STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN F. MEDAWAR,

Defendant-Appellant.

UNPUBLISHED
April 20, 1999

No. 205433
Oakland Circuit Court
LC No. 96-146596 FC

Before: Hood, P.J., and Holbrook, Jr. and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of armed robbery, MCL 750.529; MSA 28.797, kidnapping, MCL 750.349; MSA 28.581, and two counts each of first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), and second-degree criminal sexual conduct, MCL 750.520c(1)(e); MSA 28.788(3)(1)(e). He was sentenced as a second-felony habitual offender, MCL 769.10; MSA 28.1082, to concurrent prison terms of fifteen to forty years for the armed robbery conviction, eighteen to forty years for the kidnapping conviction, eighteen to sixty years each for the first-degree CSC convictions, and ten to twenty-two years each for the second-degree CSC convictions. He appeals as of right, and we affirm.

I

Defendant moved to quash the charge of armed robbery, which motion was denied. He later, at the close of the prosecution's proofs, moved for a directed verdict on that charge. That motion was also denied. Defendant appeals, claiming that there was insufficient evidence to support his conviction for armed robbery. We disagree.

We review the trial court's ruling on the motion for directed verdict under the same standard utilized by the trial court, and "consider the evidence presented by the prosecutor up to the time the motion was made in a light most favorable to the prosecution and determine whether a rational trier of fact could find the essential elements of the charged crime were proved beyond a reasonable doubt." *People v Warren,* 228 Mich App 336, 345; 578 NW2d 692 (1998), lv pending. We review claims of insufficient evidence under the same standard, specifically we view the evidence in a light most favorable

to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v McMillan*, 213 Mich App 134, 139; 539 NW2d 553 (1995). "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

The essential elements of armed robbery include (1) an assault, (2) a felonious taking of property from the victim's person or presence, and (3) the defendant must be armed with a weapon described in the statute. *People v Johnson*, 206 Mich App 122, 123; 520 NW2d 672 (1994). "Conviction of armed robbery requires a finding that the defendant was armed either with a dangerous weapon or with an article used or fashioned in such a way as to lead a reasonable person to believe that it was a dangerous weapon at the time of the robbery." *Jolly*, *supra* at 465. Further, armed robbery is a specific intent crime for which the prosecutor must establish that the defendant intended to permanently deprive the owner of property. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995).

Defendant contends that the evidence did not support the armed robbery conviction because the victim testified that defendant did not demand any money from her, but rather she offered the money to him. The victim, however, was consistent in her testimony that defendant held a knife to her throat or close to her back and neck during the charged criminal episode. She testified that she offered defendant thirty dollars while he was holding a knife to her neck because she feared for her life and wanted him to go away. Defendant then told her to give him the money. He took the money, but did not leave her house as she requested. He never returned the money. Viewed in a light most favorable to the prosecution, there was sufficient evidence to enable the jury to conclude that the victim surrendered the money unwillingly and only because she felt threatened by defendant, who was armed with a knife. The evidence was also sufficient to enable the jury to conclude that defendant intended to permanently deprive the victim of the money. Thus, all of the elements of armed robbery were present and the jury could have concluded that an armed robbery was proved beyond a reasonable doubt.

II

Defendant moved to quash the charge of kidnapping, which motion was denied. At the close of the prosecution's proofs, he moved for a directed verdict on the charge, and that motion was also denied. He appeals, claiming that the evidence was insufficient to support a conviction for kidnapping because the movement of the victim was incidental to the other alleged crimes, because he did not intend to kidnap the victim, and because there was consent, which is a defense to kidnapping. Thus, he claims that the trial court erred in denying both his motion to quash and his motion for directed verdict. We disagree.

MCL 750.349; MSA 28.581 provides, in pertinent part:

> Any person who willfully, maliciously and without lawful authority shall forcibly or secretly confine or imprison any other person within this state against his will, or shall forcibly carry or send such person out of this state, or shall forcibly seize or confine, or

> shall inveigle or kidnap any other person with intent to extort money or other valuable thing thereby or with intent either to cause such person to be secretly confined or imprisoned in this state against his will, or in any way held to service against his will, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.

The prosecution alleged that defendant willfully, maliciously and without lawful authority forcibly and/or secretly confined or imprisoned the victim against her will. However, the jury was not instructed on secret confinement, but only on forcible confinement or imprisonment.

