

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ANTHONY PRYOR,

Defendant-Appellant.

UNPUBLISHED

February 25, 1997

No. 179041

Washtenaw Circuit Court

LC No. 93-001509-FC

Before: Sawyer, P.J., and Neff and A.L. Garbrecht,* JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of one count of armed robbery, MCL 750.529; MSA 28.797, one count of unlawfully driving away a motor vehicle, MCL 750.413; MSA 28.645, one count of kidnapping, MCL 750.349; MSA 28.581, two counts of illegal sale/use of a financial transaction device, MCL 750.157q; MSA 28.354(16), one count of conspiracy to commit kidnapping, MCL 750.349; MSA 28.581 and MCL 750.157(a); MSA 28.354(1), one count of conspiracy to commit unlawful driving away of a motor vehicle, MCL 750.413; MSA 28.645 and MCL 750.157(a); MSA 28.354(1), and one count of conspiracy to commit illegal sale/use of a financial transaction device, MCL 750.157q; MSA 28.354(16) and MCL 750.157(a); MSA 28.354(1). Defendant was sentenced as an habitual offender, third offense, to twelve to thirty years in prison for armed robbery, two to five years for unlawful driving away of a motor vehicle, eighteen to forty years for kidnapping, two to four years for each count of unlawfully driving away a motor vehicle, twelve to thirty years for conspiracy to commit kidnapping, two to five years for conspiracy to commit unlawful driving away of a motor vehicle, and two to four years for conspiracy to commit illegal sale/use of a financial transaction device. We affirm.

On October 23, 1993, defendant and two other men grabbed Troy Schlotfeldt in the parking lot of Schlotfeldt's apartment complex and took Schlotfeldt's wallet and car keys at gunpoint. The men climbed into Schlotfeldt's car, forcing Schlotfeldt into the back seat with the gunman. Schlotfeldt was asked to disclose the personal identification number to his ATM card. The three men then drove Schlotfeldt to an ATM machine, where one of the men withdrew money using Schlotfeldt's ATM card.

* Circuit judge, sitting on the Court of Appeals by assignment.

Schlotfeldt was then driven to another parking lot where the three men forced Schlotfeldt into the hatchback area of his car and fled. Schlotfeldt's bank account records revealed that there were thirteen attempted transactions on his ATM card, with the successful withdrawals totaling \$170. Schlotfeldt identified defendant in a lineup as one of the three men who had robbed and abducted him. Defendant later admitted these events to police.

I

Defendant first contends that insufficient evidence was presented at trial to support his kidnapping conviction. Defendant argues that the required element of asportation was not proven where the movement of Schlotfeldt was merely incidental to the robbery and illegal use of the financial transaction device, and not for the purpose of kidnapping.

Kidnapping encompasses six forms of conduct, each of which constitutes the crime of kidnapping. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). The jury convicted defendant of kidnapping by forcible confinement or imprisonment for the purpose of kidnapping. Kidnapping through forcible confinement requires proof of four elements beyond a reasonable doubt:

- (1) a forcible confinement of another within the state
- (2) done wilfully, maliciously and without lawful authority,
- (3) against the will of the person confined or imprisoned, and
- (4) an asportation of the victim which is not merely incidental to an underlying crime unless the crime involves murder, extortion or taking a hostage. [*People v Vaughn*, 447 Mich 217, 224; 524 NW2d 217 (1994).]

Our Supreme Court has stated that asportation is a required element of forcible-confinement kidnapping. *People v Wesley*, 421 Mich 375, 384; 365 NW2d 692 (1984); *People v Adams*, 389 Mich 222, 237-238; 205 NW2d 415 (1973). Forcible-confinement kidnapping requires proof of asportation taken in furtherance of kidnapping and not merely movement incidental to the commission of the underlying offense. *Vaughn, supra*, 224. "If the movement adds either a greater danger or threat thereof, that is a factor in considering whether the movement adequately constitutes the necessary legal asportation." *Adams, supra*, 238. To satisfy the element of asportation, the movement must be shown to have significance independent of any accompanying offense. *People v Barker*, 411 Mich 291, 300; 307 NW2d 61 (1981), overruled in part on other grounds in *Wesley, supra*, 386.

