# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CEDRIC MARK EARSHIN BELL,

Defendant-Appellant.

UNPUBLISHED
October 10, 1997

No. 195562
Recorder's Court
LC No. 95-013659

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Before: Holbrook, Jr. P.J., and White and R. J. Danhof,* JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of kidnapping, MCL 750.349; MSA 28.581, two counts of felonious assault, MCL 750.82; MSA 28.277, and possession of less than twenty-five grams of heroin, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). He was sentenced to life in prison for being an habitual offender, second offense, MCL 769.10; MSA 28.1082. Defendant now appeals as of right and we affirm.

This case arises from the kidnapping and assault of a Dearborn Police Officer and a private security guard. Defendant was detained on suspicion of shoplifting from the Fairlane Town Center. While defendant was in custody, the police discovered that defendant was wanted in Alabama for attempted murder and flight from justice. In addition, a packet containing .23 grams of a substance containing heroin was found in his possession. Eventually, it became necessary to transfer defendant to the Dearborn Police Department. Officer Douglas Topolski and Security Officer Mark Eddy put defendant into a security vehicle. While en route to the police station, defendant allegedly pointed a pistol toward the front seat of the vehicle and ordered Eddy to drive to Detroit. The incident came to a conclusion when Topolski jumped from the vehicle and shot at defendant.

On appeal, defendant first contends that he was deprived of his right to due process and a fair trial because the prosecutor introduced evidence establishing that he was wanted for attempted murder and flight from justice at the time of the incident. We disagree.

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

In the instant case, the testimony regarding the outstanding warrants for defendant's arrest was not offered to suggest that he was a "bad man." The existence of the warrants was a fact otherwise relevant to the case. The evidence was relevant to motive, and to explain the officers' conduct in response to defendant's threats. Further, defense counsel was able to use the evidence to argue that it was unlikely that defendant was permitted to go in the police car without being thoroughly searched. Further, the cautionary instructions given by the trial court were sufficient to protect defendant's right to a fair and impartial trial and to prevent the jurors from convicting defendant on the basis of the prior bad acts.

Next, defendant argues that he is entitled to a new trial because the jury was not properly instructed regarding the elements of kidnapping. Defense counsel did not object to the jury instructions. Under such circumstances, our review is generally limited to the issue whether relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). However, where an erroneous jury instruction pertains to an essential element of an offense, a contemporaneous objection to the instruction is not required to preserve the issue for appeal. *People v Vaughn*, 447 Mich 217, 228; 524 NW2d 217 (1994) (Brickley, J).

Defendant was charged with kidnapping by forcible-confinement, forcible-imprisonment or secret-confinement. Forcible-confinement kidnapping requires proof of (1) forcible confinement of another within the state; (2) done willfully, maliciously and without lawful authority; (3) against the will of the person confined or imprisoned; and (3) asportation of the victim. *People v Wesley*, 421 Mich 375, 388; 365 NW2d 692 (1984). With regard to the asportation element, the prosecutor is required to prove movement taken in furtherance of kidnapping and not merely incidental to the commission of a lesser or coequal underlying offense. *People v Adams*, 389 Mich 222, 237-238; 205 NW2d 415 (1973).

Defendant argues that the trial court should have instructed the jury regarding the nonincidental asportation rule because the abduction of Officer Topolski and Security Officer Eddy was perpetrated in furtherance of the uncharged crime of escape from lawful custody. MCL 750.197a; MSA 28.394(1). The trial court must instruct on movement incidental to an underlying offense even if no such offense is charged where there is evidence before the jury suggesting that an uncharged offense had been committed. See *People v Rollins*, 207 Mich App 465, 467-468; 525 NW2d 484 (1994). In the instant case, however, defense counsel did not argue that defendant should be acquitted because the kidnapping was incidental to another offense. Rather, counsel's theory was that Topolski planted a gun on defendant in order to make it appear as if he was attempting to escape from custody. Therefore, any error which may have resulted from the kidnapping instruction was harmless.

Defendant next contends that his kidnapping conviction should be reversed because the prosecutor failed to introduce sufficient evidence to establish the asportation element of the offense. In determining whether the prosecution has presented sufficient evidence, this Court is required to view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). Circumstantial evidence and reasonable

inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *People v Greenwood*, 209 Mich App 470, 472; 531 NW2d 771 (1995).

Whether or not a particular movement constitutes legal asportation must be determined from all the circumstances. *Adams, supra*, at Mich 238. Relevant factors to consider include (1) how far the complainants were moved and (2) whether being moved added any greater danger or threat than those inherent in the underlying offense. CJI2d 19.1. In the instant case, Topolski and Eddy were transported from Dearborn to Detroit at gun point and threatened during the course of the drive. Viewing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could conclude that the element of asportation was proven beyond a reasonable doubt.

Next, defendant argues that the prosecutor improperly elicited testimony establishing that Officer Topolski had been cleared of any wrongdoing following a police investigation. Defense counsel did not object when the prosecutor questioned Officer Topolski regarding the investigation. Therefore, our review of this issue is precluded absent a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A miscarriage of justice will not be found if the prejudicial effect of the remark could have been cured by a timely request for a curative instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). We find that any prejudice which may have resulted from the challenged exchange could have been cured had defense counsel made the appropriate objection at trial.

Defendant also contends that his trial counsel was ineffective in failing to object when the prosecutor elicited testimony establishing that Officer Topolski was cleared of any wrongdoing. To establish a denial of effective assistance of counsel, the defendant must prove: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) that, but for counsel's error, there is a reasonable probability that the result of the proceeding would have been different, and (3) that the result of the proceeding was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). We conclude that there is no reasonable probability that the result of the proceeding would have been different had the objection been made.

Defendant next argues that resentencing is warranted because he was never convicted of being an habitual offender, second offense. It is well-settled that in a criminal trial the prosecutor must prove beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged and includes the right to a jury trial. However, Michigan's habitual offender statutes are merely sentence enhancement mechanisms rather than substantive crimes. *People v Zinn*, 217 Mich App 340, 345; 551 NW2d 704 (1996). Pursuant to the 1994 amendment to the habitual offender statute, the existence of the defendant's prior conviction or convictions is to be "determined by the court, without a jury, at sentencing, or at a separate hearing scheduled for that purpose before sentencing." MCL 769.13; MSA 1085, as amended by 1994 PA 110. Accordingly, defendant was not entitled to a jury trial or the right to be proven guilty beyond a reasonable doubt. *Zinn, supra*, 217 Mich App 347.

As amended, § 13 of the habitual offender statute provides that the existence of a prior conviction may be established by any relevant evidence, including, but not limited: (1) a copy of the

judgment of conviction; (2) a transcript of a prior trial or plea taking or sentencing proceeding; (3) information contained in a presentence report; or (4) a statement of the defendant. MCL 769.13; MSA 28.1085. It appears from the transcript that the existence of the prior conviction was established on the basis of the presentence report. At sentencing, the trial court reviewed the report on the record with the parties. On two occasions, the trial court made reference to the fact that defendant was previously convicted of kidnapping. The trial court's characterization of the presentence report was not challenged. Thus, the existence of the prior conviction was properly established.

Next, defendant questions whether he was provided adequate notice of the prior felony conviction upon which the habitual offender charge was based. However, although the amended information contained the wrong date, the issue was clarified at sentencing, and defendant has not denied that he had a prior conviction of kidnapping.

Defendant next challenges the reliability of Officer Topolski's testimony. At trial, evidence was introduced establishing that defendant's hands were cuffed behind his back before he was placed in the security vehicle for the drive over to the Dearborn Police Department. On direct examination, Topolski testified that he looked toward the back of the vehicle and saw defendant trying to point a pistol toward the front seat. According to Topolski, defendant's hands were still cuffed at the time. On appeal, defendant contends that the jury should not have been permitted to consider Topolski's testimony because it was inconceivable that he could have pointed the weapon at both officers. Since Topolski was the only witness who saw defendant brandishing the weapon while en route to the police station, defendant argues that the evidence was insufficient to prove that he committed the charged offenses. We disagree.

Officer Topolski demonstrated to the jury how defendant was able to hold the weapon while his hands were cuffed behind his back. Whether the jury believed that defendant committed the charged offenses depended on whether Topolski was a credible witness. Questions of credibility are for the trier of fact to resolve. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991). It is the right of the trier of fact to believe, or disbelieve, in whole or in part, any of the evidence presented. *People v Fuller*, 395 Mich 451, 453; 236 NW2d 58 (1975). This Court should not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Wolfe*, *supra* at 514-515.

Finally, defendant argues that his trial counsel was ineffective in (1) failing to object to evidence regarding the outstanding arrest warrants, (2) failing to object to the trial judge's kidnapping instruction, (3) failing to object when the trial court imposed the habitual offender sentence, and (4) failing to move to strike Officer Topolski's testimony on the basis that it was legally impossible. Given our resolution of the forgoing issues, we find no merit to these claims.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ Robert J. Danhof