IN THE COURT OF APPEALS OF IOWA

No. 3-048 / 11-2085
Filed February 27, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEITH VAN ELSON JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Ian K. Thornhill, Judge.

Keith Elson appeals his conviction for first-degree kidnapping in violation of Iowa Code section 710.2 (2009). **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Jason Burns, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

Keith Elson abducted a nineteen-year-old clerk at knifepoint from the Cedar Rapids convenience store where she was working the overnight shift. He took her to his apartment where he sexually assaulted her and held her for seven hours. Following a bench trial, the district court found him guilty of first-degree kidnapping in violation of Iowa Code section 710.2 (2009). On appeal, he contends he was too intoxicated to form specific intent to commit the crime.

Because the State offered substantial evidence from which a fact finder could infer Elson's specific intent to subject his victim to sexual abuse, we affirm his conviction.

I. Factual Background and Legal Proceedings

Elson made two trips to the Kwik Shop on Tenth Street and First Avenue Southwest in the early morning hours of May 17, 2010. Both were captured on the store's surveillance tape. Around 1:30 a.m. he entered and asked the clerk for the location of the restroom. A.D. was working alone and helping another customer as she pointed Elson toward the restroom, where she estimated he spent twenty minutes. When he emerged he asked her how late the store stayed open and then left.

Elson returned at 4 a.m. He chained his bicycle to an eye bolt on the outside wall of a Family Dollar Store across Tenth Street from the Kwik Shop. A.D. recalled him entering the convenience store wearing a backpack.[1] He tried

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[1] Video evidence showed Elson wearing the backpack both times he entered the store. Police seized the pack from his apartment and found inside a section of hemp rope measuring six to eight feet long, a section of nylon rope measuring ten to twelve feet

to buy beer, but A.D. told him the store was not allowed to sell alcohol at that hour. She put the beer back in the cooler where it belonged, and as she returned to the counter, she walked by Elson at the coffee island. He grabbed the back of her neck with his left hand and said: "I'm sorry. You have to come with me." In his right hand he held a large knife. A.D. did not perceive Elson as stumbling or slurring his words.

Keeping his grip on A.D., he walked her out of the store and around the building's dumpsters toward an alley. When they encountered another pedestrian, Elson warned A.D. not to say anything. They took a complex route, through alleyways and parking lots and over retaining walls, until they arrived at the back door of Elson's apartment complex. A.D. recalled Elson stumbling twice during the five-block walk. They went up a flight of stairs to Elson's apartment. He fumbled for his keys but eventually unlocked his door and pushed A.D. inside the apartment.

Elson ordered her to undress, and she complied because she was afraid. Elson removed his clothes, retrieved a bottle of shaving cream from a table, and returned to the bed. He forced A.D. to perform oral sex. He then slathered her with shaving cream and put his mouth on her body. He also applied the cream to his penis and then forced A.D. to have vaginal sex. Elson told the teenager to act like she "enjoyed it" or he would hurt her.

After the sex acts, A.D. put her clothes back on and recalled that Elson kept talking:

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long, a towel, a washcloth, a bungee cord, pliers, a wrench, as well as several personal grooming items.

> He kept apologizing. He would say—he would tell me not to let anybody ever hurt me. He told me that he knew I was raised up right, because of the way I acted and that he had been watching me; that he knew the people I talked to or the vehicles I drove to work. He would make me read things on the wall.

Elson told A.D. he had been abused by his father. He had scrawled several messages on the apartment walls with markers, bemoaning his condition and blaming his father. After forcing A.D. to read his writings, he returned her to the bed and rigged a belt from the ceiling, threatening to hang himself. He then talked some more. Among his revelations, he told her cocaine was his drug of choice and having sex was the best way for him to "get his fix" without doing cocaine. He also lied to A.D. about his name, saying it was Kevin. He eventually grabbed her by the wrist and forced her to accompany him to the bathroom so that he could urinate. Next he returned her to the bed, went to the kitchenette to get a different knife, and started approaching her.

At that point, A.D. stood up

> [A]nd I told him that I wasn't going to sit there and let him come toward me with a knife. And he sat it down on the white thing next to the bed and got up for something. And I grabbed the knife and I told him not to come near me. And he started coming closer.

