evening and someone might happen by the basement offices only once every thirty minutes. She stated going from the examination room back into the storage room made it a more dangerous situation. Therefore, Hawk's removal of the victim from the examination room decreased the risk of Hawk being detected and increased the risk of harm to his victim.

We also consider whether the victim "felt her life in danger." *Id.* Before the sexual abuse, the victim thought Hawk was going to kill her as he angrily struggled with her, telling her repeatedly to "shut up." She testified:

[The victim was face down on the floor and Hawk] had moved up higher to where the full weight of his chest was on the back of my chest, and I couldn't breathe, and I was kind of starting to suffocate. And I was, I can't breathe, I can't breathe, I can't breathe. And he didn't let up. And I kept telling him, please, please, please, just let me breathe, just let me breathe. I just wanted to breathe a little. I can't breathe.

At that point I just kept saying, give me one arm. Because he had both of my arms behind me and he had all of his weight on my chest. I just need one arm, just one arm, so I can breathe a little bit. But he didn't let up. And at one point I thought that he was trying to suffocate me. And then I thought he was going to rape me.

And after I said, "please don't kill me," . . . he didn't let up. In fact, if anything, I felt like he increased the pressure. I know at one point I blacked out a little bit. I don't – I remember seeing black. I lost all of my hearing. I couldn't see anything. And I saw stars. I don't know if I was completely out and then I came back or just for a second, but I was out, came back.

And at that point when I came back a little bit, he was still on me, . . . I could feel him grinding into me . . . and I felt one really strong thrust, which I connected that he ejaculated during the process.

At that time after that, I kept asking him – he still had the pressure on me. He let up a little bit. I kept telling him just to give me one arm, one arm. At one point he did release one arm just to

where I could get my elbow out and lift just a little pressure off . . . and I could finally breathe. At that point I thought maybe I won't – I thought I was going to die before that.

The victim's testimony unequivocally shows she felt her life was in danger.

Finally, "whether the defendant significantly facilitates escape for his victim following the commission of the underlying offense is a factor." *Id.* After the sexual abuse Hawk remained on top of his victim, confining her, until they were discovered by a coworker. The victim testified:

I started talking to him again. I know there were a lot of things I had said, just to let me go and let me up. . . .

Then I saw my coworker. She must have heard us. [The coworker] walked around and the door was wide open. I was face down. I just looked up enough and I saw her shoes. . . . And I looked up at her, and I said, get help, get help, get help. And I started screaming.

Hawk did not release the victim from confinement and leave until they were discovered by the victim's coworker. Because the confinement did not end until a coworker saw Hawk and left to get help for the victim, Hawk did not facilitate his victim's escape after the commission of the sex abuse.

When the five relevant factors are considered together, Hawk's confinement of the victim exceeded the confinement inherent in the commission of sexual abuse. The facts show Hawk's confinement of the victim was more than a "seizure." Rather, the victim was physically forced into a secluded setting, was suffocated to the point of blacking out, was confined both before and after the abuse, was put in fear for her life, and was released only upon discovery by a third party. This is not "slight, inconsequential confinement," or actions necessary to commit sexual abuse or a normal incident of that offense. The

State's proof of confinement advanced beyond the independent significance threshold of *Rich*. Accordingly, Hawk's trial counsel was not ineffective because he had no duty to make a meritless motion. See *State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005).

II. Sexual Abuse Conviction.

Hawk also argues counsel was ineffective in failing to specifically object to the sufficiency of the evidence to establish sexual abuse on the grounds there was not contact between his genitalia and the anus of the victim.

Under Iowa Code section 702.17 (2007), a sex act includes "contact between the genitalia of one person and the . . . anus of another person. . . ." Skin to skin contact is not required for sexual abuse, the contact may occur through clothing, as was the case here. See *State v Pearson*, 514 N.W.2d 452, 455 (Iowa 1994). The victim testified Hawk was grinding his penis into her "anus area." The testimony therefore supports the statutory requirements. Hawk's trial counsel was not ineffective because he had no duty to make a meritless motion. See *Griffin*, 691 N.W.2d at 737.

AFFIRMED.