

IN THE COURT OF APPEALS OF IOWA

No. 8-711 / 07-1616
Filed October 29, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GREGORIO TOVES GARRIDO JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer,
Judge.

Gregorio Toves Garrido Jr. appeals following his convictions and sentences on charges of kidnapping in the first degree and sexual abuse in the second degree. **AFFIRMED IN PART AND VACATED IN PART.**

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, Thomas J. Ferguson, County Attorney, and Kimberly Griffith Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Vaitheswaran and Doyle, JJ.

DOYLE, J.

Gregorio Toves Garrido Jr. appeals following his convictions and sentences on charges of kidnapping in the first degree and sexual abuse in the second degree. He contends there was insufficient evidence to support his conviction for kidnapping in the first degree and sexual abuse in the second degree. He also contends the district court imposed an illegal sentence by failing to merge sexual abuse in the second degree into kidnapping in the first degree. Upon our review, we affirm in part and vacate in part.

I. Background Facts and Proceedings.

Christina Tolentino and her husband, Jenn Tolentino, socialized regularly with Gregorio Garrido and his family. The Tolentinos and the Garridos had been friends for approximately four to five years. Jenn worked the overnight shift, and Garrido was familiar with Jenn's work schedule.

In August 2005 the Tolentinos moved into a one-and-a-half-story house in Waterloo, Iowa. The master bedroom was located on the first floor, and the couple's six-month-old baby slept in master bedroom with Jenn and Christina. A spare bedroom with an air mattress was located on the second floor of the house.

On August 21, 2005, Jenn left for work at approximately 9 p.m., and Christina and the baby remained at home. Shortly thereafter, Christina received a call from Garrido, asking if he and his wife could stop by to see the Tolentinos' new house. Garrido also asked if Jenn was at work, and Christina affirmed that he was.

Garrido arrived at the Tolentinos' house sometime after 11:00 p.m., wearing shorts and a t-shirt. Garrido was alone, though he claimed that his wife was running late and would be there soon. Once inside the house, Garrido asked Christina if he could see the rest of the house and the baby. Christina showed Garrido the master bedroom, where the baby was sleeping. Garrido then asked to see the upstairs, and Christina showed him the spare bedroom upstairs. Upon seeing an air mattress pump in the spare bedroom, Garrido asked Christina to borrow the air pump. Christina said that he could, and Garrido then picked up the pump and its attached hose.

Subsequently, Garrido asked Christina to see the baby again. Christina and Garrido then went back downstairs to the Tolentinos' bedroom. Once in the bedroom, Garrido placed the hose around Christina's neck. Christina screamed and struggled, and the baby woke up and began screaming. Garrido pulled Christina to the ground using the hose around Christina's neck. He then stated, "I just want some money I'm going to tie you up." Garrido tied Christina up with undergarments, binding her ankles and wrists and causing injuries. Garrido began frantically searching the room looking for money, pulling clothes out of the drawers in his search. He again stated he wanted money, and Christina replied that she didn't have any money. Garrido then pulled a small ball bat out of his shorts and threatened to kill or hurt the baby if Christina didn't give him some money. Christina indicated that there was money in the dresser. After Garrido found the money, he stated, "I know you have more money than this." The baby continued screaming. Garrido attempted to quiet the baby by giving the baby a bottle from the kitchen, but the baby refused the bottle and continued crying.

Garrido then began looking for tape, and he asked Christina where her tape was. Christina stated it was in the kitchen, and Garrido went back to the kitchen. When Garrido was unable to locate tape in the kitchen, he returned to the bedroom and threatened Christina and the baby with a pair of scissors. Garrido put the scissors to Christina's neck and stated, "I'll kill your son. I want some money. . . . I'll kill you . . . do what I want."

Garrido then pulled Christina to the kitchen, and Christina had to hop because her legs were bound. In the kitchen, Garrido located the tape from a drawer, and then pulled Christina back to the bedroom. In the bedroom, Garrido placed Christina on her stomach, and continued demanding more money. Garrido again threatened the baby with scissors. Garrido stuffed clothing in Christina's mouth and taped her mouth. While gagged, Christina stated, "take my ring." Garrido then took Christina's ring off her finger and placed it in his pocket.

Garrido then announced that they were going to have sex. After unsuccessfully attempting to remove Christina's bindings to make intercourse possible, he went into the kitchen and returned with a wet towel. He cut Christina's clothes with the scissors, and then he wiped Christina's vagina with the wet towel. Garrido then forced his fingers into her vagina and moved them around inside, and said, "Oh, Christina." He licked her breasts and then took off his own clothes.

Garrido removed the gag from Christina's mouth so he could force her to perform fellatio. He put his flaccid penis into Christina's mouth, but soon became frustrated by the screaming child. Garrido then brought Christina to the living

room, and inquired as to whether there was music. Garrido placed Christina in the middle of the couch, and then went to the bedroom, leaving Christina alone for a moment in the living room. Christina, naked at that point except for the bindings left on her body, freed her ankles and ran outside while Garrido was alone in the bedroom with the baby. Christina ran directly across the street and screamed, "Call 911 He is going to kill my baby."

Garrido, also naked, discovered that Christina had escaped and ran after her. He again threatened to kill the baby, and he picked up Christina and dragged her back into the house. She resisted Garrido, and attempted to grab the stairway railing to prevent him from forcing her back into the house. Once in the house, Christina ran back into the master bedroom and locked the door. While Christina was running back to the bedroom, Garrido stated, "Fuck this." Christina broke the bedroom window to scream for help, and called 911. When the police arrived shortly thereafter, Garrido had left.

At trial, several neighbors and a pizza delivery man corroborated Christina's account. They each saw Christina without clothing, running from her home and screaming that Garrido was going to kill her baby. They further witnessed Garrido naked, dragging Christina back inside. Garrido's fingerprint and DNA were found on a drinking glass. Garrido's DNA was also detected on Christina's right nipple.

Garrido waived a jury trial and did not testify at trial. On June 7, 2007, the trial court found Garrido guilty of sexual abuse in the second degree in violation of Iowa Code section 709.3 (2005), robbery in the first degree in violation of section 711.2, and kidnapping in the first degree in violation of section 710.2.

The district court did not specify that it was using one of the sex acts as the underlying sexual abuse for the kidnapping charge and the other sex act as a separate charge.

Garrido appeals.

II. Merits.

Garrido contends there was insufficient evidence to support his convictions of kidnapping in the first degree and sexual abuse in the second degree. Alternatively, he also contends the district court imposed an illegal sentence by failing to merge sexual abuse in the second degree into kidnapping in the first degree.

A. Sufficiency of the Evidence.

We review sufficiency of the evidence claims for correction of errors at law. *State v. Button*, 622 N.W.2d 480, 483 (Iowa 2001). In considering Garrido's challenge to the sufficiency of the evidence, we examine the record in the light most favorable to the State. *See State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996). We look for substantial evidence, including any inferences arising from the evidence, to support the verdict. *Id.* A verdict will be upheld where there is substantial evidence in the record tending to support the charge. *State v. Terry*, 544 N.W.2d 449, 451 (Iowa 1996). Substantial evidence means evidence that would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id.* As a constitutional issue is involved, our review is de novo. *Nichol v. State*, 309 N.W.2d 468, 470 (Iowa 1981).

Iowa Code section 710.1 (2005) defines kidnapping in the following manner:

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:

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 3. The intent to . . . subject the person to a sexual abuse.

Iowa Code § 710.1. “Kidnapping is kidnapping in the first degree when the person kidnapped, as a consequence of the kidnapping, . . . is intentionally subjected to . . . sexual abuse.” *Id.* § 710.2.

One essential element of the offense of kidnapping is the removal or confinement of the victim by the defendant. *State v. Osborn*, 455 N.W.2d 292, 293 (Iowa Ct. App. 1990). In *State v. McGrew*, 515 N.W.2d 36 (Iowa 1994), the Iowa Supreme Court explained:

A defendant “confines” another person in violation of our kidnapping statute only if the confinement definitely exceeds the confinement that is an inherent incident of the underlying felony. No minimum period of confinement is required to convict a defendant of kidnapping. Rather, the confinement must be significantly independent of the confinement incident to the commission of the underlying crime. Such confinement may exist if it substantially increases the risk of harm to the victim, significantly lessens the risk of detection, or significantly facilitates escape following the commission of the underlying offense. The rationale behind the “incidental rule” arises from our recognition that confinement of a victim, against the victim’s will, is frequently an attendant circumstance in the commission of many of the crimes, notably robbery and sexual abuse.

Id. at 39 (citations omitted).

Garrido first argues that the State’s evidence supporting his conviction for kidnapping in the first degree is insufficient because the evidence showed that any confinement or removal was a part of the robbery, and that any confinement of the victim during the sexual abuse was only incidental to that offense. As a

result, he contends the district court erred in overruling his motion for judgment of acquittal. We disagree.

Examining the record in the light most favorable to the State, we believe the record reveals ample evidence from which a rational trier of fact could conclude that Christina's confinement exceeded the degree of confinement inherent in the underlying crimes. Garrido engaged in deception from his first contact with Christina that evening and throughout the evening's events. Garrido strangled Christina, bound her wrists and ankles, gagged her, threatened her and her child repeatedly, moved Christina throughout the house, and drug her back into the house upon her escape. We agree with the trial court's conclusion:

The confinement and removal has significance apart from the underlying offense committed. The binding and removal was performed in order to maintain control of [Christina] while [Garrido] was committing his theft, so that he could sexually abuse her. In doing so, the risk of harm to [Christina] was increased, the risk of detection was reduced, and the possibility of escape from the scene was made easier.

Consequently, we conclude there was sufficient evidence to establish that the confinement exceeded what was inherent in the underlying crimes.

B. Merger of the Convictions.

We next address Garrido's alternative argument that the district court imposed an illegal sentence by failing to merge sexual abuse in the second degree into kidnapping in the first degree. Our review, therefore, is limited to the correction of errors at law. *State v. Walker*, 610 N.W.2d 524, 526 (Iowa 2000).

Merger implicates the legality of the sentence. *State v. Anderson*, 565 N.W.2d 34, 343-44 (Iowa 1997). An illegal sentence can be challenged at any time, *State v. Kress*, 636 N.W.2d 12, 17 (Iowa 2001), and we can address the

issue even if it was not expressly raised below. *State v. Carney*, 584 N.W.2d 907, 910 (Iowa 1998). Under our merger statute, “[n]o person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted.” Iowa Code § 701.9.

Sexual abuse in the second degree is a lesser-included offense of kidnapping in the first degree. *State v. Mitchell*, 450 N.W.2d 828, 831 (Iowa 1990). In *State v. Holderness*, 301 N.W.2d 733, 740 (Iowa 1981), the Iowa Supreme Court found a defendant could be convicted and sentenced separately for first-degree kidnapping and second-degree sexual abuse when the facts supported the occurrence of two separate crimes in time and place. However, the court has limited its holding in *Holderness*, concluding that the determining factor of whether a defendant could be convicted and sentenced separately for both offenses is how the charges were presented to the jury. See *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *State v. Newman*, 326 N.W.2d 788, 793 (Iowa 1982); see also *State v. Flanders*, 546 N.W.2d 221, 224-25 (Iowa Ct. App. 1996).

In *Morgan*, although there was evidence that more than one sexual assault was committed, the State presented the crime as one continuous event and the jury was given one instruction on abuse and one instruction on kidnapping. *Morgan*, 559 N.W.2d at 611-12. Therefore, the convictions merged. *Id.* at 612. However, the State can “convict a defendant of both kidnapping in the first degree and sexual abuse if the case is presented to the jury in that way and the jury makes findings accordingly.” *Newman*, 326 N.W.2d at 793. The court

explained, “[a] defendant should not be allowed to repeatedly assault his victim and fall back on the argument his conduct constitutes but one crime.” *Id.*

In the present case, the matter was not tried to a jury, but rather to the district court. Consequently, no jury instructions were given. The State argues that, because the case was tried to the court and not a jury, the court’s limitation of *Holderness* is inapplicable here. We disagree.

Here, like in *Morgan*, there was evidence that more than one sexual act was committed; however, the State presented the crime as one continuous event. Furthermore, the district court did not make specific findings that it was using one of the sex acts as the underlying sexual abuse for the kidnapping charge and the other sex act for the sexual abuse charge.¹ Consequently, we conclude that the district court erred in failing to merge the two offenses of first-degree kidnapping and second-degree sexual abuse in this particular case.²

III. Conclusion.

Based on the foregoing, we affirm Garrido’s conviction and sentence for kidnapping in the first degree, and vacate Garrido’s conviction and sentence for sexual abuse in the second degree.

AFFIRMED IN PART AND VACATED IN PART.

¹ At the post-trial motion and sentencing hearing, the district court explained that the crimes committed by Garrido that evening were “closely associated with each other. They were occurring in close proximity to each other. They are . . . an inseparable part of the whole criminal occurrence happening that evening.”

² Because we conclude the district court erred in failing to merge the two offenses of first-degree kidnapping and second-degree sexual abuse in this particular case, we need not and do not address the alternative grounds urged by Garrido for reversal of the court’s ruling.