IN THE COURT OF APPEALS OF IOWA

No. 3-344 / 12-0551
Filed June 26, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK ALLAN BITZAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Monona County, Steven J. Andreasen, Judge.

Defendant appeals his conviction for first-degree kidnapping. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Mark Bitzan, Fort Madison, pro se.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson and Susan Krisko, Assistant Attorneys General, and Michael P. Jensen, County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

EISENHAUER, C.J.

Mark Bitzan appeals his conviction for first-degree kidnapping, challenging the sufficiency of the evidence supporting his conviction. Bitzan's pro se brief raises additional challenges to the jury instructions and to trial counsel's performance. We affirm.

I. Background Facts and Proceedings.

During the evening of December 17, 2010, Bitzan was inside the women's handicap stall at an interstate restroom when nineteen-year-old Natasha stopped at the rest area and used the restroom. As she stood at the sink and washed her hands, Bitzan exited the stall, walked up behind her, placed one hand over her mouth, placed the other hand around her torso, and kissed the top of her head. After asking her if she was "going to be quiet," Bitzan forced Natasha away from the sink area and into the handicap stall at the back of the restroom. Bitzan reached back and latched the stall door as he pushed her up against the wall. Bitzan stood in front of her, between Natasha and the stall door, and began asking questions in a calm voice, for example, "Where are you going?" "Are you alone?" "Do you have people waiting for you or are people expecting you?"

When Natasha would not tell Bitzan her name and slapped his hands away from the zipper on her hoodie, Bitzan responded by changing his body language, reaching into his pocket, and pulling out a collapsible pocket knife. Natasha then gave a name, and Bitzan put the knife away and asked more questions. When Bitzan reached for her pants and she slapped his hand away, Bitzan displayed "frustration or anger" and stated, "This will just be easier if you cooperate." Natasha asked, "Are you going to hurt me?" Bitzan replied, "Not if

you cooperate." Bitzan then asked personal questions, "Are you on birth control?" and "Is this a bad time of the month?" When Natasha hesitated in her response to his questions or to his demands, Bitzan gestured toward the knife in his pocket. At some point, Natasha asked herself, "What can I do to live?"

Bitzan proceeded to remove Natasha's boots, pants, and underwear. Bitzan began touching Natasha's genitals as she begged him to stop. Bitzan ordered Natasha to the floor, and he confirmed that she was not visible from outside the handicap stall. Natasha testified, "so I'm lying in that corner, and I remember him remarking . . . 'good, you are out of sight,' because he kind of glanced off to the side to . . . check under the stalls to see if I would be visible." Bitzan pulled down his pants, raped Natasha, and ejaculated inside her. Bitzan wiped himself off and ordered Natasha to remain in the stall until he left. Natasha waited for a few minutes after she heard the bathroom door close, dressed, and drove away.

Natasha, who was in ROTC at college, called her commanding officer for advice. The officer advised Natasha to go directly to a hospital, and she stayed on the phone while Natasha drove to the hospital. Natasha called her mother, and her parents came to the hospital. The hospital was not equipped to perform a sexual assault exam, so the family went to a nearby hospital where Natasha provided samples for a sexual assault kit. The samples were analyzed by the Iowa DCI laboratory. The DNA in the samples matched Bitzan's profile. Bitzan's DNA was in the data bank as a result of a previous sexual abuse conviction in Wyoming.

On June 9, 2011, Bitzan was charged on two counts, first-degree kidnapping and second-degree sexual abuse. On July 21, 2011, the State filed a motion to amend the trial information to add a lifetime enhancement for second or subsequent sexual offenses. *See* Iowa Code § 902.14 (2009). The court allowed the amendment. Bitzan filed a motion to strike the sexual abuse count. The State requested a special interrogatory regarding sexual abuse if the court submitted the second-degree sexual abuse charge as a lesser-included offense of kidnapping. The court reserved ruling on the motion to strike and revised the preliminary instructions to state Bitzan was charged with kidnapping in the first degree and lesser-included offenses.

At the January 2012 trial, the second-degree sexual abuse charge was not submitted as a separate count but as a lesser-included offense, and the jury was given a special interrogatory:

> If you find [Bitzan] guilty of the charge of kidnapping in the first degree, you shall answer the following question: Did the State prove beyond a reasonable doubt that during the commission of the sexual abuse of [Natasha, Bitzan] displayed a dangerous weapon in a threatening manner . . . ?

The jury found Bitzan guilty of first-degree kidnapping and answered "yes" to the interrogatory. In a separate trial, the State presented evidence of Bitzan's Wyoming conviction for sexual abuse, and the jury found Bitzan had previously been convicted of a sexual offense.