In *People v Wesley*, 421 Mich 375, 388; 365 NW2d 692 (1984), the Court held that when an information charges an offense under the forcible confinement part of the kidnapping statute, the following elements must be proved 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. There is no requirement that there be a showing of specific intent when determining if a victim has been forcibly confined or imprisoned. See *People v Jaffray*, 445 Mich 287, 298-299; 519 NW2d 108 (1994), where the Court held that forcible confinement or imprisonment of another within this state does not require a showing of specific intent.

In this case, the victim testified that she offered to drive defendant anywhere. However, she also testified that after making the offer, defendant forced her into the car at knife point, with his hand over her mouth, and that he threatened to kill her if she screamed. Therefore, there was sufficient evidence to enable the jury to infer that the victim felt coerced due to defendant's assaultive conduct and was not consenting or willingly driving defendant around in the vehicle. The victim additionally testified that, during the entire ride, defendant kept the knife at her throat. She was forced to drive him around for approximately an hour and a half and he directed her to drive down dirt roads. Viewed in a light most favorable to the prosecution, this testimony was sufficient to allow the jury to convict defendant of forcible-confinement kidnapping beyond a reasonable doubt. The jury could have inferred from the testimony that the victim was forcibly confined against her will to the automobile by defendant's willful, malicious, and unlawful conduct, and that she was moved in the car for the purpose of kidnapping (see Issue III below). Accordingly, the trial court did not err when it denied defendant's motion to quash and motion for directed verdict on the charge of kidnapping.

III

Defendant argues that the trial court erred when it failed to instruct the jury that it must find that the asportation of the victim was not merely incidental to another crime. We find no error requiring reversal.

In this case, defendant did not object to the jury instructions at trial, or request that the jury be instructed that it had to find that the movement of the victim was for the purposes of kidnapping and was not merely incidental to the commission of the underlying offense. We nevertheless review defendant's claim because the alleged erroneous jury instruction pertains to an essential element of the offense.

People v Vaughn, 447 Mich 217, 228; 524 NW2d 217 (1994) (Brickley, J.). We review the jury instructions as a whole to determine if there is error requiring reversal, and even if the instructions are somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

In *Vaughn, supra*, the Court was presented with an issue identical to the one at hand. In *Vaughn*, the jury was instructed:

> [D]uring the course of such confinement the defendant must have forcibly moved or caused the victim to be moved from one place to another for the purpose of abduction or kidnapping. [*Id.* at 230[1].]

It was not instructed pursuant to CJI2d 19.1, as was requested by defense counsel, that:

> [i]f [name complainant] was moved as part of a crime other than kidnapping, this is not enough. In this case, for instance, you should consider whether [name complainant] was moved for the purpose of kidnapping or as part of the crime of _____. . . . [Name complainant] must have been moved for the purpose of kidnapping and this movement must have been independent of the other crime. [*Id.* at 233, citing CJI2d 19.1.]

In this case, the jury was instructed that the prosecutor had the burden of proving that "while [defendant] was confining [the victim], the defendant forcibly moved or caused [the victim] to be moved from one place to another for the purpose of kidnapping." The jury was not instructed as to the remainder of CJI2d, 19.1, which is set forth above. Defendant here, like the defendant in *Vaughn*, argues that the failure to give the remainder of CJI2d 19.1 was error requiring reversal.

In *Vaughn*, the majority of the Court found that there was no error requiring reversal even though the jury was not instructed that the movement of the victim should not be incidental to another crime, but had to be for the independent purpose of kidnapping[2]. Justices Brickley and Mallett concluded that it was harmless error to fail to instruct the jury on the "merely incidental" aspect of asportation where there was overwhelming and unrefuted record evidence that most of the victim's confinement and asportation was not merely for purposes of committing first-degree criminal sexual conduct (CSC). *Id.* at 239 (Brickley, J.). Justices Boyle, Riley and Griffin concluded that the jury did not have to be instructed on the "merely incidental" aspect of asportation where there was evidence of extensive movement independent of "the ultimate commission of CSC." *Id.* at 252-255 (Boyle, J.). No jury could have concluded that the victim was moved merely incidentally for purposes of committing CSC.

In this case, there was no error requiring reversal where no jury could have concluded that the victim was moved merely incidentally for purposes of committing armed robbery or CSC. Indeed, those crimes had been completed prior to defendant moving the victim, at knife point, into the

automobile, and forcing her to drive around for approximately an hour and a half, much of it on dirt roads.

IV

Defendant moved for a directed verdict and judgment notwithstanding the verdict (JNOV) on the charges of first-degree criminal sexual conduct. Both motions were denied. On appeal, defendant argues that there was insufficient evidence of penetration to support his convictions for first-degree criminal sexual conduct, specifically he argues that the evidence of penetration was insufficient. We disagree.

