

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN E. CAINE,

Defendant-Appellant.

UNPUBLISHED

January 30, 2001

No. 219566

Wayne Circuit Court

LC No. 98-013049

Before: Talbot, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of kidnapping, MCL 750.349; MSA 28.581, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and third-degree criminal sexual conduct (CSC III), MCL 750.520d; MSA 28.788(4). Defendant was sentenced to twelve to twenty years' imprisonment on the kidnapping conviction, five to ten years' imprisonment on the assault with intent conviction, and eight to fifteen years' imprisonment on the CSC III conviction. We affirm.

This case arose from defendant's beating, kidnapping and rape of his former girlfriend of fifteen years. Defendant first challenges the sufficiency of the evidence supporting his kidnapping conviction. We resolve such a challenge by viewing de novo the evidence presented to determine whether the prosecution offered sufficient evidence to justify a rational trier of fact's conclusion that defendant was guilty beyond a reasonable doubt of each of the essential elements of the crime. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). The elements of kidnapping are:

- (1) a forcible seizure, confinement, inveigling or kidnapping of another,
- (2) done wilfully, maliciously and without lawful authority,
- (3) with the intent to cause such person to be secretly confined or imprisoned within the state against his will,
- (4) an asportation of the victim which is not merely incidental to an underlying crime. [*People v Wesley*, 421 Mich 375, 388-389; 365 NW2d 692 (1984).]

Defendant first contends that there was insufficient evidence to show that the asportation of the victim was in furtherance of the kidnapping, rather than movement incidental to the commission of the other offenses. *People v Vaughn*, 447 Mich 217, 224-225; 524 NW2d 217 (1994) abrogated on other grounds by *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999). We disagree. The evidence produced at trial demonstrated that defendant moved the victim to a place where she was subjected to greater danger. Moreover, the other offenses could have been completed without the extended asportation.

Defendant further claims the evidence was inadequate to show he intended to imprison or confine the victim. *People v Jones*, 92 Mich App 100, 107; 284 NW2d 501 (1979). Testimony established that the victim tried to escape from defendant's moving vehicle and that she was prevented from doing so because defendant repeatedly struck her in the head. The testimony also demonstrated that defendant took the victim to a house he knew was vacant. Accordingly, there was sufficient evidence to establish an intent to imprison or confine the victim.

Defendant next asserts that the prosecutor presented insufficient evidence to overcome defendant's contention that plaintiff was in the car consensually. Consent is a complete defense to kidnapping when it is not obtained by duress or threats. *People v LaPorte*, 103 Mich App 444, 448-449; 303 NW2d 222 (1981). However, this consent must be present throughout the entire transaction, and a victim's initial consent does not exonerate the defendant from subsequent acts. *Id.* at 449. In this case, sufficient evidence was presented to show that although the victim initially consented to being in defendant's car, she revoked this consent by repeatedly attempting to escape from the moving car after defendant threatened and beat her.

We are satisfied that sufficient evidence was presented to justify a rational trier of fact's conclusion that (1) the asportation of the victim was done in furtherance of the kidnapping and was not incidental to the commission of the other offenses, (2) defendant intended to confine or imprison the victim, and (3) the victim revoked her consent to being in defendant's car.

Second, defendant challenges the sufficiency of the evidence supporting his conviction for CSC III. Specifically, defendant insists that the evidence was insufficient to prove (1) an actual penetration occurred, (2) that force or coercion was used to accomplish this penetration, and (3) that the penetration was nonconsensual.

Both the victim and the defendant testified that an actual penetration took place. Sufficient evidence existed to show defendant's use of force or coercion to accomplish the penetration. The force or coercion element has been interpreted to include either physical force or a putting of the victim in reasonable fear of present or future danger. *People v Kline*, 197 Mich App 165, 166; 494 NW2d 756 (1992). In light of defendant's threat, his subsequent beating of the victim, and his transportation of the victim to a deserted house, there was sufficient evidence to establish that defendant used implied threats of force or coercion to accomplish the penetration. *Id.* at 166-167.

There was also sufficient evidence presented that the victim did not consent to the penetration. The prosecution is not required to prove lack of consent as an independent element of the offense. *People v Jansson*, 116 Mich App 674, 682; 323 NW2d 508 (1982). As previously discussed, there was sufficient evidence of force or coercion presented. Moreover, the

victim testified that she had sex with defendant only because she was frightened that he would further harm her.

We are satisfied that there was sufficient evidence presented for a rational trier of fact to conclude that defendant (1) actually penetrated the victim, (2) used force or coercion in accomplishing the penetration, and (3) penetrated the victim without consent.

Finally, defendant maintains that his sentences for kidnapping and CSC III were disproportionate. We disagree. Provided the trial court considered proper factors in imposing sentence, this Court reviews sentencing decisions for abuse of discretion. *People v Coles*, 417 Mich 523, 550; 339 NW2d 440 (1983), overruled in part on other grounds *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn, supra* at 636.

Defendant's sentences were well within the sentencing guidelines and therefore are presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987).

Affirmed.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper