STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 6, 2004
v	No. 246232 Wayne Circuit Court
THOMAS ROBERTS, Defendant-Appellant.	LC No. 02-000441-01

Before: Owens, P.J., and Kelly and R. S. Gribbs,[*] JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), kidnapping, MCL 750.349, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life imprisonment for the first-degree premeditated murder conviction, life imprisonment for the first-degree felony murder conviction, twenty-five to seventy-five years' imprisonment for the kidnapping conviction; these sentences were to be served after the consecutive sentence of two years' imprisonment, with 285 days credit for time served, for the felony-firearm conviction. The trial court vacated the felony murder sentence on double jeopardy grounds. We affirm.

Defendant first contends that his prosecution for first-degree felony murder and his prosecution, conviction, and sentence for first-degree premeditated murder in Michigan constitute double jeopardy because he already pleaded guilty to reckless homicide in Kentucky for the same criminal act. We disagree. A double jeopardy challenge is a question of law that is reviewed de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

The Supreme Court has held that the Michigan Constitution prohibits a second prosecution arising out of the same criminal act as an offense prosecuted in a separate sovereign "unless it appears from the record that the interests of the state of Michigan and the jurisdiction which initially prosecuted are substantially different." *People v Childers*, 459 Mich 216, 219; 587 NW2d 17 (1998), quoting *People v Cooper*, 398 Mich 450, 461; 247 NW2d 866 (1976). It

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

is undisputed that the two convictions in this case arise out of the same criminal act. Thus, the central question is whether Michigan's interests are substantially different than Kentucky's. *Id*. at 219. Three factors to consider in determining whether the interests are the same are: (1) if the maximum penalties of the statutes involved are greatly disparate; (2) if some reason exists why the other jurisdictions cannot be fully trusted to vindicate Michigan's interest in obtaining a conviction; and, (3) if the differences in the statutes are substantive or merely jurisdictional. *Id*. at 219-220, quoting *Cooper*, *supra* at 461.

Applying these factors to this case, the first and third factors demonstrate that Kentucky's and Michigan's interests are substantially different. Considering the first factor of the *Cooper/Childers* test, the maximum penalties are greatly disparate. The maximum penalty in Kentucky is merely five years while defendant was sentenced to life in prison in Michigan. The difference is significant and clear. The third factor listed in *Childers* is whether the differences in the statutes are substantive or merely jurisdictional. *Childers*, *supra* at 220. In this case, the statutes are substantively different. In Kentucky defendant pleaded guilty to reckless homicide. A person is reckless in Kentucky when "he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists." KRS 501.020(4). This is a far cry from what is required for premeditated murder in Michigan. Premeditated murder requires a willful or deliberate act. MCL 750.316(1)(a). The Michigan statute requires a conscious, willful, and thought out action. The Kentucky statute, on the other hand, does not require a conscious decision or action. It merely requires a failure to perceive a risk. KRS 501.020(4). The Kentucky statute deals more with a negligent situation or action, while the Michigan statute deals with a willful and premeditated killing. These differences demonstrate more than a mere jurisdictional difference between the statutes. They are, in fact, different in their substance.[1]

Defendant claims that this Court should use the Kentucky capital murder statute in comparing the states' interests. This is not true. Jeopardy does not attach to charges dismissed as part of a plea agreement. *People v Mezy*, 453 Mich 269, 275-276; 551 NW2d 389 (1996), citing *United States v Garner*, 32 F3d 1305, 1311 n 6 (CA 8, 1994), (further citation omitted). Jeopardy only attached to defendant after he pleaded guilty to reckless homicide in Kentucky. *Mezy*, *supra* at 275. Therefore, reckless homicide is the appropriate statute to consider in this case.

Given that the first and third factors articulated in *Childers* definitively demonstrate a substantial difference between the states' statutes, it appears from the record that the interests of

[1] Recently, in *People v Nutt*, 469 Mich 565; 677 NW2d 1 (2004), our Supreme Court abandoned the "same transaction" test adopted in *People v White*, 390 Mich 245; 212 NW2d 222 (1973), and returned to the "same elements" test of *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932) and *People v Parrow*, 80 Mich 567; 45 NW 514 (1890). Although we conclude that the correct test to be applied when evaluating convictions obtained by two different sovereigns is the test articulated in *People v Cooper*,398 Mich 450; 247 NW2d 866 (1976) and *People v Childers*, 459 Mich 216; 587 NW2d 17 (1998), we note that, given the substantial differences in the elements of first-degree premeditated murder and reckless homicide, there would be no double jeopardy violation if the analysis were conducted under the "same elements" test.

the states of Michigan and Kentucky are substantially different.[2] Therefore, Michigan's interests were not satisfied by defendant's plea agreement and conviction in Kentucky. Michigan's subsequent prosecution and conviction of defendant for this first-degree murder does not violate his right against double jeopardy. *Childers*, *supra* at 218-219; *Cooper*, *supra* at 461-462.