"Sexual penetration" is defined in MCL 750.520a(*l*); MSA 28.788(1)(*l*) as including, in relevant part, "cunnilingus . . . or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body[.]" In *People v Legg*, 197 Mich App 131, 133; 494 NW2d 797 (1992), this Court held that the defendant's touching with his mouth of the urethral opening, vaginal opening, or labia establishes cunnilingus. The labia are included in the "genital openings" of the female. *Id.*

At trial, the victim stated that defendant put his finger in her vagina when he was spreading sun block lotion on her, and that he also licked around and inside her vagina when she was turned over on her hands and knees. This testimony sufficiently described two separate acts of sexual penetration. It is immaterial whether the victim's testimony was inconsistent with her medical records. The jury weighs the evidence and decides issues of credibility. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). A rational trier of fact could have found that the essential element of "penetration" was proved beyond a reasonable doubt. Accordingly, the trial court did not err when it denied defendant's motions for directed verdict and JNOV.

V

Defendant also contends that the trial court erred when it found that the police were in hot pursuit of him when they entered his home without a warrant. We disagree.

In *In re Forfeiture of $176,598*, 443 Mich 261, 266-268; 505 NW2d 201 (1993), our Supreme Court stated:

> The established exceptions to the warrant requirement include: (1) searches incident to a lawful arrest, (2) automobile searches, (3) plain view seizure, (4) consent, (5) stop and frisk, and (6) *exigent circumstances.*
>
> * * *
>
> [T]he following exigent circumstances justify an entry of a dwelling without a warrant: (1) hot pursuit of a fleeing felon, (2) imminent destruction of evidence, (3) the need to prevent a suspect's escape, and (4) the risk of danger to the police or others inside or outside the dwelling. [Emphasis added; citations omitted.]

See also *People v Cartwright*, 454 Mich 550, 558-559; 563 NW2d 208 (1997).

At the evidentiary hearing on defendant's motion to suppress evidence taken from his person at the time of his arrest in his home, the officers testified that they were contacted by the victim, who was shaking, screaming, and crying. She informed them that defendant had sexually assaulted her. The victim identified defendant by name and showed the officers where defendant lived. When they arrived at his home, defendant was spotted in the back yard by the first officer, who recognized defendant from the description given by the victim. The officer ordered defendant to stop. Defendant ran to his back door and attempted to flee into the house, but the officer grabbed defendant by the arm before he gained entry into the house. A struggle ensued in the doorway and defendant got away from the officer and entered the house. By this time, a second officer ran up to the back door and was able to see defendant pushing the door from the inside of the house. The second officer also recognized defendant from the description given. The officers forced the door open and ordered defendant to "get down". When defendant kept running through the house, the officers tackled and handcuffed him. He was arrested. In view of this evidence, the trial court did not clearly err in its determination that the officers were in "hot pursuit of a fleeing felon" and, therefore, it properly denied defendant's motion to suppress the evidence found on defendant's person.

VI

Finally, there is no merit to defendant's claim, raised for the first time on appeal, that the prosecution engaged in vindictive prosecution when it added the additional charges of kidnapping and armed robbery. Contrary to what defendant argues, there was sufficient evidence to support those charges. Moreover, there has been no showing that the prosecution added the charges because of "an animus toward Mr. Medawar for exercising" any rights. Therefore, the record does not support a finding that those charges were added because of presumed or actual vindictiveness. See *People v Ryan*, 451 Mich 30, 35-36; 545 NW2d 612 (1996) and *People v Watts*, 149 Mich App 502, 508-510; 386 NW2d 565 (1986).

Affirmed.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ William C. Whitbeck

[1] In *Vaughn*, the trial court did not use the language of CJI2d 19.1 when instructing on the kidnapping charge. Rather, it used the language found in CJI 19:1:01, the predecessor to CJI2d 19.1. *Id.* at 231 n 8.

[2] The Court did not reach a majority on the issue of whether the jury must be instructed as to the "merely incidental" asportation requirement in every case of forcible-confinement kidnapping. Justices Brickley and Mallet indicated that the jury should receive such an instruction in every case. *Id.* at 227-228 (Brickley, J.). Justices Boyle, Riley and Griffin ruled that the "merely incidental" language does not

need to be given in all cases of forcible-confinement kidnapping. *Id.* at 247 (Boyle, J.) It depends on the factual situation in each case. *Id.*