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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0219**

State of Minnesota,
Respondent,

vs.

Jose Ventura Hernandez Hernandez,
Appellant.

**Filed January 14, 2019
Affirmed in part, reversed in part, and remanded
Florey, Judge**

Otter Tail County District Court
File No. 56-CR-17-1831

Keith M. Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Michelle Eldien, Otter Tail County Attorney, Fergus Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Reilly, Judge; and Florey, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

In this direct appeal from a judgment of conviction, appellant argues that the evidence was insufficient to prove his guilt for kidnapping, the district court erred by

imposing a conditional-release period for a conviction of attempted criminal sexual conduct, and the warrant of commitment must be amended to reflect an attempted rather than a completed criminal-sexual-conduct offense.

We affirm the kidnapping conviction because there was sufficient evidence, but reverse imposition of the ten-year conditional-release term, and remand for resentencing and correction of the warrant of commitment to reflect that appellant was convicted of attempted first-degree criminal sexual conduct.

FACTS

Appellant Jose Ventura Hernandez Hernandez dragged his former girlfriend, A.M.B., from a vehicle into his residence, assaulted her, and attempted sexual penetration. The state charged him with kidnapping with the purpose of committing great bodily harm or causing terror in the victim, a violation of Minn. Stat. § 609.25, subd. 1(3) (2016); false imprisonment by intentional restraint, a violation of Minn. Stat. § 609.255, subd. 2 (2016); and attempted first-degree criminal sexual conduct involving penetration and the complainant's reasonable fear of great bodily harm, a violation of Minn. Stat. §§ 609.17, subd. 1, .342, subd. 1(c) (2016).

The matter proceeded to a jury trial. A.M.B. testified that she was previously in a relationship with appellant. He became very controlling and jealous, and the two stopped dating, but maintained a friendship. In March 2017, appellant went with A.M.B. on a trip to Fargo-Moorhead to purchase some supplies for A.M.B.'s store in Pelican Rapids. They got into an argument, and appellant got upset. On the way home, appellant drove erratically and told A.M.B. he was going to disfigure her face and hurt her and that the two were

“going to kill each other in the car.” Appellant started hitting A.M.B. in the face and punching her, and she punched him back. He took a back road, causing A.M.B. to become nervous because she was unsure where she was being taken. He drove her to his residence outside of Pelican Rapids.

Appellant went inside, and A.M.B. stayed in the vehicle and locked the doors. Appellant came back to the vehicle, opened it, pulled A.M.B. out against her will, forcefully dragged her into his residence by her hair and possibly her arm, and locked the door. Appellant disappeared momentarily, and A.M.B. looked for a way out, but appellant returned and ripped A.M.B.’s clothes off. He got on top of her and tried to spread her legs apart, but she fought back by kicking and punching him. He told her that she must cooperate and have sex with him. He smashed her head on the floor twice, and for a moment she thought that she lost consciousness. She feared for her life. Appellant squeezed A.M.B.’s breasts, causing severe pain. At one point, when A.M.B. was lying on the floor, she saw appellant go into the kitchen and grab a knife, but he did not have the knife when he returned, and A.M.B. was unsure what happened to the knife. A.M.B. was eventually able to coax appellant into stopping the attack. Appellant drove A.M.B. home.

A.M.B. later told law enforcement about the attack, and appellant was arrested. A detective testified that he spoke with appellant, through a translator, about the incident. According to the detective, appellant admitted that he dragged A.M.B. from his vehicle “one time . . . and they got inside the residence.” Appellant admitted that he disrobed A.M.B. against her will. He admitted to fighting with her and wanting to have sex with her, but he had “erectile dysfunction or something.” According to the detective, appellant

did not recall grabbing a knife or hitting A.M.B.'s head on the floor. Based on the conversation with appellant, the detective opined that it was appellant's "plan" to have sex with A.M.B.

Appellant testified in his own defense. He claimed that he and A.M.B. argued over money, but he denied taking her to his residence and denied her allegations. He testified that his inculpatory statements to the detective were a result of medication that he was taking.

The jury found appellant guilty of kidnapping, attempted first-degree criminal sexual conduct, and false imprisonment. Following the verdict, the jury was asked to find aggravating factors, specifically, whether A.M.B. was released to a safe place and whether she suffered great bodily harm during the kidnapping. The jury found that A.M.B. was released to a safe place and did not suffer great bodily harm.

Appellant was sentenced to 21 months' imprisonment for kidnapping, and though the judge wanted execution of the sentence to be stayed, appellant demanded execution, and execution of the sentence was ordered. There was no adjudication on the false-imprisonment conviction, which the district court deemed a lesser-included offense of kidnapping. Appellant was sentenced to 72 months' imprisonment for attempted first-degree criminal sexual conduct, with a 10-year conditional-release term. The two sentences were to be served concurrently. The warrant of commitment indicates that appellant was convicted of kidnapping and first-degree criminal sexual conduct, but it does not indicate that the criminal-sexual-conduct conviction is for an attempted offense. This appeal followed.

DECISION

I.

We first address the sufficiency of the evidence for the kidnapping conviction. Appellant was convicted under Minn. Stat. § 609.25, subd. 1(3), which criminalizes confining or removing a person from one place to another without the person's consent and with the purpose of committing "great bodily harm" or "to terrorize" the person. In other words, the perpetrator must have the specific intent to commit great bodily harm or to terrorize. *See State v. Wilson*, 830 N.W.2d 849, 853-54 (Minn. 2013) (determining that the word "purpose" denoted a specific-intent requirement). Great bodily harm is defined as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm." Minn. Stat. § 609.02, subd. 8 (2016). The term "to terrorize" is defined for juries as "causing extreme fear by use of violence or threats." 10 *Minnesota Practice*, CRIMJIG 15.02 (2015).