Defendant next claims that the prosecution presented insufficient evidence for a jury to convict him of kidnapping. We disagree. To determine if sufficient evidence existed for a conviction in a criminal proceeding, this Court must view the evidence in a light most favorable to the prosecution and decide if a reasonable juror could find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

This case involved a forced confinement kidnapping. The elements of a forced confinement kidnapping are: (1) forcible confinement of the victim within the state; (2) done willfully, maliciously, and without lawful authority; (3) against the will of the victim; and, 4) "an asportation of the victim which is not merely incidental to an underlying crime unless the crime involves murder, extortion or taking a hostage. Asportation incidental to these types of crimes is sufficient asportation for a kidnapping conviction." *People v Wesley*, 421 Mich 375, 388; 365 NW2d 692 (1984); see also *People v Vaughn*, 447 Mich 217, 225; 524 NW2d 217 (1994), overruled in part on other grounds, *People v Carines*, 460 Mich 750, 766; 597 NW2d 130 (1999).

Defendant first challenges the asportation element, arguing that the asportation was merely incidental to the underlying offense. But, according to the specific language of the kidnapping statute, asportation incidental to murder is sufficient to support a kidnapping conviction. *Wesley*, *supra* at 388. Defendant repeatedly admits on appeal that the asportation in this case was incidental to the murder. Therefore, the asportation element was sufficiently satisfied even though it was incidental to the underlying offense of murder. Sufficient evidence existed for a reasonable juror to find defendant guilty of kidnapping beyond a reasonable doubt. *Id*. at 388.

Defendant also argues that he did not have the requisite intent for a jury to convict him of kidnapping. Forcible confinement kidnapping does not require a showing of specific intent. *People v Jaffray*, 445 Mich 287, 298; 519 NW2d 108 (1994). Sufficient evidence existed to establish defendant acted willfully, maliciously, without lawful authority, and with the necessary general intent. The evidence at trial showed that defendant burst into an apartment and took the

[2] While we base our decision primarily on our analysis of the first and third *Cooper/Childress* factors, we note that while Kentucky could obviously be trusted to vindicate Michigan's interest in obtaining *a* conviction, it apparently could not be fully trusted to vindicate this State's interest in obtaining an *appropriate* conviction. Pleading the brutal planned murder in this case to a reckless homicide suggests that Kentucky was less than diligent in obtaining an appropriate and just conviction. Furthermore, we question why Kentucky should have chosen to prosecute the homicide charge at all when the evidence established that it occurred in Michigan and only the disposal of the body occurred in Kentucky. Therefore, we would conclude that, on the whole, the second factor supports our determination that Michigan properly prosecuted and convicted defendant for first-degree murder.

victim out at gunpoint. Defendant then forced the victim into his car and drove off with him. This was all without the victim's consent. This evidence is sufficient for a reasonable juror to find that defendant acted willfully, maliciously and without lawful authority. It also satisfies the general intent requirement for forcible confinement kidnapping. *Jaffray, supra* at 298; *Wesley, supra* at 388.

Defendant next contends that the trial court failed to adequately instruct the jury regarding the kidnapping charge. We disagree. At the close of its jury instructions the trial court specifically asked: "Are the jury instructions satisfactory to the Prosecution and the Defense?" Defendant, through his counsel, stated: "And Defense is satisfied." "By expressly approving the instructions, defendant has waived this issue on appeal." *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002); see also *People v Carter*, 462 Mich 206, 215-219; 612 NW2d 144 (2000). A defendant who waives his or her right under a rule may not seek appellate review of a claimed deprivation of that right. The waiver extinguishes any error. *Carter, supra* at 215, quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996).

Finally, defendant contends that he is entitled to credit towards his Michigan first-degree murder sentence for time served in Kentucky for the same criminal act. We disagree. As a general rule, issues not raised before the trial court cannot be raised on appeal absent compelling or extraordinary circumstances. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Defendant did not raise this issue at sentencing and the trial court did not address it. Therefore, this issue is not preserved. Ordinarily, this Court reviews de novo claimed errors in denying credit for time served, as they are questions of law involving statutory interpretation. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997). But this Court reviews an unpreserved issue for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

From the record it is unclear whether defendant served any time at all for this criminal act in Kentucky before this trial. But even if he had, defendant is still not entitled to credit for this time served. MCL 769.11b states:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing *because of being denied or unable to furnish bond for the offense of which he is convicted*, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing. [Emphasis added.]

Defendant contends that he is entitled to credit for his time served in Kentucky pursuant to this statute because it was time served waiting for trial. The statute simply does not apply to defendant. From its plain language, MCL 769.11b deals only with situations where a defendant is denied or unable to furnish bond. The reason why defendant was incarcerated before this trial was not because he could not furnish bond in Michigan. It was because he pleaded guilty and was convicted and sentenced in another state. Defendant is not entitled to credit for time served while incarcerated for an offense other than the one of which he was convicted. *Givans, supra* at 125-126. MCL 769.11b is simply not applicable to defendant's case.

Defendant also argues that he is entitled to the credit on double jeopardy grounds. As we have concluded, defendant's convictions and sentences in Michigan and Kentucky do not

constitute double jeopardy. *Childers*, *supra* at 218-219; *Cooper*, *supra* at 461-462. Therefore, defendant is not entitled to credit for time served in Kentucky based on double jeopardy grounds.

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs