

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD FRANK LINT, JR.,

Defendant-Appellant.

UNPUBLISHED

November 29, 2005

No. 256743

Macomb Circuit Court

LC No. 2003-003761-FC

Before: Whitbeck, C.J., and Saad and O'Connell, JJ.

PER CURIAM.

A jury convicted defendant Edward Lint of kidnapping¹ and malicious destruction of property.² The trial court sentenced Lint to concurrent prison terms of 210 months to 40 years for the kidnapping conviction and 40 to 60 months for the malicious destruction of property conviction. Lint appeals as of right. We affirm.

I. Basic Facts And Procedural History

The jury convicted Lint of kidnapping his wife, Maja Lint, and causing damage to their apartment. According to the trial testimony, shortly after midnight on November 10, 2003, Maja Lint returned to the apartment she shared with Lint. Before going to bed, Maja Lint told Lint that she wanted to leave him. Lint begged Maja Lint not to leave, and he kept shaking her to keep her from falling asleep; Lint allowed her to sleep only after she agreed that they would be able to talk out their problem. When Maja Lint later awoke, however, she told Lint that she still wanted to leave. According to Maja Lint, Lint became angry, emptied her purse and took its contents, burned her passport and green card, and threatened to kill her and her family. He then tackled her to the floor, held her mouth and nose closed until she had difficulty breathing, and tied her up with belts and utility straps. He also shoved a sock into her mouth when he used the telephone, and he sprayed PAM cooking spray on the wall and carpet. He subsequently sprayed some cooking spray in the air and ignited it to demonstrate that the substance could cause a fire.

¹ MCL 750.349.

² MCL 750.377a(1)(b)(i).

Maja Lint explained that she wanted to save her life and decided to sweet talk Lint into having sexual relations with her. Lint agreed and removed her restraints. Thereafter, the couple engaged in sexual activities. Lint did not, however, let Maja Lint leave. He took her with him to the store to purchase cigarettes. She was barefoot and, when she tried to attract attention in the store, Lint became angrier. On the way home, Lint stopped at the drive-through windows of two restaurants. Maja Lint said that she was physically ill in the car and too afraid to try to escape. When they returned to the apartment, Lint bound Maja Lint again. He then fell asleep, and she tried to remove the restraints; Lint caught her and tightened the restraints. He also hung a hot clothing iron above her face. At one point during the lengthy ordeal, Lint tethered her to a television, which was hanging halfway over her head. According to Maja Lint, if she had moved, the television would have fallen onto her head. Maja Lint engaged in sexual relations with Lint on a second occasion in order to get him to untie her.

While the couple was together in the apartment, Lint observed a police car drive through the apartment complex. He apparently thought the police were after him, and he began to clean the apartment, moving the red utility straps into the laundry room. Lint also stayed near Maja Lint when she was unrestrained. He would not let her go to the bathroom alone, and he instructed her to sit in certain places. He threatened to kill her if she moved. When he later went to pick up a pizza, he made Maja Lint accompany him to the store.

On the night of November 10, 2003, according to Maja Lint, she struggled to stay awake, but she could not. She was awakened the next morning at 8:00 a.m. by a ringing telephone. Lint answered the telephone and spoke to Maja Lint's brother, telling him that she had left and that he did not know where she went. Lint fell asleep after taking the telephone call and Maja Lint, who was then unrestrained, was able to escape the apartment. She contacted the police and officers met her at a nearby gas station. They observed that Maja Lint's neck was red, and she was transported to the hospital. Maja Lint suffered lumps on her head, apparently from where Lint hit her, and she had miscellaneous bruising on her body, although she was unsure whether Lint caused this bruising. At trial, Maja Lint claimed that she was unable to tell anyone where she was during the lengthy ordeal and that she never gave Lint permission to restrain her. She also said that she continues to suffer nightmares and has been in counseling since the incident.

After Maja Lint spoke to the police, deputies went to Lint's apartment. They did not immediately locate Lint, but they found red straps in the laundry room and an iron in the bedroom. They also noticed insulation on the ground underneath an attic access. They climbed into the attic and followed footprint tracks through the insulation. The footprints led to a large, crude hole in the drywall between Lint's apartment and the neighboring apartment. Deputies found Lint in the attic of the neighboring apartment, hiding in the insulation. According to Linda May, the apartment manager, the hole in the drywall was not there previously, and the damage cost more than \$1,000 to repair.

The jury convicted Lint of kidnapping and malicious destruction of property but acquitted him of two additional charges of first-degree criminal sexual conduct.³

³ MCL 750.520b(1)(f).

II. Jury Instructions On Secret Confinement

The jury convicted Lint of kidnapping under a secret confinement theory. Lint argues that he was not charged under a theory of secret confinement but rather under a theory of forcible confinement, which requires a showing of asportation, an element on which the trial court did not instruct the jury. Lint contends that, because the trial court instructed the jury on the elements of a crime for which he was not charged, reversal is required. We disagree.

The trial court instructed the jury on the kidnapping charge using CJI2d 19.4, the instruction for “Kidnapping; Secret Confinement of Victim.” Lint’s defense counsel approved the jury instructions as given and approved of the manner in which they were read to the jury. Therefore, Lint has waived any claim of instructional error.⁴

III. Sufficiency Of The Evidence

A. Standard Of Review

Lint argues that there was insufficient evidence to support his kidnapping conviction under a secret confinement theory. When reviewing the sufficiency of the evidence in a criminal case de novo,⁵ we “view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt.”⁶ We are to resolve all conflicts with regard to the evidence in favor of the prosecution.⁷ Circumstantial evidence and reasonable inferences drawn from that evidence may be sufficient to prove the elements of a crime.⁸

B. Evidence Of Secret Confinement

Lint claims that, although there was evidence that the victim was confined, there was legally insufficient evidence that the confinement was secret. We disagree. In *Hoffman*, this Court concluded that there was sufficient evidence of secret confinement where the victim was bound in the defendant’s house, stripped naked, had a sock placed in her mouth, and had tape placed over her mouth.⁹ This Court reasoned that a reasonable fact-finder could have concluded that the defendant confined the victim and intended to keep the confinement a secret.¹⁰ Even after the defendant removed the victim’s gag, he evidenced a continuing intent to secretly

⁴ *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

⁵ *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

⁶ *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997).

⁷ *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

⁸ *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

⁹ *Hoffman*, *supra* at 112.

¹⁰ *Id.*

confine the victim by keeping constant watch over her, claiming that he cut the telephone lines, and telling her that escape was impossible.¹¹ The defendant never allowed the victim to leave.¹²

In this case, there was evidence that Lint initially held his hand over Maja Lint's mouth and nose when he tackled her. He later bound her and threatened her life. When he was on the telephone, he placed a sock in her mouth. Lint watched her closely, telling her where to sit and refusing to allow her to go to the bathroom alone. He also lied to her brother about her location, and he never let her leave the apartment alone. The evidence was sufficient to enable a rational trier of fact to determine beyond a reasonable doubt that Lint confined Maja Lint and that he intended to keep the confinement a secret.

Relying on *People v Walker*,¹³ Lint argues, in part, that Maja Lint's confinement was not secret because "[o]n more than one occasion, they both left the apartment, went to a party store, and went to several locations to get food and spoke with people." In *Walker*, the victims were taken out of the house where they were allegedly confined and had contact with a lawyer and bank personnel, yet they never made their situation known.¹⁴ Although the prosecution argued that the victims failed to communicate their plight out of fear, this Court noted that no physical force was involved.¹⁵ Further, the victims admitted that while in the house they saw two plumbers, a meter man, and two handymen.¹⁶ This Court "decline[d] to construe secret confinement so broadly as to include an occurrence [sic] in the presence and in the view of so many witnesses as were present and testified in this case."¹⁷

We acknowledge that Maja Lint was taken out of the apartment and arguably could have made her plight known to any number of people. However, this case is distinguishable from *Walker* in two respects: (1) in that case, the victims were exposed to numerous third parties while in the house; and (2) in that case, there was no physical force involved. Here, viewing the evidence in the light most favorable to the prosecution, the only two people in the apartment were Maja Lint and Lint, and there was physical force involved. Maja Lint attempted to make her situation known to a customer at the store when they went to purchase cigarettes, but Lint caught her. Moreover, defendant's subsequent decision to take her out of the apartment "does not negate the fact that a kidnapping had occurred."¹⁸

¹¹ *Id.*

¹² *Id.*

¹³ *People v Walker*, 135 Mich App 311; 355 NW2d 385 (1984).

