STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0980

State of Minnesota,
Respondent,

vs.

Darshund Adonis Tate,
Appellant.

Filed May 20, 2013
Affirmed
Johnson, Chief Judge

Olmsted County District Court
File No. 55-CR-11-3648

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Peterson, Judge; and Chutich, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Chief Judge

An Olmsted County jury found Darshund Tate guilty of, among other things, the sexual assault and kidnapping of his girlfriend. On appeal, Tate challenges the

sufficiency of the evidence, the absence of a jury instruction, and the district court's denial of his motion for a downward departure at sentencing. We affirm.

FACTS

Tate's convictions arise from interactions with his girlfriend, S.O., at their shared apartment in the city of Rochester. According to S.O.'s trial testimony, the trouble began when she spoke to a man in the hallway of their apartment building. She later told Tate that the man was an old boyfriend. Tate became upset, yelled at her, called her derogatory names, and threatened both to make her a prostitute and to kill her. S.O. briefly left the apartment to go for a walk with the couple's daughter. When she returned, they argued further, and he again called her derogatory names.

Later that night, while S.O. was lying in bed, Tate came into the bedroom and demanded that she perform fellatio. When she refused, he hit her in the head with a closed fist. She then complied with his demand. S.O. testified that she could not leave because she feared that Tate would hit or choke her and that she could not call someone because Tate had taken away the home phone and because her cell phone was inoperable.

S.O. went to sleep and woke up briefly at 3:00 a.m. to feed her baby. When she woke up again at 8:00 a.m., Tate had taken away the car keys, yelled at her, spit in her face, and told her that he was going to put her in a coma and kill her if she called the police. Tate also told S.O. that she needed his permission to do anything. He forced her to show him that she was menstruating before allowing her to shower. He continued to call her names and threatened to hit her "like a man." He slapped her in the face and ordered her to lie on the bed and remain there until he told her to get up. Tate told her

that he should find someone to shoot up her house or kill her. S.O. remained on the bed until Tate told her to get dressed and go to work. He told her not to look at anyone or talk to anyone and to walk behind him. He drove her to work and told her he would pick her up if he felt like it. When she arrived at work, she told a coworker what had happened and reported the incident to authorities.

In May 2011, the state charged Tate with third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(c) (2010); terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2010); domestic assault in violation of Minn. Stat. § 609.2242, subd. 2 (2010); kidnapping in violation of Minn. Stat. § 609.25, subd. 1(3) (2010); and false imprisonment in violation of Minn. Stat. § 609.255, subd. 2 (2010). After a four-day trial in January 2012, the jury found Tate guilty on all counts. At the sentencing hearing, Tate moved for a downward durational departure on the ground that his conduct was less serious than typical third-degree criminal sexual conduct and kidnapping offenses. The district court denied the motion and imposed the presumptive sentence of 180 months of imprisonment for criminal sexual conduct and a consecutive sentence of 21 months for kidnapping. Tate appeals.

D E C I S I O N

I. Sufficiency of the Evidence

Tate first argues that the evidence is insufficient to sustain his conviction for kidnapping.

When the sufficiency of the evidence is challenged, we conduct "a painstaking analysis of the record to determine whether the evidence, when viewed in a light most

favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). "We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence" and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the crime charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted).

A person is guilty of kidnapping if he or she "confines or removes from one place to another, any person without the person's consent" in order to "commit great bodily harm or to terrorize the victim or another." Minn. Stat. § 609.25, subd. 1(3). The district court instructed the jury that to "confine" means "to deprive a person of freedom. A physical restraint is not necessary. A person can restrain another by threats of force."

A. Confinement

Tate first contends that the evidence is insufficient because the state failed to prove that he confined S.O. and that he intended to terrorize her. Tate asserts that S.O. had several opportunities to leave the apartment, noting that she did leave for a walk at one point but returned and chose to stay with him and remained in the apartment even after the criminal sexual conduct. He further asserts that S.O. never said she wanted to leave and never tried to do so.

