IN THE COURT OF APPEALS OF IOWA

No. 1-485 / 10-0986
Filed December 21, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEREMY MICHAEL GIBLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

A defendant appeals from his convictions of first-degree kidnapping, attempted murder, and first-degree robbery. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Kevin Hobbs, West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Jon Jacobmeier and Shelly Sedlak, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., Vaitheswaran, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

VOGEL, P.J.

Jeremy Gibler appeals from his convictions of first-degree kidnapping, attempted murder, and first-degree robbery. He argues that his first-degree kidnapping conviction was not supported by sufficient evidence, specifically arguing the State did not prove the elements of confinement or removal and serious injury. Because we find there was sufficient evidence of confinement or removal, we affirm Gibler's kidnapping conviction. However, we find there was not sufficient evidence the victim suffered a serious injury, which relates to the degree of kidnapping. We therefore reverse the entry of judgment and sentence for first-degree kidnapping and remand for entry of judgment and sentencing for third-degree kidnapping. We have considered Gibler's remaining arguments and find they are either waived or without merit. We affirm.[1]

I. Background Facts and Proceedings.

Our court previously heard Gibler's codefendant's appeal, in which we summarized the facts as follows:

> [David Maddox, Gibler], and the victim were riding around together on December 17, 2009, after having spent time together drinking at the home of Gibler's aunt and then going to the home of a person [Maddox] knew. [Maddox] was driving, Gibler was in the back seat, and the victim was in the passenger's seat. At some point, [Maddox] parked the car close to the Missouri River. As [Maddox] got out and walked around the car, Gibler struck the victim in the head from behind. [Maddox] pulled the victim out of the car, then [Maddox] and Gibler pulled the victim through trees and brush, down a slope to the rocks along the river. This area was not visible from the road. Once there, [Maddox] and Gibler beat and kicked the victim. Gibler took what the victim had in his pockets. Then [Maddox] lifted the victim by the neck of his shirt,

[1] On June 24, 2011, Gibler filed a motion requesting an extension of time to file a pro se brief, "up to and including July 1, 2011." We deny this motion. Additionally, we note that he did not file his pro se brief by July 1, 2011, but instead filed it on July 13, 2011.

> said he knew the victim was a "snitch" or a "cop" and he was going to put him "in the river where people like [him] go, people that talk to cops," and then threw the victim into the river. When the victim stood up in the waist-deep water, [Maddox] threw a bowling-ball-size rock at him. In deflecting the rock with his hands, the victim ended up about shoulder-deep in the river. He moved with the current to a point where he could get out of the river. The victim walked nearly one and two-thirds miles in sub-freezing temperatures over a period of about forty-five minutes to a gas station, where the attendant called 911. The victim was treated at the hospital and released.

State v. Maddox, No. 10-0831 (Iowa Ct. App. May 25, 2011) (footnote omitted).

In January 2010, Gibler and Maddox were charged with first-degree kidnapping in violation of Iowa Code sections 710.1(3) and 710.2 (2009); attempted murder in violation of Iowa Code section 707.11; and first-degree robbery in violation of Iowa Code sections 702.7, 711.1(1), (2), and (3), and 711.2. Following a jury trial, both Gibler and Maddox were found guilty as charged. Gibler appeals.

II. Motion to Sever.

Defendants who are charged together may, and as a general rule are, tried together. Iowa R. Crim. P. 2.6(4); *State v. Truesdell*, 511 N.W.2d 429, 431 (Iowa Ct. App. 1993). Under Iowa Rule of Criminal Procedure 2.6(4), the district court "can order separate trials if a defendant would be prejudiced by a joint trial. It is the defendant's burden to establish separate trials are necessary to avoid prejudice that would deny a fair trial." *Truesdell*, 511 N.W.2d at 431. We review the district court's ruling denying severance for an abuse of discretion. *Id.*

> To establish an abuse of discretion, the defendant must show sufficient prejudice to constitute denial of a fair trial. To cause the type of prejudice that prevents codefendants from obtaining a fair trial, the defenses must be more than merely antagonistic, they

> must conflict to the point of being irreconcilable and mutually exclusive. . . .
>
> . . . .
>
> It is well established, however, that the mere presence of conflict, antagonism or hostility among defendants or the desire of one to exculpate himself by inculpating another are insufficient grounds to require separate trials.