¹⁴ *Id.* at 325.

¹⁵ *Id.*

¹⁶ *Id.* at 324.

¹⁷ *Id.* at 326.

¹⁸ *Hoffman, supra* at 112.

IV. Lint's Silence

A. Standard Of Review

Lint challenges the testimony that, when deputies went to his apartment to find him, he did not respond to their announcements or say anything while he was hiding. Lint argues that it was improper for the prosecutor to elicit evidence of his silence and to later argue that the jury could draw conclusions from Lint's behavior when the police arrived, specifically that he was not attempting to deny any wrongdoing but was hiding in the ceiling. Because Lint did not object to the challenged testimony or the prosecutor's arguments, these issues are not preserved. We therefore review the issues for plain error.¹⁹

B. Silence As Substantive Evidence

In *People v Schollaert*, the defendant argued that the prosecutor's questions and comments about his conduct after the police arrived at his apartment unconstitutionally impinged on his right to remain silent in the face of accusation.²⁰ This Court disagreed, holding that testimony concerning a defendant's silence before custodial interrogation and before *Miranda* warnings are given may be considered as substantive evidence and does not violate a defendant's constitutional rights.²¹ In other words, a defendant's silence or nonresponsive conduct occurring outside of custodial interrogation, and not in reliance on *Miranda* warnings, is not a constitutionally protected silence.²² We therefore conclude that the prosecutor's questions and comments did not impinge on Lint's constitutional right to remain silent. The evidence that Lint failed to respond to deputies arriving at his apartment and that he hid from those deputies was properly considered as substantive evidence of Lint's flight and hiding himself from the police. Evidence of flight and hiding are admissible to support an inference of consciousness of guilt.²³ We conclude that there was no error in the prosecutor's questions or comments about Lint's behavior when the police looked for him at his apartment.

V. Other Acts Evidence; Waiver

Lint argues that he was denied a fair trial and due process of law because evidence of his other criminal activities was admitted at trial. Lint also argues that the challenged evidence was inadmissible under MRE 404(b). We conclude that these issues are waived.

During cross-examination of Maja Lint, defense counsel inquired about her civil complaint for annulment, which listed specific grounds in support of her claim that her marriage

¹⁹ *Carines*, *supra* at 774.

²⁰ *People v Schollaert*, 194 Mich App 158, 160-162; 486 NW2d 312 (1992).

²¹ *Id.* at 164.

²² *Id.* at 166.

²³ *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003); *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995); CJI2d 4.4.

to Lint was entered into by fraudulent means, including that Lint told her that he would receive a substantial sum of money upon getting married. The prosecutor interrupted the questioning and asked to have the annulment complaint admitted into evidence if Lint planned to question Maja Lint about it. After the prosecutor argued that the entire complaint should be admitted under the rule of completeness,²⁴ the trial court informed defense counsel that if he was going to question Maja Lint about the document, it would be admitted into evidence. Thereafter, defense counsel showed the document to Maja Lint, verified her signature on it, and questioned her about it. He asked her to read numerous allegations, including that Lint had lied about a sum of money he was to receive upon marriage, that Lint got into an accident and made Maja Lint tell the police she was driving, and that Lint charged \$50,000 of debt to her credit cards. Defense counsel questioned Maja Lint about these allegations because he believed they cast doubt on her credibility in accusing Lint of the charged crimes.

Where a defendant calls a witness and elicits testimony from that witness, issues related to that testimony are waived for appeal.²⁵ “A defendant will not be heard to introduce and use evidence to sustain his theory at trial and then argue on appeal that the evidence was prejudicial and denied him a fair trial.”²⁶ A party who abandons or intentionally relinquishes his rights may not seek appellate review.²⁷ Defense counsel may intentionally relinquish a defendant’s rights with respect to evidentiary objections.²⁸ Moreover, decisions regarding what evidence to present are matters of trial strategy, and this Court does not substitute its judgment for that of counsel with respect to such matters.²⁹

We therefore conclude that Lint has waived all evidentiary issues related to the challenged testimony. Through defense counsel,³⁰ Lint chose to introduce and use the evidence to sustain his theory at trial, and he pursued his line of questioning, without objection, as a matter of trial strategy after the trial court ruled that the complaint would be admitted into evidence if he continued the line of questioning. Lint cannot now complain that the evidence denied him a fair trial.

