STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1142

State of Minnesota,
Respondent,

vs.

Gary Gene Little Soldier,
Appellant.

Filed October 13, 2009
Affirmed
Peterson, Judge

Ramsey County District Court
File No. 62-K0-07-004105

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, 50 West Kellogg Boulevard, St. Paul, MN 55102 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Jessica B. Merz Godes, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Bjorkman, Judge.

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

PETERSON, Judge

In this appeal from convictions on two counts of first-degree aggravated robbery and four counts of kidnapping, appellant argues that the district court (1) erred in denying his motion to suppress evidence seized during a pat-down search because the character of the item taken from appellant's pocket was not immediately apparent to the officer; and (2) committed reversible error by failing to give a requested jury instruction on the legal definition of confinement or removal, which is an element of the kidnapping offenses. We affirm.

FACTS

T.M. and C.M. went to a party at 435 Van Buren Street in St. Paul. Also present at the party were appellant Gary Gene Little Soldier, his friend James Davis-Drew, and his cousin, H.P. After about 45 minutes, T.M. and C.M. left the party. As T.M. and C.M. walked to T.M.'s car, the three men who had also been at the party approached T.M. and C.M. Davis-Drew asked T.M. for a cigarette and then knocked C.M. to the ground. Appellant put T.M. in a headlock and told him to empty his pockets. Davis-Drew went through C.M.'s pockets. The three men then robbed T.M. and C.M. of their wallets, cell phones, and a folding knife. Appellant held the folding knife to T.M.'s chin. Davis-Drew ordered C.M. into the backseat of T.M.'s car, and appellant pushed T.M. in after him. Appellant continued to hold T.M. in a headlock with the knife in his hand while Davis-Drew drove the car about eight miles to a wooded area. On the way, Davis-Drew said that he had a gun.

Davis-Drew stopped the car, and the three men forced T.M. and C.M. to take off their clothes and run into the woods. The three men then gathered up the clothing and drove back to the house on Van Buren Street. During the ride back, H.P. found an iPod in the car, which he kept and later gave to appellant.

T.M. and C.M. ran until they came to a house where a resident let them in, gave them some clothing, and called the police. Two police officers arrived, and T.M. and C.M. told them what had happened. They described the three robbers' physical features and clothing in general terms. The officers first took the robbery victims to the woods to search for evidence, but none was found. The officers then drove the victims back to the general area of the party until they were able to identify 435 Van Buren as the house where the party was. They found T.M.'s car parked on the street nearby.

The officers called for backup, and four more officers arrived at the scene. The homeowner let five of the officers into the house. While Officer Jeremiah McQuay interviewed the homeowner, the other officers pat-searched all of the men in the house. When Officer Thomas Weinzettel pat-searched appellant, he felt what he described as a small, hard, irregular object that was approximately the size of a pack of cigarettes in appellant's right front pocket. Weinzettel could not tell what the object was, so he removed the object from appellant's pocket and saw that it was a 30-gigabyte iPod, which was later identified as the iPod taken from T.M.'s car. Weinzettel testified that the reason he removed the iPod was "[f]or [his] safety." Before he discovered the iPod, Weinzettel knew that one of the stolen items was an iPod.

Because there were a number of men at the party who matched the victims' descriptions of the robbers, the officers conducted a series of show-up identifications. During the show-ups, the victims positively identified Davis-Drew and H.P. as two of the men who robbed them. The officer standing by appellant testified that the victims could not eliminate appellant as one of the robbers, but they were not 100% sure that he was involved. At trial, T.M. testified that he was sure at the time of the show-up that appellant was one of the robbers and that it just took him longer to identify appellant than the other two. Two other men who were brought down were ruled out by T.M. and C.M.

Appellant was charged by amended complaint with two counts of aggravated robbery, two counts of kidnapping to facilitate the commission of a felony, and two counts of kidnapping to terrorize or cause bodily harm. Defense counsel moved to suppress the iPod.

Following a *Rassmussen* hearing, the district court denied the motion to suppress, ruling:

> With regard to the issue of the pat-down, there are many items that are used currently as weapons that may not be in a classic form of what we may consider a weapon, whether it's a knife or a gun. . . .
>
> For officer safety, given the information that has already been received from them by these alleged victims with regard to a gun and a knife, it is imperative that they search — do a pat-search, pat-down, of all of those individuals. And I think it is not unreasonable to expect that, when an officer finds an object that he cannot identify, that he be allowed to take it out simply for officer safety.

The district court did not give appellant's requested jury instruction that if the confinement or removal of the victims involved in the kidnapping was merely incidental to the robbery, the jury could not find appellant guilty of kidnapping. In rejecting the requested instruction, the district court explained, "In this particular case I think the facts do not justify the suggestion by the defense that this could be incidental. In fact, the way that the testimony has come out it is anything but."

