STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0791

State of Minnesota,
Respondent,

vs.

James J. Bookwalter,
Appellant.

Filed June 3, 2008
Affirmed
Connolly, Judge

Anoka County District Court
File No. K6-06-6060

Lori Swanson, Attorney General, 445 Minnesota Street, Bremer Tower, Suite 1800, St. Paul, MN 55101; and

Robert M. A. Johnson, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, Anoka County Government Center, 2100 Third Avenue, Suite 720, Anoka, MN 55303-5025 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Toussaint, Chief Judge; Connolly, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, §10.

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

CONNOLLY, Judge

Appellant challenges his convictions, arguing that (1) appellant's conduct that the district court relied on to support its finding of guilt on the kidnapping charge was "merely incidental" to the conduct that the district court relied on to support its finding of guilt on the first-degree-assault charge and (2) he received ineffective assistance of counsel because his trial counsel inaccurately advised him that he could not be subject to consecutive sentencing if convicted. We affirm.

FACTS

Appellant James Bookwalter's convictions stem from the brutal attack on M.F.M. on June 1, 2006. The assault was committed by appellant and Theodore Haste, an acquaintance of appellant. Around noon on June 1, Haste noticed that his wallet, containing $650 in rent money, was missing. Haste and appellant concluded that M.F.M. had stolen the money. They then began attacking M.F.M. in an attempt to retrieve the allegedly missing rent money. The attack occurred at Haste's residence and lasted approximately one and a half hours.

During the course of the attack, appellant: (1) punched M.F.M in the face and kicked her in the back; (2) held M.F.M. while Haste struck her in the mouth, knocking out several of her teeth; (3) struck M.F.M in the head with a shotgun; (4) stepped on M.F.M.'s hand as she was attempting to crawl out of Haste's residence; (5) used a knife to cut off M.F.M.'s pants while Haste was holding her down; and (6) held M.F.M. down while Haste digitally penetrated her vagina without her consent. As a result of this

assault, M.F.M suffered a subdural hematoma, lacerations to the left side of her head, a fracture of her nasal bone, multiple contusions to her head and scalp, and abrasions outside of her vagina and on the inside of her vaginal wall.

After a court trial on October 18, 2006, appellant was convicted of: first-degree assault, in violation of Minn. Stat. § 609.221, subd. 1 (2004); second-degree assault, in violation of Minn. Stat. § 609.222, subd. 2 (2004); first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subds. 1(f)(i), 2 (2004); and kidnapping, in violation of Minn. Stat. § 609.25, subds. 1(2), 2(2) (2004). He was sentenced consecutively to 110 months on his first-degree assault conviction and 144 months on his kidnapping conviction for a total of 254 months in prison.[1] This appeal follows.

D E C I S I O N

If a defendant commits multiple offenses during a single behavioral incident, the defendant may be sentenced for only one of those offenses. Minn. Stat. § 609.035, subd. 1 (2006); *State v. Bookwalter*, 541 N.W.2d 290, 293 (Minn. 1995).[2] There are explicit statutory exceptions to this general rule. One of these exceptions is for kidnapping. Minn. Stat. § 609.251 (2006); *Bookwalter*, 541 N.W.2d at 293 ("[I]f . . . a person commits a kidnapping, the person generally may be punished both for the kidnapping and for the most serious crime committed during the course of the kidnapping."). But when interpreting this statute, the Minnesota Supreme Court has held that the "confinement or

[1] Appellant was sentenced to 86 months on his first-degree criminal-sexual-conduct conviction, to be served concurrently with the first-degree assault sentence. Appellant's second-degree assault conviction was dismissed because it was a lesser-included offense of the first-degree assault conviction.

[2] This case did not involve appellant.

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." *State v. Smith*, 669 N.W.2d 19, 32 (Minn. 2003), *overruled on other grounds by State v. Leake*, 669 N.W.2d 312, 321 (Minn. 2005).

In the present case, appellant argues that he is "entitled to have his sentence for kidnapping vacated because the conduct the [district] court relied on to support its finding of guilt on the kidnapping charge was merely incidental to the assault." Appellant does not dispute that the conduct occurred. Instead, he argues that the conduct underlying the kidnapping conviction is insufficient to support the conclusion that it was not "merely incidental" to the conduct constituting the assault.[3] In considering a sufficiency-of-the-evidence claim, this court will not disturb the verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the appellant was guilty of the charged

[3] The kidnapping statute provides:

> Whoever, for any of the following purposes, *confines or removes from one place to another*, any person without the person's consent or, if the person is under the age of 16 years, without the consent of the person's parents or other legal custodian, is guilty of kidnapping and may be sentenced as provided in subdivision 2:
>
> (1) to hold for ransom or reward for release, or as shield or hostage; or
>
> (2) to facilitate commission of any felony or flight thereafter; or
>
> (3) *to commit great bodily harm* or to terrorize the victim or another; or
>
> (4) to hold in involuntary servitude.

Minn. Stat. § 609.25, subd. 1 (2004) (emphasis added).

offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). Appellant's argument fails. His acts of confinement or removal were not merely incidental to his acts of assault.

Concerning the kidnapping charge, the district court found that the appellant "acted to confine [the victim] . . . when he stepped on [the victim's] hand as she was attempting to crawl out of the trailer." It went on to find that this was done "for the purpose of committing great bodily harm on her." Concerning the first-degree assault charge, the district court pointed to the victim's specific injuries it considered in determining that the victim had suffered great bodily harm. It focused on the victim's subdural hematoma, but also listed "a laceration to the left side of her head, a fracture of her nasal bone, a temporal lobe contusion, and multiple contusions to her head and scalp." The district court did not list any of the injuries that the victim suffered on her hand as being the basis for its determination that she suffered great bodily harm. Therefore, the evidence supports the district court's finding that, when appellant stepped on M.F.M.'s hand, it was not merely incidental to the assault, but rather was an act that satisfied the elements of the crime of kidnapping because it was done for the purpose of confining the victim to commit future great bodily harm. This finding is supported by the victim's testimony that appellant told the victim that she "wasn't going anywhere" as he stepped on her hand. Based on this evidence, a fact-finder "could reasonably conclude [the] defendant was proven guilty of the offense charged," which in this instance is that appellant confined the victim without her consent in more than an incidental manner in order to commit great bodily harm. *Bernhardt*, 684 N.W.2d at 476-77.

Next, appellant argues that when his lawyer was advising him about the potential risks of going to trial, he did not correctly advise him that he could be subject to consecutive sentences if convicted of all the charges. This bad advice allegedly caused him to reject a plea bargain for less time than 254 months. Because the appropriate forum to raise appellant's ineffective-assistance-of-counsel claim is in a postconviction petition in the district court, we do not address that issue here. *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000) ("Generally, an ineffective assistance of counsel claim should be raised in a postconviction petition for relief, rather than on direct appeal."); *see also Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007) ("Because we cannot, on the record presented, determine whether Leake was denied effective assistance of counsel in connection with advice he received from his trial counsel about the consequences of rejecting a plea offer, we remand to the postconviction court for an evidentiary hearing on that issue.").

Affirmed.