A.D. stabbed Elson in the stomach. As they struggled for control of the knife, A.D. cut her hands on the blade. When Elson took the knife from her, she grabbed an electrical fan and threw it at him. He caught her by the work shirt, but she slipped it off over her head and ran into the bathroom. The bathroom door would not lock behind her, so she kept it closed by jamming her foot against a cupboard and bracing herself against the door. While she was in the bathroom, Elson grew angry. He yelled for her to come out so she could call an

ambulance because he did not want to die from his stab wounds. A.D. shouted for help while holding Elson at bay.

Meanwhile, the unattended convenience store drew the attention of a delivery man and a female customer. The customer called police officers, who arrived at 4:20 a.m. The officers called the Kwik Shop manager, who came to the store and provided them with its video recording showing A.D. being led out of the store. Elson's neighbor, Ed Hoffman, was running errands that morning and saw at least ten squad cars parked between the Kwik Shop and the Family Dollar Store. Hoffman noticed the bicycle tethered to the wall and told one of the officers on the scene he recognized it as belonging to Elson. Officers followed the lead and heard a woman screaming for help in Elson's building. Eventually the police rescued A.D. from Elson's apartment.

A.D. recalled Elson drinking beer throughout the seven hours he held her in the apartment, though she did not know how many cans he consumed.

The police took both Elson and A.D. to the hospital. A.D. received stitches to her hand and provided samples for a sexual assault kit. DNA from a vaginal swab matched Elson's profile. The hospital took a sample of Elson's blood, which revealed an alcohol concentration (BAC) of .216 at 11:45 a.m.

On June 7, 2010, the State prepared a trial information charging Elson with kidnapping in the first degree, a class "A" felony. Elson provided notice to the prosecution that he intended to rely on diminished responsibility and intoxication defenses. Elson also waived his right to a jury trial. The parties tried the case to the court on October 24–27, 2011. In support of his intoxication

defense, Elson called forensic toxicologist Michael Rehberg as an expert witness. Rehberg started from the hospital blood test and extrapolated back to determine Elson's BAC at 4 a.m. when he abducted A.D. from the Kwik Shop. Rehberg estimated Elson's BAC would have been at least .21 and could have been as high as .39, depending upon Elson's consumption during the seven hours he held A.D. captive. Rehberg characterized a BAC between .31 and .39 as "heroic. It's extremely high." In rebuttal, the State offered the opinion of psychiatrist Michael Taylor, who testified that Elson's actions and statements to A.D. indicated his ability to form specific intent, regardless of his blood alcohol level.

The district court issued a nine-page, detailed Findings of Fact, Conclusions of Law, and Verdict on November 4, 2011. The court determined Elson was guilty of the offense of kidnapping in the first degree as charged in the trial information. The defendant filed a motion for new trial on December 12, 2011. The court denied the new trial motion and sentenced Elson to life in prison without the possibility of parole. He filed a timely appeal and now raises this claim: "whether the State proved beyond a reasonable doubt Elson had the ability to form specific intent."

II. Standard of Review

We review claims of insufficient evidence for legal error. *State v. Dewitt*, 811 N.W.2d 460, 467 (Iowa 2012). The court's finding of guilty is binding on appeal if supported by substantial evidence. *Id*. Substantial evidence is the

quantum and quality of proof that would convince a rational trier of fact that Elson was guilty beyond a reasonable doubt. *See id.*

In a criminal defendant's appeal following a bench trial, we construe the district court's fact findings broadly and liberally, rather than narrowly and technically, and in the face of ambiguity, our construction aims to uphold, rather than defeat the verdict. *State v. Dible*, 538 N.W.2d 267, 270 (Iowa 1995).

III. Analysis

Elson claims the State failed to prove he formed the specific intent necessary for a first-degree kidnapping conviction. The phrase "specific intent" designates a special mental element the State is required to prove above and beyond the intentional nature of the criminal act. *See State v. Neuzil*, 589 N.W.2d 708, 711 (Iowa 1999). The definition of kidnapping requires proof the defendant either confined the victim or removed the victim from one place to another, without consent, and with the intent to do one or more of the following: (1) hold the victim for ransom, (2) use the victim as a hostage or shield, (3) inflict serious injury or subject the victim to sexual abuse, (4) secretly confine the victim, or (5) interfere with the performance of a government function. Iowa Code § 710.1. The crime is enhanced to first degree if the victim, as a result of the confinement or removal, suffers serious injury, or is intentionally subjected to torture or sexual abuse. Iowa Code § 710.2.