The jury found appellant guilty on all counts. The district court sentenced appellant to 115 months on the two aggravated-robbery counts and to 54 months on the two kidnapping-for-the-purpose-of-terrorizing counts, to be served concurrently with the aggravated-robbery sentence. This appeal followed.

D E C I S I O N

I.

Citing *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130 (1993), appellant argues that because it was not immediately apparent to Weinzettel that the object in appellant's pocket was contraband, Weinzettel's retrieval of the object from appellant's pocket was unlawful, and, therefore, the district court erred in denying the suppression motion.[1] "When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). The factual findings underlying the district court's decision

[1] Appellant does not dispute that the police were justified in conducting the pat-down search for weapons.

will be upheld unless clearly erroneous. *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997).

In *Dickerson*, a police officer conducting a protective pat-down search of a man seen leaving a notorious "crack house" felt a small lump in the man's front pocket and, after examining the lump with his fingers, the officer determined that it felt like a lump of crack cocaine in cellophane. *Dickerson*, 508 U.S. at 368-69, 113 S. Ct. at 2133. The officer reached into the man's pocket and retrieved a small plastic bag containing cocaine. *Id.* at 369, 113 S. Ct. at 2133. The man was arrested and charged with possession of a controlled substance, and before trial, he moved to suppress the cocaine. *Id.*, 113 S. Ct. at 2134. The district court denied the motion, concluding that plain feel is no different than plain view and that the officer's identification of the object by feel supported the seizure. *Id.* at 369-70, 113 S. Ct. at 2134. This court declined to adopt the plain-feel exception to the warrant requirement and reversed. *Id.* The Minnesota Supreme Court affirmed this court. *Id.*

On appeal to the United States Supreme Court, the Supreme Court explained that subject to a few specifically established and well-delineated exceptions, searches and seizures conducted without prior approval by a judge or magistrate are per se unreasonable under the Fourth Amendment to the United States Constitution. *Id.* at 372, 113 S. Ct. at 2135. The Supreme Court then explained that one of the established exceptions was recognized in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968), which

> held that "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or

> to others," the officer may conduct a patdown search "to determine whether the person is in fact carrying a weapon."

Id. at 372-73, 113 S. Ct. at 2135-36 (quoting *Terry*, 392 U.S. at 24, 88 S. Ct. at 1881). The Supreme Court then explained, "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Id.* at 373, 113 S. Ct. at 2136. Finally, the Supreme Court explained:

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Id. at 375-76, 113 S. Ct. at 2137.

Appellant relies on this explanation to argue that because the iPod's contour or mass did not make its identity as contraband immediately apparent, Weinzettel's retrieval of the iPod from appellant's pocket was unlawful. But in making this argument, appellant fails to recognize a critical factual distinction between his case and *Dickerson*. In *Dickerson*, when the officer reached into the man's pocket and retrieved the cocaine, the officer had concluded that the lump in the man's pocket was not a weapon. *Id.* at 369, 113 S. Ct. 2133. After recognizing a plain-feel exception to the warrant requirement, the Supreme Court concluded that

> the officer's continued exploration of [the man's] pocket after having concluded that it contained no weapon was unrelated to the sole justification of the search under *Terry*: the protection of the police officer and others nearby. It therefore

> amounted to the sort of evidentiary search that *Terry* expressly refused to authorize and that we have condemned in subsequent cases.

Id. at 378, 113 S. Ct. at 2138-39 (quotation and citation omitted). The Supreme Court affirmed the suppression of the cocaine because "the officer determined that the item was contraband only after conducting a further search, one not authorized by *Terry* or by any other exception to the warrant requirement." *Id.* at 379, 113 S. Ct. at 2139. In other words, the Supreme Court concluded that the cocaine should be suppressed because after determining that what he felt in the pocket was not a weapon, the officer continued his search by manipulating the item to determine what it was, which exceeded the permissible scope of a *Terry* search.

Unlike the officer in *Dickerson*, when Weinzettel reached into appellant's pocket after feeling a small, hard, irregular object, Weinzettel had not determined that the object was not a weapon. Weinzettel testified that he was unable to tell what the object was while it was still in appellant's pocket. In *State v. Bitterman* the Minnesota Supreme Court explained that "where a frisk is appropriate, the feeling of a hard object of substantial size, the precise shape or nature of which is not discernible through outer clothing, justifies the removal of that object." 304 Minn. 481, 486, 232 N.W.2d 91, 94 (1975). In *Bitterman*, an officer who was frisking a known heroin user in an apartment where heroin use had been reported felt a round, hard object in a coat pocket and reached into the pocket and retrieved a prescription bottle. *Id.* at 482-83, 232 N.W.2d at 92-93. The supreme court applied *Terry* and held that when coupled with the surrounding circumstances, feeling the hard object during the frisk justified the officer's reaching into

the pocket. *Id.* at 486, 232 N.W.2d at 94. The supreme court stated, "Since weapons are not always of an easily discernible shape, a mockery would be made of the right to frisk if the officers were required to positively ascertain that a felt object was a weapon prior to removing it." *Id*.

When he pat searched appellant, Weinzettel knew that weapons had been used against T.M. and C.M. In light of this knowledge, Weinzettel acted reasonably when, after feeling a small, hard, unknown object, he reached into appellant's pocket and removed the iPod. Because Weizettel's actions did not go beyond what was necessary to determine whether appellant was armed, Weinzettel did not exceed the permissible scope of a *Terry* search, and the district court did not err by denying appellant's motion to suppress the iPod.

II.

Whether to give a requested jury instruction lies within the district court's discretion, and the district court will not be reversed absent an abuse of discretion. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001). The focus of our analysis is on whether the district court's refusal to give a requested instruction resulted in error. *Id.*

> When we review jury instructions for error, we review the instructions in their entirety to determine whether they fairly and adequately explained the law of the case. An instruction is in error if it materially misstates the law. Furthermore, it is well settled that the court's instructions must define the crime charged.

Id. at 555-56 (citations omitted).

To convict a defendant of kidnapping, the state must prove beyond a reasonable doubt that the defendant confined or removed a person from one place to another without the person's consent. Minn. Stat. § 609.25, subd. 1 (2006). For each kidnapping count, the district court instructed the jury as follows regarding the element of confinement or removal:

> To confine a person is to deprive the person of freedom. A physical restraint is not necessary. A person can restrain another by threats of force. To remove a person from one place to another is to cause the person to move from the place where the person was to another place. It is not necessary that the defendant have physically transported [T.M. or C.M.]. It is sufficient if the removal was accomplished by the threat of force.

The supreme court has held that confinement or removal completely incidental to the commission of a separate felony does not amount to kidnapping. *State v. Smith*, 669 N.W.2d 19, 32 (Minn. 2003). In *Smith*, the court reasoned that the serious consequences of an additional conviction for kidnapping required that the confinement or removal "be criminally significant in the sense of being more than merely incidental to the underlying felony, in order to justify a separate criminal sentence." *Id.*

Appellant argues that when instructing the jury on the elements of kidnapping, the district court erred by failing "to instruct the jury about the level of conduct necessary to legally satisfy the element of confinement or removal." The district court denied appellant's request for an instruction on the definition of confinement or removal. Appellant contends that his convictions for kidnapping must be reversed because the instructions that the district court gave "created the possibility that the jury convicted

appellant without finding that the state had proven all of the elements of the offense of kidnapping beyond a reasonable doubt."

In *Turnage v. State*, the supreme court was presented with this same argument that a jury instruction regarding kidnapping was erroneous because it failed to inform the jury that any confinement or removal that was incidental to the underlying felony was insufficient to constitute kidnapping. 708 N.W.2d 535, 545 (Minn. 2006). In *Turnage*, the district court gave the same instruction that the district court gave in appellant's trial, and the defendant did not request an instruction on confinement or object to the instruction that the district court gave. *Id.* Consequently, the parties agreed that the jury-instruction issue should be reviewed under a plain-error analysis. *Id.*

The supreme court declined to address whether, under facts other than those in the case before it, the district court must instruct the jury that confinement or removal that is only incidental to the underlying felony is insufficient to constitute kidnapping. *Id.* Instead, the supreme court explained that

> in deciding whether a specific jury instruction should be given, a reviewing court must view the evidence in the light most favorable to the party requesting the instruction to determine whether the trial court abused its discretion. A trial court's refusal to give a jury instruction constitutes an abuse of discretion if the evidence warrants such an instruction. Here, the question is whether, when viewed in the light most favorable to [the defendant], the evidence would support a jury finding that the confinement and removal of [the victim] were completely incidental to the murder.

Id. at 545-46 (citation omitted).

The supreme court then analyzed the evidence in the case and concluded:

> Given the length of the removal of [the victim] from North St. Paul to West St. Paul and his confinement in the car for that distance, well before the assault got underway, there was no evidence on which the jury could have found that the removal and confinement were merely incidental to the murder. Instead, the removal and confinement were criminally significant because they both preceded and facilitated the commission of the murder.

Id. at 546.

As in *Turnage*, a finding that appellant's confinement or removal of T.M. and C.M. was completely incidental to the underlying robbery is not supported by the evidence. After robbing T.M. and C.M. of their wallets, cell phones, and a folding knife, appellant forced them into a car and took them approximately eight miles to a wooded area before releasing them. There was no evidence on which the jury could have found that this confinement and removal were merely incidental to the robberies. Consequently, as in *Turnage*, the district court did not abuse its discretion when it denied appellant's request for an instruction on the definition of confinement or removal.

We have considered the arguments made by appellant in his pro se supplemental brief, and we conclude that the arguments do not establish a reversible error.

Affirmed.