Lint additionally argues that the trial court erred by failing to sua sponte provide a limiting instruction with respect to the allegations of defendant’s other bad acts. We review this unpreserved issue for plain error.³¹ In the absence of a request for, or objection to the failure to

²⁴ MRE 106.

²⁵ *People v Riley*, 465 Mich 442, 448-450; 636 NW2d 514 (2001).

²⁶ *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). See also *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998) (a defendant may not waive objection to the admission of evidence, then raise the admission as error on appeal).

²⁷ *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

²⁸ *Id.* at 218.

²⁹ *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

³⁰ *Carter*, *supra* at 218 (the defendant is bound by the acts of his lawyer-agent).

³¹ *Carines*, *supra* at 774.

provide, a limiting instruction, a trial court has no duty to sua sponte provide such an instruction.³² Lint has not made any showing of prejudice and, thus, has not persuaded this Court that the failure to provide a limiting instruction affected the trial. Therefore, Lint has not shown plain error.

VI. Prosecutorial Misconduct

A. Standard Of Review

Lint raises numerous issues of prosecutorial misconduct. Lint's preserved claims of prosecutorial misconduct are reviewed by evaluating the prosecutor's allegedly improper conduct in context to determine if Lint was denied a fair and impartial trial.³³ But his unpreserved claims, where he failed to object at trial, are reviewed for plain error affecting his substantial rights.³⁴

B. Burden Of Proof

Lint argues that the prosecutor shifted the burden of proof and implicated his right to remain silent when he argued that Maja Lint's testimony was uncontroverted and when he noted that Lint did not call certain witnesses to testify. We disagree.

"A prosecutor may not comment upon a defendant's failure to testify. However, a prosecutor's statement that certain inculpatory evidence is undisputed does not constitute a comment regarding the defendant's failure to testify, particularly where someone other than the defendant could have provided contrary testimony."³⁵ Although the prosecutor discounted the testimony of Lint's sister and cousin, they, in fact, both disputed portions of Maja Lint's testimony. Also, Lint could have called witnesses from the places where he allegedly took Maja Lint. On the record before us, we are not convinced that Lint was the only person who could have contradicted Maja Lint's testimony.

Further, the prosecutor's argument regarding the absence of certain witnesses was responsive to defense counsel's closing argument. The rebuttal argument was a fair response to Lint's complaint that the prosecutor had not called a certain witness and had not produced necessary evidence. A prosecutor's comments must be considered in light of defense counsel's arguments.³⁶ Under the doctrine of fair response, "a party is entitled to fairly respond to issues raised by the other party."³⁷

³² *People v Rice (On Remand)*, 235 Mich App 429, 443-444; 597 NW2d 843 (1999).

³³ *People v McLaughlin*, 258 Mich App 635, 644-645; 672 NW2d 860 (2003).

³⁴ *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

³⁵ *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996), *aff'd* 460 Mich 55 (1999) (internal citations omitted).

³⁶ *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993).

³⁷ *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003).

Moreover, the trial court issued a cautionary instruction to the jury, instructing them that Lint was not required to prove anything and that the burden was on the prosecution. And during final jury instructions, the trial court informed the jury that the prosecutor had to prove the elements of the crime beyond a reasonable doubt, and it repeated that “defendant is not required to prove his innocence or do anything.” The trial court also instructed the jury that the lawyers’ statements and arguments were not evidence that could be considered when reaching a verdict.

Examining the record and evaluating the prosecutor’s remarks in context, we conclude that Lint was not denied a fair and impartial trial. The trial court promptly provided a curative instruction when defense counsel objected to the line of argument. Therefore, no resultant prejudice occurred from the prosecutor’s comments.

C. Other Acts Evidence

Lint claims that the prosecutor improperly used evidence of his other bad acts as substantive evidence to secure convictions based on his bad character. The prosecutor referred to evidence that Lint ran up \$50,000 on credit cards in two months, was in and out of jail, and engaged in fights with Maja Lint. The prosecutor also argued that Lint liked to be controlling and dominant, but that he did not demonstrate control, given his actions. The comments were not met by objection, and we disagree that they amount to plain error requiring reversal. “[P]rosecutors are accorded great latitude regarding their arguments and conduct.”³⁸ “They are ‘free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.’”³⁹ Here, the prosecutor properly argued the evidence and inferences to be drawn from that evidence.

