

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH IRWIN BANKS,

Defendant-Appellant.

---

UNPUBLISHED  
November 5, 1999

No. 197816  
Wayne Circuit Court  
LC No. 95-010930

Before: Smolenski, P.J., and White and Markman, JJ.

WHITE, J. (concurring in part and dissenting in part).

Defendant was charged with kidnapping a child under the age of fourteen, in violation of MCL 750.350; MSA 28.582, which provides:

A person shall not maliciously, forcibly, or fraudulently lead, take, carry away, decoy, or entice away, any child under the age of 14 years, with the intent to detain or conceal the child from the child's parent or legal guardian, or from the person or persons who have adopted the child, or from any other person having the lawful charge of the child. A person who violates this section is guilty of a felony, punishable by imprisonment for life or any term of years.

The jury was instructed:

Each Defendant is charged with the crime of kidnapping. To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the Defendant forcibly confined or imprisoned [the victim] against [his] will.

Second, that the Defendant did not have any legal authority to confine [the victim].

Third, that while he was confining [the victim], the Defendant forcibly moved or caused [the victim] to be moved from one place to another.

Fourth, that the Defendant intended to detain or conceal the child from the child's parent.

Fifth, that the Defendant acted willfully and maliciously. This means the Defendant knew it was wrong to confine [the victim] and knew he did not have legal authority to do so.

Sixth, at the time of the confinement that the child was under the age of 14 years.

Defendant argues that the jury should have been instructed as follows:

First, that the Defendant led, took, carried away, decoyed, or enticed [the victim] from his parent.

Second, that the Defendant intended to detain or conceal the child from the child's parent.

Third, that the Defendant acted maliciously, forcibly, or fraudulently. This means that the Defendant acted with an unlawful motive, or that the Defendant either used physical force or did something to make [the victim] reasonably afraid of present or future danger, or that the Defendant made a false representation which he knew to be false, in order to lead, take, carry away, decoy, or entice [the victim] from his parent.

While I do not necessarily agree with defendant's argument that the child enticement statute focuses solely on a defendant's intent at the time the child was initially lead, taken, carried away, decoyed or enticed away,<sup>1</sup> I conclude that at minimum the statute includes as an element the leading, taking, carrying away, decoying or enticing away of the child, an element as to which the jury was not instructed,<sup>2</sup> and requires that the requisite malice, force or fraud and the requisite intent to detain or conceal the child from the child's parents or legal guardian be present when the requisite act of leading, taking, carrying away, decoying or enticing takes place. While the prosecution's argument that the erroneous instructions increased, rather than decreased, its burden is correct as to portions of the instructions, it is unpersuasive as to these aspects of the charge. Based on the evidence, and the jury's questions and verdict, I conclude that manifest injustice is present because had the jury been instructed as defendant and the prosecution agree it should have been, the jury might have acquitted of the actual offense charged.<sup>3</sup>

In reaching this conclusion, I assess the manifest injustice issue and likelihood of prejudice in the context of the entire proceeding. In this regard, I observe that defendant's third claim of error lends support to the view that the jury was confused as to the requisite acts and intent.

The jury's questions indicate that it had sustained difficulty understanding the instructions, particularly the acts and intent necessary to establish guilt. During deliberations, the jury requested a dictionary to clarify the definitions of "kidnapping" and "extortion,"<sup>4</sup> and later asked for clarification regarding the "malicious act" referred to in the kidnapping or extortion instructions.<sup>5</sup> The trial court's response to both communications was to re-read the kidnapping instruction it had read originally. When

the jury sent out its second note, it also asked: “Is a child allowed to go with a person without permission from a guardian for any reason without govern [sic] law as long as the child was willing?” The trial court responded:

Ladies and gentlemen, it’s not a question that I can answer directly. Much of the question is subsumed into the material of this trial. You’re to rely on your own common sense. You’re to rely on your understanding of the evidence in this case. You’re to rely on your finding of the facts and the law as I gave it to you, and in that way to reach a verdict.

If you have any – candidly, I couldn’t totally understand your second question. So, if you want to clarify, you’re certainly free to ask it again. But for now return to the jury room and continue your deliberations.

At a later point in the deliberations, the jury asked another question:

THE COURT: Back on the record in People versus Kenneth Banks.

The jury has sent a question. I’ll read it, quote, **‘If the intent was never there to commit a crime, does this constitute reasonable doubt?’** question mark, end quote.

In terms of the – obviously the jury is asking me to answer the question. Do the People have any position?

[Prosecutor]: Not really. We’ll leave it to your discretion.

[Defense Counsel]: Well, Defense has a position on this question. I think on this question I think it should just -- the answer just should be a resounding yes.

THE COURT: Well, I’ve studied the question. I’ve had the advantage of having it for ten minutes or so. I can’t answer such a question without invading their province, and I will tell them that. I’m not on the jury.

[Defense Counsel]: The instruction on intent, how does that read?

THE COURT: The specific intent instruction?

[Defense Counsel]: Yes. Does it address anything with regard to their question?

[Defense Counsel]: How about this, Your Honor, how about that that’s one of the elements of the charge, and the People have to prove each of the elements beyond a reasonable doubt.

THE COURT: Anything else?

[Prosecutor]: No.

THE COURT: Okay. You can bring in the jury.

(Jury for Mr. Banks entered the courtroom at about 11:27 a.m.) (On the record in the presence of the jury.)

THE COURT: Ladies and gentlemen, once again you have sent a question. I'll read it. "if the intent was never there to commit a crime, does this constitute reasonable doubt?"

I cannot answer such a question without invading the province of the jury. So I'd ask you to return to the jury room and continue your deliberation.

(Jury for Mr. Banks left the courtroom . . . )

THE COURT: Objections?

[Defense Counsel]: I do have an objection on that.

THE COURT: Go ahead.

[Defense Counsel]: Just for the reasons that I stated, Your Honor.

THE COURT: Oh, okay. It's continued – I mean, those objections are continued.

[Defense Counsel]: Right.

THE COURT: Thank you.

Later that day, the jury returned a guilty verdict on kidnapping and acquitted defendant of extortion.

The jury's last question is especially problematic. The jury directly inquired regarding the intent necessary to convict. While the question might be understood in differing ways, it expressed the jury's confusion and called for a response. Like the majority, I do not fault the trial court for declining to repeat the same kidnapping instructions to the jury's persistent questions. However, the failure to provide any meaningful answer undermines any assumption that the jury accurately sorted out the intent issue. The court should have reinstructed on the requisite intent and the prosecutor's obligation to establish all the elements of the offense beyond a reasonable doubt, and further instructed that if all the elements are established beyond a reasonable doubt, including the requirements that defendant have acted (carried the victim away) maliciously, forcibly or fraudulently, and with intent to detain or conceal the victim from his mother, it is irrelevant whether defendant intended thereby to commit a crime. Although the court had previously instructed on the requisite intent, the jury nevertheless was apparently left with a question regarding the requirement that defendant have acted maliciously, defined by the court as requiring that defendant have known 1) that it was wrong to confine the victim (as opposed to take away the victim) and 2) that he did not have the legal authority to do so. It cannot properly be assumed

that a reference back to the same instructions that had repeatedly left the jury confused suddenly clarified the issue for them.

While I would not necessarily reverse on the basis of the erroneous kidnapping instruction alone, or the failure to adequately respond to the jury's questions during deliberation alone, I conclude that the totality of the circumstances leads to the conclusion that it is likely that the jury did not fully understand the requirement that defendant have understood at a point when he was carrying the victim away that it was wrong to do so and that he did not have authority to do so, and that defendant at that time intended to detain or conceal the victim from his mother. I would remand for a new trial.

I concur with the majority regarding defendant's remaining claims of error.

/s/ Helene N. White

<sup>1</sup> The prosecution does not take issue with defendant's assertion. I therefore do not address it except to note that one could conclude that the statute prohibits the leading, carrying, taking away, decoying or enticing away of a child with unlawful intent to detain or conceal even where the intent is formed after the child is initially lead, taken, carried away, decoyed or enticed away providing there is a further act of leading, taking, carrying away, decoying or enticing away accompanied by the requisite intent. The phrase "from the child's parent or legal guardian" can be linked to the requisite intent to detain or conceal, not the acts of leading, taking, carrying away, decoying, or enticing away. Under this view, if there is a leading, taking, carrying away, decoying, or enticing away that is done maliciously, forcibly or fraudulently, with the intent to detain or conceal the child from the parent or legal guardian, it is irrelevant that the defendant's initial taking of the child was done with innocent intent.

<sup>2</sup> While the instructions given included the general kidnapping asportation element requiring that defendant have forcibly moved or caused the victim to be moved from one place to another while confining him, that instruction is not the equivalent of an instruction that defendant had to have lead, taken, carried away, decoyed or enticed away the victim maliciously, with intent to detain or conceal him from his mother.

<sup>3</sup> See *People v Vaughn*, 447 Mich 217, 238; 524 NW2d 217 (1994) (Brickley, J.). The court's instructions focused on the victim's confinement. The statute under which defendant was charged focuses on the leading, taking, carrying away, decoying or enticing away of the child. The jury was not instructed that defendant had to have maliciously, forcibly or fraudulently, lead, taken, carried away, decoyed or enticed away the victim. Based on the testimony, the jury might well have focused on the events that occurred after McDonald went to retrieve her son, if so, one cannot conclude with any confidence that the jury would have concluded that the same conduct satisfied the requirements of the statute with which defendant was actually charged.

<sup>4</sup> The trial court read the note: "Dictionary needed. Need to clarify kidnapping and extortion by law."

<sup>5</sup> The trial court read the question: “Malicious act was referred to under kidnapping or extortion?”