Bitzan filed a motion for new trial, and at the hearing, he argued the evidence of "confinement and/or movement" was not sufficient to support first-degree kidnapping. The court disagreed, ruling:

> Among other factors, the court believes the movement of [Natasha] from the sink to the stall, the use of a knife during the incident, the location of the stall, closing of the door, and the location of [Natasha] tucked between the toilet and the wall did make the risk of detection significantly reduced and also increased the risk of harm to [Natasha].

Counsel addressed the court regarding sentencing and enhancement. The State argued Bitzan "needs to also be sentenced . . . under the enhancement." The court recognized the State is asking "essentially for two Class A sentences," and ruled:

> The court would note that during trial, it formally reserved ruling on the motion to strike Count II, but then proceeded at the request of defendant with jury instructions submitting only the kidnapping charge with the Count II sexual abuse as an included offense.
>
> . . . .
>
> Section 902.14 creates an enhancement of the sentence on the underlying charge. It is not a separate crime . . . .
>
> . . . .
>
> . . . [T]he court [concludes] the amended Count II and the lesser-included offense of sexual abuse does merge into the kidnapping conviction, and even though [enhancement under section] 902.14 may still apply, it only creates one sentence.
>
> In this particular case, it just happens to be that the enhanced sentence . . . is the exact same sentence as the underlying crime.

The court entered judgment finding Bitzan guilty of the crime of first-degree kidnapping "as alleged in Count I of the trial information" and sentenced Bitzan to life in prison without parole.

Bitzan appeals and requests we reverse his kidnapping conviction and remand for a finding of guilt on third-degree sexual abuse. Bitzan, pro se, requests we remand for judgment and sentence for false imprisonment and "[i]n addition, reverse his conviction (and sentence per se) for [second-degree sexual abuse] and grant him a new trial 'limited' to [third-degree sexual abuse.]"

II. Standards of Review.

We review claims of insufficient evidence for the correction of errors at law. *State v. Davis*, 584 N.W.2d 913, 915 (Iowa Ct. App. 1998). If there is substantial evidence to support the verdict, we will uphold a finding of guilt. *State v. Hagedorn*, 679 N.W.2d 666, 668 (Iowa 2004). Evidence is substantial if a rational trier of fact could find Bitzan guilty beyond a reasonable doubt. *Id*. at 669.

We also review challenges to jury instructions for correction of errors at law." *State v. Marin*, 788 N.W.2d 833, 836 (Iowa 2010). To the extent Bitzan alleges his trial counsel was ineffective, our review is de novo. *State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006). "To prove a claim of ineffective assistance of counsel, [Bitzan] must show by a preponderance of the evidence that his trial counsel failed to perform an essential duty and prejudice resulted." *Id*. at 784.

III. Sufficient Evidence of Confinement or Removal.

Relevant to this case, kidnapping requires proof Bitzan *either* confined Natasha or removed Natasha from one place to another knowing[1] he did not have the consent of Natasha to confine or remove her and with the intent to subject Natasha to sexual abuse. *See* Iowa Code § 710(1). First-degree kidnapping occurs if Natasha, as a consequence of the kidnapping, is intentionally subjected to sexual abuse. *See id*. § 710(2).

[1] Assuming error is preserved, we find no merit to the pro se argument the court erred in instructing the jury because the elements of kidnapping do "not require knowledge." *See* Iowa Code § 710.1 (stating "knowing that the person who confines or removes the other person has neither the authority nor the consent of the [victim] to do so").

Bitzan challenges the evidence supporting the confinement or removal element. He argues the confinement or removal of Natasha was *incidental* to the sexual abuse and, therefore, insufficient to support his kidnapping conviction.[2]

In *State v. Rich*, the court recognized every sexual abuse case involves some degree of confinement or removal of the victim. 305 N.W.2d 739, 745 (Iowa 1981). The court ruled 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." *Id*. The "incidental rule" is designed to justify the more severe penalties of kidnapping. *State v. McGrew*, 515 N.W.2d 36, 39 (Iowa 1994). "Such confinement or removal may exist because it [1] substantially increases the risk of harm to the victim, [2] significantly lessens the risk of detection, or [3] significantly facilitates escape following the consummation" of the sexual abuse. *Rich*, 305 N.W.2d at 745; *see State v. Hardin*, 359 N.W.2d 185, 190 (Iowa 1984) (dragging the victim out of car and into residence reduced "risk of detection" and made "risk of harm to the victim more likely"). If the defendant merely "seizes" the victim, this does not rise to the level of kidnapping. *State v. Mead*, 318 N.W.2d 440, 445 (Iowa 1982) (refusing to extend kidnapping "to nearly any case involving a seizure by a defendant of another person during" a crime).