State v. Snodgrass, 346 N.W.2d 472, 475 (Iowa 1984).

Gibler moved to sever his trial from Maddox's in February 2010. In March 2010, the district court ruled,

> Generally, a defendant may be entitled to severance when mutually antagonistic defenses are so prejudicial as to create a risk that a joint trial will compromise the right of one defendant to a fair trial. Severance is required when defenses are irreconcilable and mutually exclusive. *State v. Olsen*, 482 N.W.2d 452, 455 (Iowa Ct. App. 1992).
>
> The court does not find that Mr. Gibler's potential defenses are irreconcilable with, or mutually exclusive of, those of his co-defendant Mr. Maddox. Mr. Gibler has filed notices that he may rely on defenses of self-defense and intoxication. These potential justification defenses would not be incompatible with a possible position by Maddox that Gibler was the primary actor or sole cause of any alleged kidnapping, injury or robbery suffered by the alleged victim.
>
> On the record developed at this point, the court concludes that defendant Gibler is not entitled to severance.

Gibler asserts the district court should have granted his motion to sever. He argues that the record before the court at the time of the March 2010 ruling demonstrated that Gibler and Maddox's defenses were irreconcilable and mutually exclusive, and also claims the subsequent trial was complex. In the two day trial, neither defendant testified. *Cf. Snodgrass*, 346 N.W.2d at 476 (explaining that in a case where the defendants were accused of first-degree murder, both defendants' testimony that the other pulled the trigger of the shotgun was irrelevant because the jury needed only to find that one defendant

pulled the trigger and the other knowingly aided and abetted). Both Maddox and Gibler's defenses rested upon attacking the credibility of the victim and challenging the sufficiency of the evidence. We agree with the district court that Gibler's defenses were not "irreconcilable and mutually exclusive" of Maddox's defenses such that Gibler was prejudiced by the joint trial. *Snodgrass*, 346 N.W.2d at 475. The district court did not abuse its discretion in denying Gibler's motion to sever.

III. Sufficiency of the Evidence—Kidnapping.

> We review challenges to the sufficiency of the evidence for correction of errors at law. If a verdict is supported by substantial evidence, we will uphold a finding of guilt. Substantial evidence is that upon which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. The State must prove every fact necessary to constitute the crime with which the defendant is charged. The evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture. In conducting our review, we consider all the evidence in the record, that which is favorable as well as unfavorable to the verdict, and view the evidence in the light most favorable to the State.

State v. Neitzel, 801 N.W.2d 612, 624 (Iowa Ct. App. 2011) (internal citations and quotation marks omitted).

A. Confinement or Removal.

In his challenge to the sufficiency of the evidence, Gibler first argues there was not sufficient evidence of confinement or removal. Iowa Code section 710.1 defines kidnapping:

> A person commits kidnapping when the person either confines a person or removes a person from one place to another, knowing that the person who confines or removes the other person has neither the authority nor the consent of the other to do so; provided, that to constitute kidnapping the act must be accompanied by one or more of the following:
>
> 1. The intent to hold such person for ransom.

> 2. The intent to use such person as a shield or hostage.
> 3. The intent to inflict serious injury upon such person, or to subject the person to a sexual abuse.
> 4. The intent to secretly confine such person.
> 5. The intent to interfere with the performance of any government function.

In examining the statutory terms "confines" and "removes," as it pertains to section 710.1(3) (sexual abuse), the supreme court concluded that in enacting section 710.1, our legislature

> intended the terms "confines" and "removes" to require more than the confinement or removal that is an inherent incident of commission of the crime of sexual abuse. Although no minimum period of confinement or distance of removal is required for conviction of kidnapping, the confinement or removal must definitely exceed that normally incidental to the commission of sexual abuse. Such confinement or removal must be more than slight, inconsequential, or an incident inherent in the crime of sexual abuse so that it has a significance independent from sexual abuse. 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.