Appellant argues that "[t]he state presented no evidence that [his] purpose was to commit great bodily harm or to terrorize [A.M.B.]." He asserts that he removed and confined A.M.B. with the purpose of having sex with her, and this intent does not satisfy the intent element of the kidnapping charge. He acknowledges that he used force against A.M.B., but argues that it was incidental to his "goal of engaging in sex." Appellant's argument is rooted in *State v. Smith*, which held that "where the confinement or removal of the victim is completely incidental to the perpetration of a separate felony, it does not

constitute kidnapping.” 669 N.W.2d 19, 32 (Minn. 2003), *overruled on other grounds by State v. Leake*, 699 N.W.2d 312 (Minn. 2005).

In considering a claim of insufficient evidence, this court’s review is limited to a thorough analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

The parties agree that a circumstantial-evidence standard is applicable because appellant’s intent is at issue. *See State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997) (recognizing that intent is generally proved by circumstantial evidence). Under the circumstantial-evidence standard, we review the evidence using a two-step analysis. We first identify the circumstances proved, deferring “to the jury’s acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the [s]tate.” *State v. Robertson*, 884 N.W.2d 864, 871 (Minn. 2016) (quotations omitted). Second, we “independently examine the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with a hypothesis other than guilt.” *Id.* (quotations omitted). “In order to sustain a conviction based on circumstantial evidence, the reasonable inferences that can be drawn

from the circumstances proved as a whole must be consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *Id.* (quotation omitted). We view not only the circumstances proved as a whole, but also consider the inferences drawn therefrom as a whole. *State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017).

The circumstances proved are that appellant and A.M.B. were previously in a romantic relationship. After traveling to Fargo-Moorhead, the two quarreled, and appellant became upset. On the way home, he drove erratically and told A.M.B. he was going to disfigure her face and hurt her and that the two were going to kill each other. Appellant hit A.M.B. in the face and punched her. When they arrived at appellant’s residence, he pulled A.M.B. out of the vehicle against her will, forcefully dragged her into his residence by the hair, and locked the door. He disappeared momentarily, then returned, forcefully removed A.M.B.’s clothes, and attempted sexual penetration. He smashed her head on the floor twice and squeezed her breasts, causing severe pain. At one point, A.M.B. saw appellant go into the kitchen and grab a knife. She feared for her life.

The circumstances proved are consistent with appellant’s guilt and inconsistent with his alternative hypothesis. The charged offense permitted a conviction based on an intent to commit great bodily harm *or* to terrorize. We focus on intent to terrorize, as the circumstances proved are consistent with that intent. Moreover, the circumstances are inconsistent with the hypothesis that appellant’s sole purpose for removal and confinement was sex, and inconsistent with the hypothesis that appellant’s removal, confinement, and terroristic purpose were merely incidental to the criminal-sexual-conduct offense.

Appellant words and actions on the drive home indicate an intent to terrorize. When appellant dragged A.M.B. into his residence by the hair, he did not immediately engage her sexually. When he did disrobe her, his act of viciously grabbing her breasts is unrelated to penetration or forced sexual compliance and indicative of an intent to cause terror. Indeed, after appellant slammed A.M.B.'s head on the ground, she feared for her life. At one point, A.M.B. saw appellant go into the kitchen and grab a knife, which was not used to force sexual compliance. It is unreasonable to conclude, based on the circumstances proved, that appellant's sole motivation was sex. The only reasonable hypothesis is that appellant removed A.M.B. to his residence and confined her with the independent purpose of causing fear through violence or threats.

II.

Appellant next argues that the district court erred by imposing a ten-year conditional-release term for attempted first-degree criminal sexual conduct because conditional release cannot be imposed for an attempted offense. The state agrees that appellant's conditional release period "should be vacated," and the warrant of commitment should be corrected because appellant was convicted of an attempt.

In *State v. Noggle*, the supreme court held that "[t]he plain language of Minn. Stat. § 609.3455, subd. 6 (2014), does not authorize the imposition of a 10-year conditional release term for [a] conviction of attempted third-degree criminal sexual conduct." 881 N.W.2d 545, 545 (Minn. 2016). The supreme court reasoned that Minn. Stat. § 609.3455, subd. 6, imposes a mandatory ten-year conditional-release term for five enumerated offenses (four degrees of criminal sexual conduct, first through fourth, and criminal sexual

predatory conduct), and an attempted completion of one of those enumerated offenses is sufficiently distinct from a completed offense, and therefore does not qualify as one of the five enumerated offenses. *Id.* at 547-551.

Appellant was convicted of an attempt, which is distinct from the offenses listed in Minn. Stat. § 609.3455, subd. 6. Therefore, the reasoning in *Noggle* applies.¹ We reverse imposition of the ten-year conditional-release term and remand for resentencing and correction of the warrant of commitment to reflect that appellant was convicted of attempted first-degree criminal sexual conduct.

III.

Lastly, appellant filed a pro se supplemental brief, offering his version of the events in question. Appellant's brief contains factual allegations outside of the record and is void of argument or legal citation, and we therefore must disregard it. *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007).

Affirmed in part, reversed in part, and remanded.

¹ While the district court did not state the statutory grounds for the conditional-release term, the warrant of commitment references the sentencing statute, Minn. Stat. § 609.342, subd. 2(a) (2016), which in turn references Minn. Stat. § 609.3455. It therefore seems apparent that the conditional-release term was imposed under section 609.3455.