The evidence supports the conclusion that Tate confined S.O. Tate confined S.O. to her bedroom after the criminal sexual conduct. S.O. testified that she could not leave

because she feared that Tate would hit or choke her and that she could not call someone because Tate had taken away the home phone and because her cell phone was inoperable. S.O. also testified that when she woke up at 3:00 a.m. to feed her baby, she believed that Tate's abuse was finished and did not expect it to continue into the next day. When she woke up the next morning, Tate was already awake and had taken the car keys. Tate further confined her by ordering her to remain on the bed until he told her to get up, all the while threatening to find someone to shoot up the house or kill her.

The evidence also supports the conclusion that Tate intended to terrorize S.O. She testified that he repeatedly threatened her with physical violence and struck her three times. She also testified that she did not believe that she "was going to make it to work alive." Furthermore, those who spoke to S.O. following the incident testified that she was upset and frightened.

B. Nexus to Criminal Sexual Conduct

Tate also contends that the evidence of kidnapping is insufficient because the state failed to prove that his confinement of S.O. was more than incidental to the criminal sexual conduct, the only other offense for which he was sentenced. Tate relies on *State v. Welch*, 675 N.W.2d 615 (Minn. 2004), and *State v. Smith*, 669 N.W.2d 19 (Minn. 2003), *overruled on other grounds by State v. Leake*, 699 N.W.2d 312 (Minn. 2005). In *Smith*, the supreme court stated that the "confinement or removal must be criminally significant in the sense of being more than merely incidental to the underlying crime, in order to justify a separate criminal sentence." 669 N.W.2d at 32; *see also Welch*, 675 N.W.2d at

620-21 (relying on *Smith* to conclude that confinement was incidental to attempted criminal sexual conduct).

The state argues that this case is distinguishable from *Smith* and *Welch* because the allegations of kidnapping and false imprisonment arose several hours after Tate sexually assaulted S.O. The state is correct. The criminal sexual conduct occurred before S.O. went to bed. Tate resumed terrorizing S.O. in the morning and confined her again by taking the car keys and by ordering her to lie on the bed and remain there until he told her to get up. It was only after Tate told S.O. to get dressed and go to work that she was allowed to leave, with him, as he drove her to work. Unlike *Smith* and *Welch*, the confinement at issue here was not incidental to the criminal sexual conduct.

Thus, the evidence was sufficient to support Tate's conviction of kidnapping.

II. Jury Instructions

Tate argues that the district court erred by failing to instruct the jury that the confinement of S.O. must have been more than incidental to the commission of other offenses.

A district court must instruct the jury in a way that "fairly and adequately explain[s] the law of the case" and does not "materially misstate[] the applicable law." *State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011). A district court has "considerable latitude" in selecting language for jury instructions. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011) (quotation omitted). Tate concedes that he did not preserve an objection to the lack of an instruction that any confinement of S.O. must be more than incidental to other offenses. Accordingly, we review for plain error. *See* Minn. R. Crim.

P. 31.02. Under the plain-error test, we may not grant appellate relief unless (1) there is an error, (2) the error is plain, and (3) the error affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is "plain" if it is clear or obvious under current law, *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), and an error is clear or obvious if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the first three requirements of the plain-error test are satisfied, we then consider the fourth requirement, whether the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005) (quotation omitted).

In *Smith*, the supreme court stated that the "confinement or removal must be criminally significant in the sense of being more than merely incidental to the underlying crime, in order to justify a separate criminal sentence." 669 N.W.2d at 32. In this case, the district court gave the jury a kidnapping instruction that parallels the pattern jury instruction. *See* 10 Minnesota Dist. Judges Ass'n, *Minnesota Practice—Jury Instruction Guides*, §§ 15.01, 15.02 (5th ed. 2006). Tate contends that the pattern instruction is inaccurate because the original version was drafted before *Smith* and has not been revised since *Smith*. He also contends that a comment to pattern instruction number 15.01 that quotes *Smith* and refers to *Welch* provided the court with an opportunity to modify the instructions to correctly define the law. In response, the state contends that a modified instruction was not required given the facts of this case. *See Turnage v. State*, 708 N.W.2d 535, 545-46 (Minn. 2006). The state also contends an instruction was not required because this case is distinguishable from *Smith* and *Welch* in that the kidnapping

and false imprisonment offenses were committed several hours after Tate sexually assaulted S.O.