State v. Rich, 305 N.W.2d 739, 745 (Iowa 1981) (emphasis added).

Gibler argues that the confinement and removal of the victim were simultaneous with the assault that escalated to attempted murder. In Gibler's codefendant's appeal, this court thoroughly examined the same argument based upon the same evidence and concluded:

> The case before us is one of the many "that fall on neither end of the continuum," but in which a reasonable jury could find either that the movement and confinement was merely incidental to the attempted murder and robbery or that the movement or confinement had significance independent of those charges—such as substantially increasing the risk of harm to the victim, significantly lessening the risk of detection, or significantly facilitating escape. Because substantial evidence in the record supports the inference the removal and confinement had "significance independent" of the underlying robbery or attempt to

> commit murder charges, we affirm the conviction of kidnapping. Defendant's second claim relates to the proper degree of kidnapping.

State v. Maddox, No. 10-0831 (Iowa Ct. App. May 25, 2011) (citations omitted). We agree with this holding and affirm Gibler's kidnapping conviction.

B. Serious Injury.

Gibler next claims the State failed to prove an element of first-degree kidnapping, which requires proof the victim suffered serious injury. First-degree kidnapping is defined as:

> Kidnapping is kidnapping in the first degree when the person kidnapped, as a consequence of the kidnapping, suffers serious injury, or is intentionally subjected to torture or sexual abuse.

Iowa Code § 710.2.

Iowa Code section 702.18 defines serious injury:

> 1. "Serious injury" means any of the following:
> a. Disabling mental illness.
> b. Bodily injury which does any of the following:
> (1) Creates a substantial risk of death.
> (2) Causes serious permanent disfigurement.
> (3) Causes protracted loss or impairment of the function of any bodily member or organ.
> c. Any injury to a child that requires surgical repair and necessitates the administration of general anesthesia.
> 2. "Serious injury" includes but is not limited to skull fractures, rib fractures, and metaphyseal fractures of the long bones of children under the age of four years.

"[A] substantial risk of death means more than just any risk of death but does not mean that death was likely." *State v. Anderson*, 308 N.W.2d 42, 47 (Iowa 1981). If there is a real hazard or danger of death, a "serious injury" is established. *Id.*

Gibler does not argue he preserved error by making a motion for judgment of acquittal, but rather raises the claim in an ineffective-assistance-of-counsel

context. *See State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999) (explaining that in order to preserve error on a sufficiency-of-the-evidence claim, the defendant must make a motion for judgment of acquittal that points out the specific deficiencies in the evidence). Again, in Gibler's codefendant's appeal, this court thoroughly examined the same argument (in an ineffective-assistance-of-counsel context) based upon the same evidence and concluded:

> [T]he evidence of the victim's injuries and attendant circumstances does not support the conclusion the injuries "create[d] a substantial risk of death." *See* Iowa Code § 702.18(1)(b)(1). The treating physician testified the injuries combined with the circumstances of being in the icy river and walking in sub-freezing temperatures could have caused a substantial risk of death if certain other circumstances had been present, such as staying in the river longer or being hit in the head with a rock. This is insufficient to meet the statutory definition of serious injury.
>
> The jury convicted defendant of kidnapping. The serious-injury determination goes only to whether the State proved all the elements to raise the offense to kidnapping in the first degree. Serious injury is an element of kidnapping in the first degree, a class A felony. Iowa Code § 710.1. Without proof of serious injury, the degree of kidnapping would be third degree, a class C felony. Iowa Code § 710.4. Kidnapping in the first degree and kidnapping in the third degree are not separate offenses; they are different degrees of kidnapping. *Cf. State v. Stump*, 254 Iowa 1181, 1201, 119 N.W.2d 210, 222 (1963) (discussing conviction of the offense of murder as distinguished from degrees of murder). Because there was not sufficient evidence to support a finding of serious injury, defense counsel should have specifically challenged that lack through a motion that would have given the district court the opportunity to address the issue. Because counsel did not specifically raise the issue, defendant was sentenced based on a degree of kidnapping not supported by the evidence. Defendant has demonstrated both failure to perform an essential duty and prejudice. *See* [*State v. Maxwell*, 743 N.W.2d 185. 195 (Iowa 2008)].
>
> Because the evidence supports defendant's conviction of kidnapping, but not in the first degree, we reverse the entry of judgment and sentence for kidnapping in the first degree and remand for entry of judgment and sentence for kidnapping in the third degree. *See State v. Morris*, 677 N.W.2d 787, 788–89 (noting