The evidence presented at trial revealed that the armed robbery of Schlotfeldt was completed before Schlotfeldt was placed into the back seat of his car. Therefore, it cannot be said that the movement of Schlotfeldt was merely "incidental" to the armed robbery.

Likewise, it is the *use* of an illegally obtained financial transaction device which is prohibited by MCL 750.157q; MSA 28.354(16). Successful use of the card, i.e., withdrawing money from an ATM

machine, is not required. *People v Hilliard*, 160 Mich App 484, 488; 408 NW2d 482 (1987). While *Hilliard* involved the use of a stolen credit card, the logic applies equally to the use of a stolen ATM card. In *Hilliard*, this Court stated that the defendant "presented the cards for payment of the VCR and for payment of the gasoline that was pumped into the automobile. The fact that he was thwarted before he was able to obtain the goods does not detract from the nature of his crime. The purchase of goods or services is not an element of the offense of illegal use of a credit card." *Id.* Therefore, it cannot be said that defendant's movement of Schlotfeldt was "incidental" to the underlying crime of illegal use of a financial transaction device.

The evidence presented at trial was sufficient to prove that such movement of Schlotfeldt was in furtherance of kidnapping and not merely incidental to defendant's crimes of armed robbery and illegally using Schlotfeldt's ATM card. Reviewing the evidence in a light most favorable to the prosecution, there is sufficient evidence to allow a rational trier of fact to conclude that all elements of kidnapping, including asportation, were proven beyond a reasonable doubt.

II

Next, defendant contends that he is entitled to a new trial because the jury was not properly instructed on the asportation element of kidnapping. The record reveals that while the trial court erroneously instructed the jury on the element of asportation, such error was harmless.

Asportation is an essential element of a forcible-confinement kidnapping charge, *Wesley, supra*, 388. As discussed previously, to meet the asportation requirement for forcible-confinement kidnapping, movement of the victim must not be merely incidental to an underlying offense, it must be incidental to the commission of the kidnapping. *Adams, supra*, 560. It is error for a trial court to instruct the jury that the asportation element of kidnapping would be satisfied if the jury found the movement of the victim to be incidental to the commission of the underlying offense. *Vaughn, supra*, 235; *Barker, supra*, 301.

In the present case, the trial judge instructed the jurors that if they found movement either for the purpose of kidnapping or "to get money or other valuables from Troy [Schlotfeldt]," this would be sufficient to prove the asportation element of kidnapping. The instruction failed to explain to the jurors the requirement that they find asportation incidental to kidnapping and not movement merely incidental to the commission of another crime. The instruction did not explain what must be proven to establish the element of asportation, and erroneously stated that asportation could be proven if the jury found that the victim was moved "to get money or other valuables" from the victim. Therefore, the instruction was erroneous.

"In the context of an erroneous jury instruction on an essential element, . . . [this] Court [must] assess whether the jury, properly instructed, could have reached a different verdict had the error not occurred." *Vaughn, supra*, 238. The record reveals that Schlotfeldt was "moved" by defendant to ensure that defendant's illegal use of Schlotfeldt's ATM card would result in a successful withdrawal of cash. However, as discussed earlier, movement of Schlotfeldt was not necessary, i.e., incidental, to

defendant's commission of armed robbery or illegal use of a financial device. Therefore, a properly instructed jury could not have found that defendant moved Schlotfeldt for the purpose of illegally using a financial transaction device, and not for the purpose of kidnapping. The erroneous jury instruction was harmless.

III

Finally, defendant seems to argue that the sentencing court's failure to prepare a sentencing information report constitutes error requiring resentencing. Although the sentencing guidelines do not apply to habitual offenders, the trial court must fill out an SIR for the underlying offense. *People v Zinn*, 217 Mich App 340, 350; 551 NW2d 704 (1996); *People v Derbeck*, 202 Mich App 443, 446; 509 NW2d 534 (1993); Michigan Sentencing Guidelines (2d ed), p 1.

Because the trial court did prepare an SIR, the factual predicate for defendant's argument is incorrect and defendant's argument is therefore without merit.

Affirmed.

/s/ David H. Sawyer

/s/ Janet T. Neff

/s/ Allen L. Garbrecht