STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 19, 2002
v	No. 228703 Eaton Circuit Court
DAVID MICHAEL O'BRIEN NEALY, Defendant-Appellant.	LC No. 99-020357-FC

Before: Owens, P.J., and Sawyer and Cooper, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of: first-degree home invasion, MCL 750.110a(2); taking and driving away another's motor vehicle, MCL 750.413; two counts of armed robbery, MCL 750.529; two counts of kidnapping, MCL 750.349; eight counts of first-degree criminal sexual conduct, MCL 750.520b(1)(c) ; conspiracy to commit first-degree home invasion, armed robbery, kidnapping, and first-degree criminal sexual assault, MCL 750.157a; and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison sentences of: 150 to 240 months for the home invasion conviction; 320 to 480 months each for the kidnapping and armed robbery convictions; 30 to 60 months for the conviction of taking and driving away another's vehicle; 324 to 600 months for each criminal sexual conduct conviction; 120 to 240 months for the conspiracy to commit first-degree home invasion conviction; 210 to 480 months each for the conspiracy to commit armed robbery and kidnapping convictions; and 260 to 480 months for the conspiracy to commit first-degree criminal sexual conduct conviction. Defendant also received two years' imprisonment for the felony-firearm conviction, with 223 days of sentence credit, to be served before and consecutive to his other sentences. Defendant appeals as of right. We affirm.

This case arises from a crime spree that began in Mulliken and continued to Detroit, during the early morning hours of November 14, 1999. The prosecutor presented evidence that defendant and two others entered a home, threatened a young woman with guns, and repeatedly raped her.[1] The assailants also demanded money and other property from her father. The father testified that during this ordeal he was bound and gagged with duct tape and left in his basement

[1] There was no evidence presented at trial that defendant was one of the assailants who physically raped or sexually assaulted the young woman.

bedroom.[2] Thereafter, one of the assailants forced the female victim to drive him to a bank and withdraw money from an ATM machine. Upon returning to her home, the perpetrators, joined by a fourth person, forced the female victim into a Ford Expedition and drove her to Detroit, repeatedly raping her on the way. When the assailants reached Detroit they rented a motel room and continued their campaign of sexual assault against the young woman. Later that morning, she was dropped off at a restaurant in Novi.

I. Venue

Defendant argues that he was denied due process and an impartial jury when the trial court denied his request for a change of venue. We disagree. The defense argued that they were forced to collectively exhaust their peremptory challenges in order to obtain a jury that was unaware or unbiased by the publicity and that a number of potential jurors were excused for cause. In denying their motions, the trial court announced that it was "satisfied that those fourteen people are fair and impartial jurors." A trial court's decision on a motion for change of venue will not be disturbed on appeal absent an abuse of discretion. *People v Jendrzejewski*, 455 Mich 495, 500; 566 NW2d 530 (1997).

Criminal defendants are generally tried in the county where the alleged crime occurred. *Id*. at 499; MCL 600.8312. However, a trial court may order a change of venue when justice demands. *Jendrzejewski, supra* at 499-500; MCL 762.7. Justice requires a change of venue when the pretrial publicity is so ubiquitous and unrelenting that the entire community must be presumed to have been prejudiced by it. *Jendrzejewski, supra* at 501. The Court in *Jendrzejewski, supra* at 500-501, noted that:

> Community prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice.

However, we note that a juror's exposure to media reports about the defendant and the alleged crime does not automatically establish that defendant was denied a fair trial. *Id*. at 502. Rather, a reviewing court must look at the circumstances surrounding the trial to determine if it was fair. *Id*. Due process only demands that jurors act with a "lack of partiality, not an empty mind." *Id.* at 519.

In this case, defendant fails to identify any specific juror as having preconceived ideas about defendant's guilt. Further, defendant does not point to any prejudicial information that the jurors may have received from pretrial publicity that potentially interfered with their duty to decide the case according to the evidence presented at trial. Rather, defendant supports his argument with a general statement that there was widespread pretrial publicity. Defendant further cites the exhaustion of peremptory challenges by all three defense lawyers and the "large

[2] The father was eventually able to escape from his restraints and call the police from a neighbor's home.

number" of potential jurors excused for cause, as "strong evidence of how the pre-trial publicity impacted on the community."

However, defendant provides no evidence, other than the fact that a number of prospective jurors were excused for bias, to support the assertion that the pretrial publicity was "extensive, intensive, and inflammatory." Nonetheless, it appears that the trial court was sensitive to potential problems stemming from pretrial publicity. Indeed, the trial court followed our Supreme Court's recommendations and frequently resorted, with the participation of counsel, to sequestered questioning of each prospective juror. See *Jendrzejewski*, *supra* at 509. While the record reveals most prospective jurors were exposed to some pretrial publicity, all the jurors who were eventually seated declared an ability to judge the case solely on the evidence presented at trial.