We conclude there is substantial evidence from which a rational jury could find the period of confinement or the distance of removal exceeded what is normally incidental to the commission of the sexual abuse. Bitzan forced

[2] We assume error was preserved.

Natasha out of the sink area and into the back stall, latching the door behind them, and thus secluding Natasha from the general public while reducing the risk of detection. Forcing Natasha into the largest stall also allowed Bitzan to lay Natasha down on the floor between the toilet and the wall, further secluding her from the view of anyone walking into the restroom and freeing him to rape her without detection and interruption. Both the removal and the confinement of Natasha lessened the likelihood of anyone either intervening or calling the police. Bitzan points out the confinement of Natasha lasted only about ten minutes, but no minimum time is required. *See Rich*, 305 N.W.2d at 745. When viewed in the light most favorable to upholding the verdict, sufficient evidence of independent removal and confinement was presented. *See Davis*, 584 N.W.2d at 916 (stating one factor of confinement "is whether the victim believed her captor possessed a weapon and whether the victim felt her life in danger").

IV. Sufficient Evidence of Dangerous Weapon.

Sexual abuse in the second degree includes: "During the commission of sexual abuse the person displays in a threatening manner a dangerous weapon." Iowa Code § 709.3(1). Bitzan argues there is insufficient evidence the pocket knife he possessed is a "dangerous weapon." The State argues the only proof required for the sexual abuse element of first-degree kidnapping is that Natasha was "intentionally subjected to . . . sexual abuse." *See id*. § 710.2. Therefore, "even assuming, arguendo, the knife Bitzan displayed was not a 'dangerous weapon,' the State nevertheless presented sufficient evidence of sexual abuse to

support the first-degree kidnapping conviction." We agree with the State and conclude there is no reason to address the merits of this claim.[3]

V. Failure to Instruct on Second-Degree Kidnapping.

Iowa Code section 710.3 provides: "Kidnapping where the purpose is to hold the victim for ransom or where the kidnapper is armed with a dangerous weapon is kidnapping in the second degree." Bitzan argues the trial court erred in failing to instruct on second-degree kidnapping as a lesser-included offense of first-degree kidnapping.[4] Alternatively, Bitzan claims trial counsel was ineffective for failing to request the second-degree kidnapping instruction.

We disagree. The State charged first-degree kidnapping under the "intentionally subjected [Natasha] to a sexual abuse" alternative. *See* Iowa Code § 710.1(3) (listing the first-degree kidnapping alternatives—suffering serious injury, intentionally subjected to torture, and intentionally subjected to sexual abuse). As discussed above, the "dangerous weapon" element is not necessarily included in first-degree kidnapping—sexual abuse alternative. *See Ondayog*, 722 N.W.2d at 783 (applying "the impossibility test"). Accordingly, second-degree kidnapping is not a lesser-included offense, and the trial court did not err. Also, defense counsel was not ineffective because counsel has no duty to pursue a meritless issue. *See State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005).

[3] Assuming error was preserved, we likewise need not address the pro se claims challenging the court's jury instructions on "dangerous weapon."

[4] The lesser-included offenses submitted to the jury were second-degree sexual abuse, third-degree sexual abuse, third-degree kidnapping, false imprisonment, aggravated assault, assault with intent to commit sexual abuse, and assault.

VI. Ineffective Assistance of Counsel.

Bitzan first argues trial counsel was ineffective in failing to object to the State's pretrial motion to amend the trial information to add the sentencing enhancement. Bitzan contends this amendment prejudiced him and charged a "wholly new and different offense" by raising "the offense from a class 'B' felony to a class 'A' felony." Second, Bitzan asserts trial counsel was ineffective in failing to challenge the State's motion, during the enhancement trial, to correct the date of his Wyoming conviction to conform to the proof.

At sentencing, the court merged the kidnapping and the sexual abuse into one conviction for first-degree kidnapping and entered judgment and sentence *only* on the conviction for first-degree kidnapping, a class "A" felony. *See* Iowa Code § 710.2. The court did not apply an enhancement. We have upheld the first-degree kidnapping conviction that, as a class "A" felony, mandates life imprisonment. *See* Iowa Code § 902.1 (stating sentence for class "A" felonies). Accordingly, we need not address these arguments.

VII. Conclusion.

Any arguments raised and not specifically addressed are deemed to be without merit. We affirm Bitzan's conviction for first-degree kidnapping.

AFFIRMED.