> the jury verdict on the greater offense necessarily included the lesser offense, and "In such instances, we have approved entering an amended judgment of conviction with respect to the lesser-included offense"); *see also State v. Pace*, 602 N.W.2d 764, 774 (Iowa 1999) (reversing the entry of judgment and sentence for burglary in the first degree and remanding for entry of judgment and sentence for burglary in the second degree).

State v. Maddox, No. 10-0831 (Iowa Ct. App. May 25, 2011). We agree with this holding and reverse the entry of judgment and sentence for first-degree kidnapping and remand for entry of judgment and sentencing for third-degree kidnapping, a lesser-included offense on which the jury was also instructed.

IV. Closing Arguments.

Gibler asserts the prosecutor engaged in misconduct during closing arguments. The State responds that during closing arguments Gibler only objected to the prosecutor's use of the word "proven," and any other arguments were not preserved for our review. Issues not raised before the district court are not preserved for our consideration on appeal. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2006) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."); *State v. McCright*, 569 N.W.2d 605, 608 (Iowa 1997) ("Requiring objections at the earliest possible time gives the district court the opportunity 'to take any necessary corrective action at a time when correction is still possible.'"). We therefore address Gibler's argument as to the use of the word "proven" and find any other arguments are not preserved.

During closing arguments Gibler objected to the prosecutor's Power Point presentation. He specifically argued that the prosecutor superimposed the word "PROVEN" over the visually projected elements of the crimes. By doing so,

Gibler asserts the prosecutor was expressing his personal opinion that the defendants were guilty and it was the prosecutor's personal opinion the elements of the crime were proved. The district court ruled that the prosecutor "did not insert personal opinion" and "kept his argument to what the evidence show[ed]." Further, the district court found the use of the word "proven" was the prosecutor stating "the evidence has proven this element." Upon our abuse of discretion review, we find the district court properly overruled Gibler's objection. *See State v. Craig*, 490 N.W.2d 795, 797 (Iowa 1992) (reviewing a claim that a remark made by the prosecutor during closing arguments was misconduct for an abuse of discretion).

V. Ineffective Assistance of Counsel.

Finally, Gibler makes several one-sentence assertions that his trial counsel was ineffective for various reasons. He does not make an argument, nor does he cite any authority, in support of these assertions. Consequently, we do not consider the merits of any of the assertions. *See* Iowa R. App. P. 6.903(2)(*c*), (*g*) (requiring a brief to include the issues presented for review and an argument section addressing each of those issues, and stating "[f]ailure to cite authority in support of an issue may be deemed waiver of that issue"); *State v. Mann*, 602 N.W.2d 785, 788 n.1 (Iowa 1999) (holding that random mention of an issue, without elaboration or supporting authority, is insufficient to raise issue for appellate court's consideration); *see also State v. Piper*, 663 N.W.2d 894, 913–14 (Iowa 2003) ("We conclude Piper has waived any argument with respect to these issues as any consideration of the merits of the defendant's complaints by this court on appeal would require the court 'to assume a partisan role and

undertake the [defendant's] research and advocacy,' a task we will not accept."), *overruled on other grounds by State v. Hanes*, 790 N.W.2d 545 (Iowa 2010). We additionally note that it is not necessary to raise an ineffective-assistance-of-counsel claim on direct appeal in order to preserve the claim for postconviction relief proceedings. *State v. Johnson*, 784 N.W.2d 192, 197 (Iowa 2010).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.