To the extent defendant argues that the exhaustion of his peremptory challenges evidences the likelihood of an impartial jury, we find his argument to be meritless. The exhaustion of peremptory challenges merely preserves jury selection issues for appeal, *People v Taylor*, 195 Mich App 57, 59-60; 489 NW2d 99 (1992). We further note that the record does not indicate that any of the defense attorneys, including defendant's, ever requested additional challenges as permitted by MCR 6.412(E)(2).

Furthermore, defendant provides no numbers or citations to the record concerning challenges for cause or how they may have reduced the jury pool. Defendant also fails to cite any authority for his proposition that the extent of such challenges in this case is grounds for reversal. We regard this failure of presentation as forfeiture of this argument. MCR 7.212(C)(7). We note that according to the record, less than half the prospective jurors excused for cause were due to bias relating to pretrial publicity.

Based on the complete record, we do not find that the trial court abused its discretion by refusing to change venue to another county. Further, after a careful review of the jury selection procedure in this case, *Jendrzejewski*, *supra* at 517, we are satisfied that the trial court succeeded in seating an impartial jury.

II. Duress Instruction

Defendant further contends that the trial court erroneously refused a defense request for an instruction on duress. We disagree. Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

It is the function of the trial court to clearly present the case to the jury and instruct on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). Jury instructions must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). "The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court." *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

The evidence in this case does not support defendant's contention that he acted under duress. Duress is a common-law affirmative defense that applies when the crime committed avoided a greater evil. *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997). To warrant an instruction on duress, the defendant must present evidence that:

> A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm; B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant; C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and D) The defendant committed the act to avoid the threatened harm. [*Id*. at 246-247, quoting *People v Luther*, 394 Mich 619, 623; 232 NW2d 184 (1975).]

Absent sufficient evidence of each of these elements, the trial court is not required to instruct the jury on duress. *Id*. at 248. We further note that a threat of future injury is insufficient to support a defense of duress. *People v Ramsdell*, 230 Mich App 386, 401; 585 NW2d 1 (1998).

On appeal, defendant points exclusively to his police statements as evidence that he acted under duress. However, defendant fails to identify any specific remarks or provide any citation to the record to sustain his argument. Appellate review of this issue is thereby precluded. MCR 7.212(C)(7). We note, however, that a thorough review of defendant's statements fails to support the theory that he acted under duress.

Defendant stated to police that he was with friends that night and made no indications that he acted out of fear. At best, defendant's statements suggest that he did not initially plan the events of that night. However, both victims testified under oath that defendant was armed and that none of the assailants threatened each other. The principal complainant also testified that while she was being sexually assaulted during the drive to Detroit, defendant commented to one of her rapists that "[he didn't] hear her moaning." There was further testimony that the victims' money was split among all four assailants. Thus, neither the evidence produced during trial, nor defendant's statements to police, provided support for a jury instruction on duress.

III. Kidnapping

Defendant next maintains that the prosecutor failed to present sufficient evidence that he kidnapped one of the victims. Specifically, defendant claims that the facts fail to support a finding that the complainant's father was secretly confined for purposes of the kidnapping statute. We disagree. In reviewing sufficiency of the evidence claims, this Court views the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The trial court instructed the jury that in order to convict defendant of kidnapping, the prosecutor must prove beyond a reasonable doubt that defendant, without legal authority, forcibly confined or imprisoned the victim against his will, intentionally kept that location secret, and acted wilfully and maliciously. See MCL 750.349. This is the secret confinement theory of kidnapping. See *People v Jaffray*, 445 Mich 287, 305; 519 NW2d 108 (1994).

The evidence produced at trial indicated that the victim in question was subdued with duct tape around his face, arms, and legs. Trial testimony also established that a sock was placed in the victim's mouth, leaving him unable to speak and barely able to breath. The victim claimed that the assailant wearing a red coat, whom his daughter identified as defendant, asked him where he could find more money in the house and later put a gun to his head. The victim testified that he was eventually able to work free of the duct tape and seek help from a neighbor.

Defendant insists that there was nothing secret about the victim's confinement because the victim was in his own bedroom. However, the secret confinement theory of kidnapping does not necessarily fail when the victim is confined in his own home. "[A] victim can be a 'prisoner in his own castle' for purposes of the kidnapping statute." *Id*. at 312, n 37. Essentially, "secret confinement," as contemplated by MCL 750.349, exists when a victim is deprived of the assistance by others due to the victim's inability to communicate a need for help. *Jaffray, supra* at 309.

Similar to *Jaffray, supra*, the evidence in this case clearly establishes that the victim was secretly confined to his room and precluded from communicating his predicament to others. See i*d*. at 312-313. Indeed, a sock was put in his mouth and his arms and legs were bound with duct tape. It appears that the victim was left in this manner to prevent him from calling for help. While his daughter was aware of this confinement, she was being held captive by defendant and his co-felons and could not communicate the victim's plight to others. Because this evidence suggests that defendant and his cohorts intentionally left the victim in a state of confinement, unbeknownst to all but themselves and the victim's daughter, the jury could reasonably conclude that defendant secretly confined the victim for purposes of secret-confinement kidnapping.