Further, the prosecutor did not seek a conviction based on Lint’s bad acts or character. Rather, he sought to explain the evidence presented and the situation that existed between the parties. The challenged evidence was actually elicited by defense counsel to support Lint’s theory that Maja Lint was not credible and made untrue, ridiculous allegations. The prosecutor used the same evidence to argue that the charged violence was the culmination of problems in the marriage and was not merely a false accusation made by Maja Lint. A prosecutor’s comments must be considered in light of defense counsel’s arguments.⁴⁰ And other bad acts evidence may be relevant to rebut a defendant’s theory with regard to the case against him.⁴¹

³⁸ *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), quoting *People v Rohn*, 98 Mich App 593, 596; 296 NW2d 315 (1980), overruled on other grounds *People v Perry*, 460 Mich 64-65 (1999).

³⁹ *Id.*, quoting *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989) (alteration by *Bahoda*).

⁴⁰ *Vaughn*, *supra* at 39.

⁴¹ *Knapp*, *supra* at 380.

Even if we accepted Lint's claim that the evidence was used in an impermissible fashion, a curative instruction could have cured any resulting prejudice. Thus, reversal is not required.⁴²

D. Matters Not In Evidence

Lint argues that the prosecutor argued matters that were not in evidence when he argued in rebuttal that domestic violence victims often return to their abusers. We find no plain error in the prosecutor's argument, which was not met with an objection at trial. Defense counsel argued that Maja Lint's conduct of going to the jail to see Lint after his arrest was not a normal gesture and that, if someone really feared for her life, she would not go to the jail several times. The prosecutor's argument was, therefore, a fair response to this argument by defense counsel.⁴³ And the prosecutor's argument was not improper because it was merely an attempt to appeal to the jurors' common sense.⁴⁴ Under the circumstances, Lint cannot demonstrate that prejudice resulted from the prosecutor's comments or that a timely curative instruction would not have cured any possible prejudice.⁴⁵

E. Biblical Quotations

Lint argues that the prosecutor improperly quoted from the bible during his closing argument. We find that this unpreserved issue is abandoned on appeal. Lint impermissibly gives cursory treatment to the argument and fails to explain or rationalize his position that the argument constitutes error requiring reversal.⁴⁶

F. Misleading The Jury

Lint argues that the prosecutor misled the jury by misstating the law during rebuttal argument. The prosecutor argued that not every piece of evidence may be admitted and that the trial court makes evidentiary rulings. He reminded the jury about pictures that he unsuccessfully tried to have admitted. Lint never objected to the prosecutor's arguments on the ground that they misled the jury on a point of law. An objection on one ground is insufficient to preserve an appellate attack on another ground.⁴⁷ Regardless, defendant's unpreserved argument has no merit. As previously discussed, the prosecutor's rebuttal comments about the nonproduction of some evidence were a fair response to defense counsel's argument during closing.⁴⁸ Further, the challenged argument was not a misleading statement of law. It was a true statement, and we

⁴² *Watson, supra* at 586 (error requiring reversal will not be found if the prejudicial effect of the prosecutor's comments could have been cured by the court's timely instruction).

⁴³ *Jones, supra* at 352 n 6.

⁴⁴ *People v Lawton*, 196 Mich App 341, 355; 492 NW2d 810 (1992).

⁴⁵ *Watson, supra* at 586.

⁴⁶ *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

⁴⁷ *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003).

⁴⁸ *Jones, supra* at 352 n 6.

disagree that the prosecutor attempted to mislead the jury to believe that the missing evidence was not produced based on rulings of the trial court. To the contrary, the prosecutor acknowledged that there was evidence he did not have, evidence he could not have, and evidence that Lint could have presented himself if he wanted to do so.

