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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2013**

Shawn Richard Burrington, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed July 15, 2019
Affirmed
Jesson, Judge**

Sherburne County District Court
File No. 71-CR-17-859

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Kathleen A. Heaney, Sherburne County Attorney, George R. Kennedy, Assistant County Attorney, Elk River, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Jesson, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

JESSON, Judge

Appellant Shawn Richard Burrington pleaded guilty to aggravated robbery and reported to prison to begin his sentence. But upon his arrival, prison staff informed

Burrington that because he was also charged with attempted kidnapping, he was required to register as a predatory offender, a fact never discussed with him previously. In this appeal from the denial of his postconviction petition, Burrington argues that he should not be required to register as a predatory offender because the charge requiring registration—attempted kidnapping—was not supported by probable cause. But we conclude that probable cause supported the attempted-kidnapping charge, and therefore we affirm.

FACTS

In the early morning hours on May 5, 2017, appellant Shawn Richard Burrington went to HiTech Motorsport before the store was open. Burrington, wearing a red bandana over his face and carrying a pillowcase and duct tape, approached the store owner, who was in the process of opening the store. Burrington attacked the store owner from behind. He then forced the owner inside the store. Once inside, Burrington and the store owner struggled, and Burrington unsuccessfully attempted to put the pillowcase over the store owner's head and place duct tape over his mouth.

Eventually, the store owner forced Burrington outside the store. Burrington then demanded that the store owner give him money, and the store owner gave him about \$700.¹ Burrington fled. The store owner called the police, and when they arrived, they discovered a pillowcase and piece of duct tape inside the store and a roll of duct tape outside the store. A fingerprint recovered from the piece of duct tape matched Burrington's fingerprint.

¹ The district court order and complaint state that the amount of money stolen equaled \$700, but the store owner filed an affidavit seeking restitution alleging that \$1100 in cash was taken.

Police arrested Burrington, who told police that he had been nearly homeless and needed money. Burrington admitted to going to the store, and explained that he brought the pillowcase and duct tape with him to subdue the store owner so that he could flee after the robbery.

The state charged Burrington with first-degree aggravated robbery, simple robbery, and fifth-degree assault, and later amended the complaint to add a charge of attempted kidnapping.² Pursuant to a plea agreement, which indicated that all other charges would be dismissed, Burrington pleaded guilty to aggravated robbery. The district court sentenced Burrington to an executed term of 90 months in prison. Predatory offender registration was not discussed during the plea or the sentencing hearings.

When Burrington reported to prison, officials told him that he must register as a predatory offender because he had been charged with attempted kidnapping and convicted of another offense arising from the same set of circumstances. Burrington filed a postconviction petition seeking relief from the obligation to register as a predatory offender. The district court denied Burrington's petition, reasoning that the attempted-kidnapping charge was supported by probable cause. Burrington appeals.

DECISION

Burrington argues that he should not be required to register as a predatory offender because the attempted-kidnapping charge was not supported by probable cause. Specifically, Burrington contends that the actions which formed the basis for the

² The district court signed the amended complaint, which included a finding of probable cause.

attempted-kidnapping charge were incidental to the aggravated robbery and thus not criminally significant. We review the denial of a petition for postconviction relief for an abuse of discretion but review legal issues de novo. *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). On the issue of probable cause, we review factual findings for clear error but review the application of the legal standard de novo. *State v. Lopez*, 778 N.W.2d 700, 703 (Minn. 2010).

Under Minnesota Statutes section 243.166, subdivision 1b(a)(1)(ii) (2016), persons charged with attempted kidnapping are required to register as predatory offenders if they are “convicted of or adjudicated delinquent for that offense or another offense arising out of the same set of circumstances.”³ But in order to trigger the registration requirement, the charge must be supported by probable cause. *State v. Haukos*, 847 N.W.2d 270, 274 (Minn. App. 2014).

Probable cause to support a charge “exists where the facts would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person under consideration is guilty of a crime.” *State v. Carlson*, 267 N.W.2d 170, 173 (Minn. 1978). But evidence required to support a finding of probable cause is *significantly less* than the evidence required to support a conviction. *State v. Harris*, 589 N.W.2d 782, 790 (Minn. 1999). And “[u]nlike proof beyond a reasonable doubt or preponderance of the evidence, probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.” *Id.* at 790-91 (quotation omitted). And it

³ Burrington does not dispute that he was convicted of aggravated robbery and that the attempted-kidnapping charge was an offense arising out of the same circumstances.

is the judiciary’s determination of probable cause—not simply a prosecutor’s filing of a charge—that triggers the registration requirement. *Haukos*, 847 N.W.2d at 273. If a district court determines that the charge triggering the registration requirement is not supported by probable cause, it may relieve an individual of the registration obligation. *Id.* at 274.

Attempted kidnapping requires that an individual attempt to “confine[] or remove[] from one place to another, any person without the person’s consent” for one of the enumerated reasons, including “to facilitate commission of any felony or flight thereafter.” Minn. Stat. § 609.17, subd. 1 (defining attempt), .25, subd. 1(2) (2016). Here, the postconviction court concluded that probable cause supported the attempted kidnapping charge. It noted that Burrington had a pillowcase and duct tape with him and that “his attempt to place the pillowcase over [the store owner’s] head and tape his mouth establishes an attempt to confine [him].” Further, the postconviction court determined that the “force and coercion” that formed the basis for the attempted kidnapping was different than the “force and coercion” that supported the conviction for aggravated robbery.⁴ We agree.

We begin our analysis by noting that the evidence required to find probable cause is significantly less than what is required to support a conviction. *Harris*, 589 N.W.2d at

⁴ Further, even though the postconviction court analyzed Burrington’s petition, it also determined that he waived any challenge to probable cause during his plea. We do not decide the question of whether Burrington waived his ability to challenge probable cause in a postconviction proceeding, an issue the state does not raise on appeal. Nor do we reach the question of whether a postconviction petition is the proper mechanism for challenging predatory offender registration requirements.

790. The undisputed facts here establish that Burrington took a pillowcase and duct tape with him, intending to use them to flee the store after he robbed it. Further, Burrington attempted to confine the store owner by placing the pillowcase over his head and covering his mouth with duct tape. These facts show that Burrington attempted to confine the store owner for the purpose of facilitating the commission of the aggravated robbery. See Minn. Stat. § 609.25, subd. 1(2). That is sufficient to support a finding of probable cause for the kidnapping charge. See *Harris*, 589 N.W.2d at 790-91.

Burrington alleges that the attempted kidnapping charge is not supported by probable cause because any confinement was merely incidental to the aggravated robbery and thus not criminally significant. In order for confinement to be criminally significant, it must be “more than merely incidental to the underlying crime.” *State v. Earl*, 702 N.W.2d 711, 722 (Minn. 2005) (quotation omitted). And if the confinement is “completely incidental to the perpetration of a separate felony, it does not constitute kidnapping.” *State v. Smith*, 669 N.W.2d 19, 32 (Minn. 2003), *rev’d on other grounds by State v. Leake*, 699 N.W.2d 312 (Minn. 2005). But if the confinement results from “purposeful behavior in its own right,” it is not incidental. *Earl*, 702 N.W.2d at 723. We conclude that Burrington’s attempts to confine the store owner were not “merely incidental” to the aggravated robbery. Said differently, attempting to confine the store owner using the pillowcase and duct tape was not a necessary step in order to complete the aggravated robbery. Because Burrington took additional, purposeful steps to attempt to confine the store owner, the confinement was not incidental to the commission of the robbery.

Finally, caselaw Burrington relies on to support his argument is distinguishable.⁵ Each of Burrington's cited cases involved the question of whether the confinement supported a kidnapping *conviction*, which requires proof beyond a reasonable doubt, a much higher standard than probable cause. See *Harris*, 589 N.W.2d at 790-91.

Because a finding of probable cause only requires "a probability or substantial chance of criminal activity, not an actual showing of such activity" and because Burrington's actions demonstrated an attempt to confine the store owner that was not incidental to the aggravated robbery, we conclude that the attempted kidnapping charge was supported by probable cause. *Harris*, 589 N.W.2d at 790-91 (quotation omitted). Accordingly, Burrington is required by statute to register as a predatory offender, and it was not an abuse of discretion for the postconviction court to deny his petition for relief.⁶

Affirmed.

⁵ In *Smith*, the supreme court determined that blocking a doorway after an attack was incidental to the underlying crime and not criminally significant. 669 N.W.2d at 32-33. But Burrington took additional steps beyond blocking a doorway in an attempt to confine the store owner. Similarly, in *State v. Welch*, the supreme court concluded that holding a victim down in order to perpetrate a sexual assault was not confinement sufficient to support a kidnapping conviction, noting that it was difficult to imagine a sexual assault that did not involve such an action. 675 N.W.2d 615, 620-21 (Minn. 2004). But again, aggravated robbery does not always inherently require attempting to confine the victim by placing a pillowcase over the victim's head and attempting to duct tape his mouth. Finally, in *State v. McEwan*, the supreme court reversed a kidnapping conviction after concluding that "the evidence that the confinement of the boys was to facilitate the robbery was minimal at best." 265 N.W.2d 818, 821 (Minn. 1978). Nothing in this case suggests that there is any doubt that Burrington attempted to confine the store owner using the pillowcase and duct tape.

⁶ Burrington raises policy arguments that the burdensome restrictions of the predatory-offender registration statute were not intended to apply to someone in his position who committed an aggravated robbery and that his sentence for aggravated robbery adequately addresses his criminal conduct. But "the task of extending existing law falls to the supreme

court or the legislature, but it does not fall to this court.” *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987).