IV. Sentencing

Defendant contends that the trial court abused its discretion in sentencing him to several minimum terms of imprisonment exceeding the range recommended by the legislative sentencing guidelines.[3] We disagree.

The sentencing guidelines require the trial court to impose a minimum sentence in accordance with the calculated guidelines range. MCL 769.34(2). However, a trial court may depart from the recommended sentencing range if it has a substantial and compelling reason. MCL 769.34(3); *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000). To constitute a substantial and compelling reason for departing from the guidelines, the reason must be objective and verifiable, and must irresistibly hold the attention of the court. *Babcock, supra* at 75. A court may not base a departure on an offense or offender characteristic already considered by the guidelines, unless it concludes that the guidelines provided inadequate or disproportionate weight to that factor, given the facts of the case. MCL 769.34(3)(b).

The existence of a particular factor is a factual determination for the trial court and is reviewed for clear error on appeal. *Id*. at 75-76. "[O]nce this Court determines as a matter of

[3] Because the felonies in this case took place on November 14, 1999, the legislative sentencing guidelines apply. MCL 769.34(1).

law that the trial court's stated factor for departure was objective and verifiable, our review is limited to whether the trial court abused its discretion in concluding that the factor constituted a substantial and compelling reason to depart." *Id.* at 78. Further, the extent of the departure from the guidelines is reviewable pursuant to the principle of proportionality. *People v Babcock (After Remand)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 235518, issued March 19, 2002), slip op at 3-4.

In this case, several of the minimum sentences exceeded the range recommended by the guidelines. Specifically, defendant received minimum sentences of 150 months for home invasion, 320 months for each count of kidnapping and armed robbery, 324 months for each count of criminal sexual conduct, and 260 months for conspiracy to commit criminal sexual conduct. The guidelines recommended minimum sentences of 140, 285, 285, and 210 months, respectively. At sentencing, the trial court explained its rationale for imposing these sentences:

> [T]he victims in this case . . . have certainly endured as monstrous a crime as you can imagine. Not only were they assaulted in their home, they were deprived of what everybody should have and that's security, security to be safe in their homes, to be safe in their bodies. And that safety was violated continually during that fateful night.
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> I think that also we have to understand that the community has also in a way been assaulted because people who lived in the community and who have known about this case certainly must not sleep as soundly, must have a sense of their security also lost. . . .
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> . . . How you can repeatedly be involved in a brutal assault and rape continually, again, I have no answer for that. . . .
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> [Defendant] presents, certainly, a difficult problem because one of the things the Court has to consider is rehabilitation. And certainly the callousness in which they treated the victims in this case argues against rehabilitation . . . .
>
> I would agree with the Prosecutor that the sentencing guidelines do not adequately meet the crimes that have been committed. There's multiple crimes, the callousness in which they treated the victims, the dehumanization of the victims certainly require the Court to go outside of the guidelines.
>
> But in sentencing, again, I have to consider the guidelines and any deviation must be done with the understanding that the guidelines are there for a purpose and the Court must adhere to that purpose.
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> * * *

> The Court has exceeded the sentencing guidelines for the reasons I've previously stated, that the guidelines do not adequately take into account the number of criminal offenses, nor does it take into account the severe callousness in which the victims were treated.

In the departure evaluation, the trial court reiterated that "[t]he law does not take into account the multiple criminal offenses and the callousness with which the defendant treated the victims."

Defendant claims that there was no substantial and compelling reason for these departures and that the guidelines already accounted for the circumstances of the instant crimes. Initially, we note that defendant's argument in this regard is very general. Moreover, defendant fails to explain which factors were allegedly already considered by the sentencing guidelines. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604, n 4; 617 NW2d 339 (2000).

We are satisfied that the trial court provided a detailed and rational explanation for its upward departures. The guidelines for defendant's crimes fail to account for the unusually high number of crimes committed that night, combined with the humiliation, numerous atrocities, and acts of criminal sexual conduct that the victim endured. The fact that a jury found defendant guilty on nineteen separate counts in the matter, including eight counts of first-degree criminal sexual assault, clearly establishes an objective and verifiable basis for concluding that the multiplicity and callousness of defendant's behavior constituted substantial and compelling reasons for departing from the guidelines.

Defendant suggests that the guidelines failed to account for the fact the he was not the principal actor but merely an aider and abettor. However, defendant's argument neglects the evidence presented that he held a gun to the father's head while demanding money, that he helped drive the vehicle while others were raping the daughter, that he cheered others on while they raped her, and that he received a share of the money taken from the house. Furthermore, defendant offers no authority to suggest that an aider and abettor should be judged more leniently than a principal actor. Indeed, the public policy of this state is to treat all participants in a crime as principals. MCL 767.39.

Based on this evidence, we cannot conclude that the trial court's decision to exceed the sentencing guidelines was so palpably and grossly violative of fact and logic that it evidenced a perversity of will. *Babcock (On Remand), supra* at 5. Nor do we find that the extent of the upward departure constituted an abuse of discretion. *Id*.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jessica R. Cooper