Here, the district court determined the State proved the following elements of first-degree kidnapping beyond a reasonable doubt: (1) Elson removed A.D. from the Kwik Shop; (2) he did so with the specific intent to sexually assault her;

(3) he knew he did not have her consent to remove her from the store; and (4) as a result of the removal, A.D. was sexually abused by Elson. Elson contests the second element—whether the State proved he formed the specific intent to commit sexual assault.

The question posed in this appeal is whether Elson's "heroically" high blood alcohol level rendered him unable to form specific intent to commit sexual assault. Toxicologist Rehberg estimated Elson's BAC could have been as high as .39 when he abducted A.D. from the store. Rehberg testified most human beings would be "asleep or sick" at that level. On appeal, Elson contends a BAC ranging from .21 to .39 "could make a person unable to deliberate, premeditate or form a plan and carry it out."

Our common law did not allow voluntary intoxication to excuse the criminal consequences of one's conduct, but evidence of intoxication was deemed "admissible and important as bearing upon the defendant's motive or intent." *State v. Booth*, 169 N.W.2d 869, 874 (Iowa 1969). "When specific intent must be shown, intoxication which prevents one from forming such intent is material and may entitle defendant to acquittal." *Id*. Those principles were codified at Iowa Code section 701.5, which provides:

> The fact that a person is under the influence of intoxicants or drugs neither excuses the person's act nor aggravates the person's guilt, but may be shown where it is relevant in proving the person's specific intent or recklessness at the time of the person's alleged criminal act or in proving any element of the public offense with which the person is charged.

When the accused presents intoxication as a defense, the State retains the burden of proving the element of specific intent. *State v. Templeton*, 258 N.W.2d 380, 383 (Iowa 1977).

"Intent is rarely susceptible of direct proof but it may be inferred from outward acts and attending circumstances." *State v. Query*, 594 N.W.2d 438, 444 (Iowa Ct. App. 1999). Where a defendant denies his intent to commit sexual abuse, the trier of fact may look to his words and actions to see if it may be reasonably inferred. *State v. Radeke*, 444 N.W.2d 476, 478 (Iowa 1989). Intent to commit sexual abuse may be inferred from "a sexual comment made by the defendant to the victim, touching in a sexual way, the removal or request to remove clothing, or some other act during the commission of the crime that showed a desire to engage in sexual activity." *Cf. State v. Casady,* 491 N.W.2d 782, 787 (Iowa 1992) (chronicling proof for conviction of assault with intent to commit sexual abuse).

The district court referred to Iowa Uniform Criminal Jury Instruction 200.14 in considering Elson's intoxication defense. That stock instruction provides:

> The defendant claims he was under the influence of intoxicants at the time of the alleged crime. The fact that a person is under the influence of intoxicants does not excuse nor aggravate his guilt.
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> Even if a person is under the influence of an intoxicant, he is responsible for his act if he had sufficient mental capacity to form the specific intent necessary to the crime charged or had the specific intent before he fell under the influence of the intoxicant and then committed the act. Intoxication is a defense only when it causes a mental disability which makes the person incapable of forming the specific intent.

The district court paid attention to the defense evidence concerning intoxication, writing:

> Defendant's expert opined that Defendant's BAC at 4:00 a.m. on May 17, 2010, could have been anywhere from .21 to .39, depending on what assumptions are made regarding when Defendant began drinking and how much he drank. The expert also testified that it was possible, but not likely, that Defendant could have achieved a BAC of .21 to .26 at 11:45 a.m. by having nothing to drink until after 4:00 a.m. The expert also opined a BAC anywhere between .21 and .39 could make a person unable to deliberate or premeditate one's actions.

But the court was not persuaded that Elson's high BAC rendered him unable to form the specific intent necessary to commit first-degree kidnapping. The court explained:

> Although the Court does not doubt the expert's calculations or opinions, neither they, nor the assumptions behind them, negate for the Court what the substantial evidence presented by the State shows beyond a reasonable doubt—that Defendant specifically intended to sexually assault A.D. when he entered the Kwik Shop at 4:00 a.m. on May 17, 2010.

The court listed numerous circumstances supporting its determination that Elson formed the specific intent to sexually abuse A.D. The court first pointed to Elson's own statements to A.D. that he had been watching her, knew her work hours, the car she drove, and with whom she interacted. The court also found evidence of planning from Elson's act of packing ropes and a large knife in his backpack before coming to the store. The court believed Elson's first entry into the store revealed his intent to conduct surveillance, or perhaps reflected a decision to abort his first attempt to nab A.D. because of other customers in the store.

The court detailed deliberate steps Elson took during his second trip to the store: his act of securing his bicycle to a building across the street, his direct path to the checkout counter on entering, his movement to the back of the store to find A.D., the removal of the knife from his pack, and his seizure of A.D. by the neck—forcibly marching her from the store where any criminal activity could be detected.[2] The court then aptly observed Elson's route home with A.D. was "direct and covert." The court found it significant to Elson's intent that upon entering his apartment with the victim, he locked the door and ordered A.D. to undress.

We find the district court's legal analysis to be insightful and its verdict to be based on reasonable inferences arising from the State's evidence. Elson's course of conduct during the early morning hours of May 17, 2010, exposed his plan to subject A.D. to sexual abuse. It did not support the contrary inference that he was too drunk to form the intent to achieve his sexual goal. We are also persuaded by the testimony of Dr. Taylor, who found Elson's own statements to be telling of his intent. For example, Elson acknowledged to A.D. that what he had done required an apology, and he explained that his desire to have sex with her was a substitute for getting high on cocaine.

On appeal, Elson highlights details that detract from the inference he formed specific intent to commit a crime. For instance, he notes that he parked his bicycle in plain sight and made no attempt to retrieve it. While leaving his

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[2] In addition to A.D.'s testimony as to the sequence of events at the Kwik Shop, the record includes surveillance footage from two angles capturing Elson's conduct inside the store.

bicycle at the Family Dollar might have shown bad planning (and was ultimately his undoing), an ill-conceived decision in the course of carrying out a kidnapping is not the same as an alcohol-induced inability to form specific intent.

Elson's extremely high BAC was undoubtedly relevant to the impact intoxication may have played in his mental functioning. In the context of drunken driving, our courts have endorsed the concept that "a BAC showing some level of alcohol in the blood makes it *more probable* that a person was under the influence of alcohol than without the evidence." *State v. Price*, 692 N.W.2d 1, 4 (Iowa 2005). But while the influence of intoxicants is relevant to proving a person's specific intent to commit a criminal offense, unlike chapter 321J cases, no per se level of intoxication governs the finding of substantial evidence.

Both toxicologist Rehberg and psychiatrist Taylor discussed the concept of tolerance to a high level of alcohol consumption in their testimony. Rehberg explained that as individuals become more experienced drinkers they can accommodate the symptoms of intoxication and the symptoms can appear less pronounced. He also acknowledged some individuals possess an innate ability to "handle a larger load"—or in common parlance, to "drink everybody else under the table." But Rehberg ultimately opined that a person cannot wholly avoid the effects of a high alcohol level.

Dr. Taylor somewhat disagreed, contending Elson's high BAC did not alter his view that the defendant was able to form specific intent. Dr. Taylor relayed Elson's admission to typically drinking thirty beers per day: "Given the amount of alcohol that Mr. Elson told me he drank on a regular basis, a blood alcohol level

of .21 would be typical for him on a daily basis and, no, it would not change my opinion one iota."

We find no legal error in the district court's decision to credit the defense expert's testimony concerning Elson's high level of intoxication but nevertheless adjudge Elson's behavior—as established through the State's witnesses—to signal the ability to form specific intent. Whether Elson had an inherent ability to handle more liquor than the average person or whether his daily practice of drinking large quantities of beer enabled him to function more normally with a high BAC, the record shows that his intoxication on May 17, 2010, did not cause a mental disability which made him incapable of forming specific intent. The defense evidence of Elson's high BAC did not diminish the State's substantial evidence illuminating his specific intent to subject A.D. to sexual abuse. We find no reason to disturb the court's finding of guilt.

AFFIRMED.