IN THE COURT OF APPEALS OF IOWA

No. 3-399 / 12-0556
Filed June 26, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DERRELL EARL SALLAY,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris, Judge.

Derrell Sallay appeals from his convictions of third-degree kidnapping and willful injury, both as an habitual offender. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brian Williams, Assistant County Attorney, for appellee.

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

POTTERFIELD, J.

Derrell Sallay appeals from his convictions of third-degree kidnapping and willful injury, both as an habitual offender. He challenges the sufficiency of the evidence that he intended to cause serious injury as to both charges and the element of removal or confinement as to the kidnapping charge. He also contends the verdicts are contrary to the weight of the evidence. Finally, Sallay argues the district court failed to give adequate reasons for his sentencing. Finding substantial evidence to sustain the convictions, no abuse of discretion in the denial of the motion for new trial, and sufficient reasons for the sentencing, we affirm.

I. Background Facts and Proceedings.

A reasonable jury could find the following facts. Derrell Sallay and S.E. had an on-again, off-again relationship for about ten years and occasionally lived together. Sallay knew S.E. had surgery to remove a brain tumor in January 2011. S.E. and Sallay renewed their relationship in April 2011 and began living together in May 2011. S.E.'s three children and a roommate, Missy, were also living in the residence.

Shortly after midnight, on September 12, 2011, S.E. received a phone call from Sallay telling her to pick him up at a bar. About the time S.E. was leaving the apartment, Missy received a call from Sallay on her phone telling her to "[t]ell that bitch to hurry up." S.E. went to Rumors Bar to get Sallay; she found him inside, "fighting—arguing—arguing with his brother. Kind of fighting him."

Sallay was angry when S.E. picked him up. Once the two were in the vehicle, Sallay started to call S.E. names, accused her of sleeping with others,

and punched her in the side of her face. S.E. drove back to her apartment, and Sallay continued to yell at her. S.E. got out of the van, and Sallay "came up behind me and started hitting me again." Sallay punched her repeatedly on both sides of her head.

S.E. was bleeding from her mouth as she made her way up the interior stairs to their apartment,[1] but Sallay grabbed her leg and pulled her down the stairs. S.E. "was hanging on to the railing and beating the wall for Missy to come help" her. The noise woke up a neighbor who overheard the "blood curdling scream and some pounding." The neighbor testified, "It really did sound like somebody was dying." S.E. estimated she was hit at least ten or fifteen times, primarily in the "[h]ead area."

During the struggle on the stairs, S.E.'s keys and phone were knocked from her hands. When they were later recovered by police, those items were splattered with S.E.'s blood.

Though S.E. attempted to minimize the situation when she testified at trial, the evidence presented and S.E.'s statements on the day of the incident provide substantial evidence that Sallay dragged S.E. to the bottom of the stairs, leaving rug burns down S.E.'s back, and a trail of blood splatter on the stairs, wall, and carpet. Sallay dragged S.E. outside, pushed her down, and was screaming at her. S.E. testified he "was obviously going to hit me again" so she got into a "fetal position" on her back, "with [her] feet in the air trying to protect" herself. She told him, "[S]top. You're going to kill me. You know I just had surgery."

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[1] S.E. testified, "Probably walking up the stairs trying to—I don't remember if I was like crawling up the stairs. I just know I made it up to this step [indicating]."

Missy came out of the apartment building and saw a "frantic" and crying S.E. on the ground[2] with "blood all over her face." Missy stated Sallay made eye contact with her and his demeanor was "not any way I ha[d] ever seen him before." She went back inside with the children and called the police.

The police arrived, but Sallay and S.E. were gone. The police began to search the woods for S.E. S.E.'s sisters arrived and helped with the search. After less than an hour, S.E. was found. Sergeant Kye Ritcher testified S.E. was "stunned," stumbling, and "out of it." S.E.'s sister, Jennifer, testified, "She walked out of the woods like a zombie . . . . Her mouth wasn't closed. Her eyes were glazed." Her face was bloody and covered in dirt. At some point, S.E.'s bra was torn in the front. It was later collected as evidence, blood soaked and covered in burs from the woods. S.E. was crying as she told police and her sisters that Sallay had dragged her into the woods. S.E. also tried to tell police Sallay had fled to a nearby apartment building, but she was hard to understand because her mouth was bruised and swollen from Sallay's assault.