G. Cumulative Error

Lint makes a cumulative error argument that we also reject. The argument is also abandoned by the cursory treatment given to it and by Lint's failure to explain or rationalize his claim that the cumulative effect of the prosecutor's conduct deprived him of a fair trial.⁴⁹

VII. Ineffective Assistance Of Counsel

A. Standard Of Review

Lint argues that defense counsel was ineffective at trial for several reasons. Our review of these claims is limited to errors apparent on the record because the trial court held no *Ginther*⁵⁰ hearing.⁵¹ In order to prevail on a claim that counsel was ineffective, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different.⁵² A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial.⁵³ He must also overcome a strong presumption that his counsel's conduct constituted sound trial strategy.⁵⁴

B. Witness List

Lint argues that counsel was ineffective for failing to file a witness list, which resulted in the exclusion of exculpatory evidence. The record does not support Lint's argument. At trial, defense counsel informed the trial court that there was no alibi defense. When the prosecutor challenged Lint's witnesses on the ground that no witness list was filed, defense counsel pointed out that he was not required to file a witness list unless he planned to call witnesses. Defense counsel stated that he was only calling rebuttal witnesses and had not planned to call them before hearing the prosecutor's case. Defense counsel had no objection to his rebuttal witnesses being limited to impeaching the victim's testimony. Defense counsel was permitted to call the rebuttal witnesses, and he obtained their desired testimony. Therefore, we conclude that Lint has not established that he was precluded from offering any specific exculpatory evidence. He has not

⁴⁹ *Kelly, supra* at 640-641.

⁵⁰ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

⁵¹ *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

⁵² *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

⁵³ *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

⁵⁴ *Stanaway, supra* at 687; *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

demonstrated or identified any witnesses who would have supported his claims of innocence or any claim of alibi. The record indicates that defense counsel engaged in trial strategy when he intentionally chose not to identify rebuttal witnesses in a witness list, chose not to file a witness list, and decided that no witnesses would be offered other than rebuttal witnesses. Decisions regarding what evidence to present are issues of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy.⁵⁵ We conclude that Lint has not established his claim of ineffective assistance of counsel on this basis.

C. Objections To Testimony

Lint challenges his counsel's failure to object to the testimony about his behavior when deputies looked for him at his apartment. As previously discussed, the detective's testimony about Lint's conduct at the apartment complex was admissible evidence. Counsel was not required to make a frivolous objection to the challenged evidence.⁵⁶

D. Prosecutorial Misconduct

Lint additionally argues that counsel should have objected to all instances of prosecutorial misconduct as set forth in his brief on appeal. We have reviewed the claims of misconduct, even those without objection from counsel, and conclude that the challenged conduct does not warrant reversal. Under the circumstances, Lint has not established that, but for counsel's failure to object, the outcome of trial would have been different.⁵⁷

E. Limiting Instruction

Lint argues that his counsel was ineffective for failing to request a limiting instruction related to the other bad-acts testimony elicited from Maja Lint. This issue is abandoned because Lint fails to argue, explain, or rationalize that, but for counsel's alleged failure, the outcome of trial would have been different.⁵⁸ Lint has not established that his counsel was ineffective on this basis.⁵⁹

F. Jury Instructions

Lint argues that counsel was ineffective for failing to object to the jury instructions, which enabled the jury to convict him under a theory of secret confinement. While we previously concluded that any direct claim regarding the jury instructions has been waived, it is nevertheless necessary to consider the propriety of the instructions in the limited context of

⁵⁵ *Rockey, supra* at 76.

⁵⁶ *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

⁵⁷ *Stanaway, supra* at 687-688.

⁵⁸ *Kelly, supra* at 640-641.

⁵⁹ *Stanaway, supra* at 687-688.

determining whether defense counsel was ineffective for failing to object. We conclude that this argument has no merit because the trial court properly instructed the jury.

In general, jury instructions must be reviewed in their entirety.⁶⁰ There is no error if, on balance, the instructions fairly presented the issues and sufficiently protected the defendant's rights.⁶¹

Lint was charged under MCL 750.349, which provides, in relevant part:

Confining a person against will, etc. – Any person who wilfully, 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.