As discussed above, we conclude that the confinement was not incidental to the criminal sexual conduct. Tate completed the commission of the criminal sexual conduct offense hours before he committed the offense of kidnapping. The district court did not err in its jury instructions.

III. Downward Durational Departure

Tate argues that the district court erred by denying his motion for a downward durational departure.

A district court has broad discretion in determining an appropriate sentence, and reviewing courts will not reverse a district court's denial of a request for a downward departure unless the district court has abused its discretion. *State v. Kindem*, 313 N.W.2d 6, 7-8 (Minn. 1981). "Departures from the presumptive sentence are justified *only* when substantial and compelling circumstances are present in the record." *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008) (citing *State v. McIntosh*, 641 N.W.2d 3, 8 (Minn. 2002); Minn. Sent. Guidelines II.D.). Even if there are reasons for departing, this court will not disturb the district court's sentence if the district court had reasons for refusing to depart. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006); *Kindem*, 313 N.W.2d at 7-8. Reversing a denial of a request for a departure is appropriate only in "rare" circumstances, *Kindem*, 313 N.W.2d at 7, such as when the district court incorrectly believed that it was constrained from exercising its discretion or otherwise failed to

exercise its discretion, *see, e.g.*, *State v. Mendoza*, 638 N.W.2d 480, 484 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002).

Tate contends that his conduct warranted a downward durational departure because his conduct was less serious than typical third-degree criminal sexual conduct and kidnapping. He notes that he did not use a weapon, assaulted a girlfriend rather than a stranger, and assaulted S.O. in her own home without removing her to a more frightening location. In response, the state argues that these same factors make Tate's offense more serious, not less serious.

The district court explained at length its reasons for denying Tate's motion:

> I don't know how one defines offenses like this as being less than the normal offense because they are so serious. And it really does require review of the situation. And Mr. Tate, you were in a position of trust. You had a relationship with this woman, she had attachment to you, you were the father of her child, she had feelings toward you and you were in a position to really take advantage of that, to violate her, and to place her in fear for her life, which you did do. The power, the manipulation, the trust, the domestic relationship, all of that ties into the severity of this offense and I don't find that it's less serious than what we would consider to be normal. And with that, I don't know what you really do -- what one would consider to be a normal offense for something like this because it really does require review of the factual circumstances as they may be, but all offenses within this sexual assault and also with kidnapping are serious. They're serious offenses. That's why they're charged out as such and that's why the jury considers whether or not you committed the offense and they found, based on the evidence submitted, that you did. So, I'm not going to -- With that, I'm not going to grant the defense for a departure based on this offense being less serious than normal because I find that it is serious period, in and of itself. And the placing of your girlfriend on bitch status, requiring her to prove to you that she was menstruating in order for you to allow her to

> even use the restroom, joking with your son outside of the room about what had happened the night before and what you had done to her, the physical relationship, the manipulation, the control, the power, all of that really equates into the Court's decision in that defense motion is denied, because quite honestly I think that you were appropriately charged, the evidence was clean, the jury found you guilty, and I'm going to uphold their decision. And I think to grant a departure would be to minimize the severity of the offense.

The district court's statement of reasons for a presumptive sentence demonstrates that it considered Tate's arguments but rejected them. This is not the "rare case which would warrant reversal of the refusal to depart." *Kindem*¸ 313 N.W.2d at 7. Thus, the district court did not err by denying Tate's motion for a downward durational departure.

Affirmed.