S.E.'s sister took photos of her injuries and more photos were taken once the ambulance transported S.E. to the hospital. The nurse who examined S.E. testified that S.E. told her what she told her sisters and police—that she had been dragged through the woods and hit and kicked multiple times. The nurse stated the injuries she observed were consistent with S.E.'s report of events. An emergency room physician testified S.E. was "emotionally devastated," and told

[2] Missy testified S.E. was lying on the sidewalk, which was later noted to have a pool of blood on it. S.E., however, testified she was on the grass.

him "her boyfriend beat her up and that she was drug into the woods." He also concluded that S.E.'s injuries were consistent with S.E.'s statements.

S.E. was cleaned up, and her injuries were more fully assessed. The full charting of her injuries was read for the jury and included numerous dirty abrasions, bleeding, bruising, a laceration on the lip, and multiple lacerations on her ears. Jennifer testified there was "skin ripped off [S.E.'s] face," which left scarring.

When Jennifer went back to S.E.'s apartment around 5:00 a.m., she spotted Sallay. She immediately called 911. Thinking Jennifer was S.E., Sallay approached Jennifer's vehicle and said, "I don't have anything on me." . . . "I just want to get my shit." When he realized Jennifer was not S.E., he cussed, turned, and left. Jennifer testified he was wearing jean shorts and a white shirt with "blood or red stuff on it." By the time police arrived, Sallay was gone, but officers found a blood-stained white t-shirt outside the apartment door.

A few hours later, police escorted S.E. home from the police department. They found Sallay inside S.E.'s van under a blanket. The window latch on the van had been broken. Sallay was shirtless, and his shorts were covered in burs. Sallay was arrested.

While in jail and despite a no-contact order, Sallay telephoned S.E. almost fifty times. Some of those phone calls were recorded. Sallay urged S.E. not to be available to be subpoenaed, to say her injuries were from a fight with some girls in a bar, and told her *not* to say that she did not remember because then her prior statements could come in.

At trial, S.E. testified she went into the woods voluntarily with Sallay because they knew the police were coming and there was a protective order prohibiting contact between her and Sallay. She also testified Sallay did not strike her while in the woods; she had the opportunity to yell, but did not; and she gave him time to get away when the police arrived.

Sallay was convicted of third-degree kidnapping and willful injury. Sallay conceded his status as an habitual offender, admitting he had a prior willful injury conviction and a conviction for possession of controlled substance (third offense). His motion for new trial was denied.

In separate matters he pleaded guilty to obstructing justice, in that he tried to induce a witness (S.E.) to either hide or fail to appear, and to ten violations of a no-contact order (prohibiting contact with S.E.).

At a combined sentencing hearing, the State requested the fifteen-year terms for Sallay's kidnapping and willful injury habitual offender convictions run consecutive to one another, and consecutive to the sentence to be imposed for a parole violation, but concurrent to sentences imposed upon his convictions for obstructing justice and violations of a no-contact order. The defense asked that all sentences be ordered to run concurrently with one another. The district court ruled:

> Derrell Earl Sallay, you having been found guilty of kidnapping in the third degree as an habitual offender, willful injury as an habitual offender, obstructing prosecution and 10 counts of violating the no contact order, you are adjudged guilty of those offenses. It is the judgment and sentence of this court that on the kidnapping in the third degree as an habitual offender you serve a term not to exceed 15 years under the director of adult corrections. There is a mandatory 3 years before you're eligible for parole in that case. On the willful injury as an habitual, term of not to exceed

> 15 years under the director of adult corrections. There is a mandatory 3 years on that offense.
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> On the obstructing prosecution you're sentenced to a term not to exceed 2 years under the director of adult corrections. You're also fined in the amount of $625 plus a 35 percent surcharge, and the fine and surcharge is suspended.
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> On all of those cases, those cases will run concurrent with each other but consecutive to the parole case that—that you're presently on.
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> The violation of the no contact orders you'll be sentenced to time served in those matters. That will give you a total of 15 years on these sentences plus the 5 from before. I've run the two habitual offender sentences concurrently in this case rather than consecutively. The court feels that although they are definitely two separate offenses, they did occur as one occurrence. They were one act.
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> I'm not buying, sir, that this is alcohol. You've had—you've had opportunities to address that problem. You've had opportunity to face your anger problems, and you've completely ignored those. You haven't used them and—and the—and because of that you're going to be locked up for a long time. It is going to be a minimum of 3 years. It could be much more. You're not going to serve the full 15 or actually 20 with the parole violation. That can be reduced. Be cut in half, and you'll get good and honor time. You know that. You know how the system works. You've been through it before.
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> But while you're down there, you need to make some real changes because like [the prosecutor] said, you look at this track record, and you've done it time and time and time again and you think alcohol is your excuse. Nobody is buying it. You're a dangerous person right now, and if you don't address that, you're going to be a dangerous person when you get out. But this will give you an opportunity to go down there, but you need to do some real soul-searching because if you're not, you're going to be back in there again. It is that simple.

Sallay now appeals, claiming the evidence is insufficient to prove he specifically intended to cause serious injury to sustain either charge, and insufficient to prove the element of confinement or removal to sustain the kidnapping charge. He also contends the verdicts are against the weight of the evidence, and that the district court failed to provide sufficient reasons for running his sentences consecutive to his parole violation sentence.

II. Scope and Standards of Review.

We review challenges to the sufficiency of evidence for correction of errors at law. *State v. Quinn*, 691 N.W.2d 403, 406 (Iowa 2005). In reviewing sufficiency, we view the record in the light most favorable to the State, making any legitimate inferences and presumptions that may fairly and reasonably be deduced from the evidence in the record. *See State v. Leckington*, 713 N.W.2d 208, 212-13 (Iowa 2006).

As for the weight-of-the-evidence challenge,

> [t]he district court has broad discretion in ruling on a motion for new trial, and thus our review in such cases is for abuse of discretion. A court may grant a new trial where a verdict rendered by a jury is contrary to law or evidence. We have held the phrase contrary to evidence means contrary to the weight of the evidence. Unlike the sufficiency-of-the-evidence analysis, the weight-of-the-evidence analysis is much broader in that it involves questions of credibility and refers to a determination that more credible evidence supports one side than the other.

State v. Nitcher, 720 N.W.2d 547, 559 (Iowa 2006) (internal quotation marks, editing, and citations omitted).

A sentence that is within statutory limits is "cloaked with a strong presumption in its favor, and will only be overturned for an abuse of discretion or consideration of inappropriate matters." *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002).

III. Discussion.

Sallay's challenges to the sufficiency and the weight of the evidence are both grounded in his contention that the jury was required to accept S.E.'s trial testimony, which minimized the extent and severity of the September 12, 2011 assault. S.E.'s statements made to her sisters, police, and hospital personnel on

the day in question, however, indicated Sallay—knowing she had recent brain surgery—beat S.E. about the head repeatedly, first in the van, then in the apartment building, and then again outside; dragged her down the stairs away from her apartment, and away from the aid of her roommate; and then when the police were summoned, dragged her into the woods. When the police found S.E., she thanked them and stated, "I thought he was gonna fuckin' kill me back there."

Other evidence presented at trial supports S.E.'s pretrial statements, rather than her trial testimony. A neighbor heard pounding in the stairway and screaming that "sound[ed] like somebody was dying"; the walls of the apartment stairway were blood splattered; S.E.'s keys and cell phone were found on the stairway and were also blood splattered; S.E.'s roommate heard her screams and came outside to see a frantic S.E. on the sidewalk and the defendant "hovering" over her; S.E.'s sister testified S.E. told her that Sallay had dragged her into the woods, hit her in the head even though he knew she had had recent surgery, and had hit her so hard she could not hear out of her right ear; and S.E.'s injuries included dirt-filled abrasions on her lower back that were consistent with being dragged through a wooded area.

"Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury was free to reject certain evidence, and credit other evidence." *Nitcher*, 720 N.W.2d at 556 (internal quotation marks and citation omitted). The jury believed S.E.'s excited utterances and statements to medical personnel, rather than her trial testimony. Upon our review, the jury could

reasonably find S.E.'s trial version of the events to be less credible. Moreover, her trial testimony did not comport with the other evidence presented.

Substantial evidence supports the convictions. "Evidence is considered substantial if, viewed in the light most favorable to the State, it can convince a rational jury that the defendant is guilty beyond a reasonable doubt." *Id.* The finder of fact is free to use circumstantial evidence: "[c]ircumstantial evidence is equally probative as direct evidence for the State to use to prove a defendant guilty beyond a reasonable doubt." *State v. Brubaker*, 805 N.W.2d 164, 172 (Iowa 2011).

Sallay claims there is insufficient evidence of the necessary specific intent that is an element of each of the charged offenses. The intent required by Iowa Code section 708.4(2) (2011) is the intent to cause "serious injury," which, pursuant to section 702.18, means "any of the following": "a disabling mental illness"; bodily injury that "[c]reates a substantial risk of death" or "[c]auses serious permanent disfigurement," or "[c]auses protracted loss or impairment of the function of any bodily member or organ." It is the intent to cause serious injury that was the question for the jury to determine, not whether the victim actually suffered a serious injury.

"It is a general rule, applicable to all criminal cases, including those where a specific intent is an element of the crime, that the accused, if sane, is presumed to intend the necessary or the natural and probable consequences of his unlawful voluntary acts, knowingly performed." *State v. True*, 190 N.W.2d 405, 407 (Iowa 1971). A reasonable jury could find Sallay intended to cause serious injury by considering the natural and probable consequences of his

hitting S.E. in the head ten to fifteen times with the force required to cause the injuries she sustained, particularly knowing that she had recently had brain surgery.

Sallay also claims there was not sufficient evidence of the element of confinement or removal to sustain the kidnapping conviction. No minimum period of confinement or distance of removal is required for conviction of kidnapping, but the jury was instructed that the confinement or removal must go beyond what is inherent in the commission of the assault. *See State v. Rich*, 305 N.W.2d 739, 745 (Iowa 1981). "Such confinement or removal must be more than slight, inconsequential, or an incident inherent in the crime" so that "it has a significance independent from" the assault. *Id.* We look to whether the confinement or removal "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." *See id.*

There is clearly evidence to support confinement or removal sufficient to sustain the kidnapping conviction. The jury could reasonably find that Sallay "removed" S.E. by dragging her into the woods, which was independent of his assault upon her, and which increased the risk of harm to S.E. (taking her away from medical assistance), lessened the risk of his detection, and facilitated his escape from scene.[3]

[3] The district court observed that there was sufficient evidence from which the jury could determine removal:

> There was sufficient evidence for them to find, if they determined that the removal of . . . [S.E.], from the top of the stairs, down the stairs and out the door would be sufficient to be considered . . . as a crime of kidnapping. . . . The jury—jury could also choose to not believe the testimony of [S.E.] but rather believe the excited utterance that she said

The verdicts are not against the weight of the evidence. Iowa Rule of Criminal Procedure 2.24(2)(b)(6) allows a court to grant a new trial when the verdict is "contrary to law or evidence." Our supreme court has held that "contrary to . . . evidence" means "'contrary to the weight of the evidence' as defined in *Tibbs* [*v. Florida*, 457 U.S. 31, 37-38 (1982)]." *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998).

> A reversal based on the weight of the evidence, on the other hand, draws the appellate court into questions of credibility. The "weight of the evidence" refers to "a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other."

Tibbs, 457 U.S. at 37-38.

Here, the district court did not abuse its discretion in denying Sallay's motion for new trial on the claimed ground that the verdicts were against the weight of the evidence. A greater amount of credible evidence supported the jury's findings of intent to cause serious injury and confinement or removal.

The court gave adequate reasons for consecutive sentences. While a trial court must give reasons for its decision to impose consecutive sentences, the reasons need not be overly detailed. *See State v. Oliver*, 588 N.W.2d 412, 414 (Iowa 1998). Our case law recognizes that the minimum requirement is only that "at least a cursory explanation must be provided to allow appellate review of the trial court's discretionary action." *State v. Jacobs*, 607 N.W.2d 679, 690 (Iowa 2000). "The trial court generally has discretion to impose concurrent or consecutive sentences for convictions on separate counts." *State v. Delaney*,

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> when she was dr[a]gged into the woods. The jury could choose to find that, but in—in either case there was sufficient evidence for this jury to determine that the crime of kidnapping did take place.

526 N.W.2d 170, 178 (Iowa Ct. App. 1994). The reasons for imposing consecutive sentences need not "be specifically tied to the imposition of consecutive sentences, but may be found from the particular reasons expressed for the overall sentencing plan." *Id.* The district court's overall sentencing plan is adequately explained here.

The court stated the kidnapping and willful injury were "definitely two separate offenses, they did occur as one occurrence." But those offenses occurred while the defendant was on parole. So the court ordered the sentence imposed on the new offenses to be served consecutively to the sentence to be imposed for parole violation. We find adequate reasons were provided for the sentence imposed. We therefore affirm.

AFFIRMED.