This statute sets forth alternative theories to support a conviction for kidnapping.⁶² In *People v Hoffman*,⁶³ this Court acknowledged that a kidnapping conviction may be premised on a showing of forcible confinement with intent to secretly confine. “[A]sportation is not required where the accused is charged with either secret confinement of the victim or forcible confinement with intent to secretly confine the victim.”⁶⁴

In this case, the felony complaint and felony information charged Lint with kidnapping, stating that he did “wilfully, maliciously and without lawful authority forcibly confine Maja Lint.” Neither document specified the element of asportation or the element of secret confinement. At the preliminary examination, after Maja Lint testified, the prosecutor argued that Lint should be bound over for trial on the kidnapping charge because the victim was “restrained for numerous hours in different ways against her will.” Defense counsel stipulated that Lint should be bound over on the kidnapping charge as argued by the prosecutor. In his opening statement at trial, the prosecutor made it clear that his theory was that Lint held Maja Lint against her will, tied her up on two occasions, forbade her from leaving the apartment, and took her out of the apartment without shoes so that she could not run away. During closing argument, the prosecutor again argued that Lint forcibly confined Maja Lint against her will without legal authority, that he kept her location a secret, and that he intended her confinement to

⁶⁰ *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002).

⁶¹ *Id.*

⁶² *People v Mackle*, 241 Mich App 583, 595; 617 NW2d 339 (2000).

⁶³ *People v Hoffman*, 225 Mich App 103, 112; 570 NW2d 146 (1997), citing *People v Jaffray*, 445 Mich 287, 300-301; 519 NW2d 108 (1994).

⁶⁴ *Jaffray*, *supra* at 299.

be a secret. Defense counsel argued in closing that the prosecutor had to prove Maja Lint was “secreted from other people.”

With defense counsel’s approval, the trial court instructed the jury on the kidnapping charge using CJI2d 19.4, the instruction for “Kidnapping; Secret Confinement of Victim.” The elements of that theory include that the defendant forcibly confined the victim against the victim’s will, that the defendant did not have legal authority to confine the victim, that the defendant kept the victim’s location a secret, that the defendant intended the confinement to be a secret, and that the defendant acted willfully and maliciously.⁶⁵ Clearly, an element of secret confinement is that the defendant forcibly confined the victim.⁶⁶ Thus, the reference to forcible confinement in the charging documents did not, alone, require that asportation be proven.

We conclude that it is apparent from the record that the parties knew at all times that the kidnapping charge was based on a theory of secret confinement. Counsel argued that theory to the jury, and the trial court instructed the jury on that theory. The instructions properly included the elements of the crime of kidnapping and did not exclude consideration of the material issues, defenses, or theories for which there was supporting evidence.⁶⁷ The instructions fairly presented the issues and protected Lint’s rights.⁶⁸ There was no plain instructional error. Accordingly, we conclude that defense counsel was not ineffective for failing to object to the jury instructions. He was not required to advocate a meritless position.⁶⁹

G. Cumulative Error

Lint makes a cursory argument that the cumulative effect of his counsel’s conduct requires reversal. Lint has also abandoned this argument by the cursory treatment he gives to it and by his failure to explain or rationalize the claim that the cumulative effect of counsel’s conduct deprived him of a fair trial.⁷⁰

VIII. Sentencing

A. Standard Of Review

Lint argues that the trial court misscored several offense variables when calculating the applicable sentencing guideline range as 126 to 210 months. The issues are properly presented to us because Lint objected to each alleged scoring error at sentencing.⁷¹ A sentencing court has discretion with respect to the scoring of offense variables, provided that evidence of record

⁶⁵ CJI2d 19.4.

⁶⁶ *Id.*

⁶⁷ *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

⁶⁸ *Heikkinen*, *supra* at 327.

⁶⁹ *Torres*, *supra* at 425.

⁷⁰ *Kelly*, *supra* at 640-641.

⁷¹ MCL 769.34(10).

supports a particular score.⁷² ““Scoring decisions for which there is any evidence in support will be upheld.””⁷³

B. Offense Variable (OV) 1

Lint argues that the trial court improperly scored five points for OV 1.⁷⁴ We disagree. MCL 777.31(1)(d) provides that five points may be scored where a “weapon was displayed or implied.” In *People v Lange*, this Court concluded that the phrase “any other type of weapon,” as used in MCL 777.31(1)(c), embodied judicial interpretations of dangerous weapons.⁷⁵ It then applied the common dictionary definition of “weapon,” which includes “any instrument or device used for attack or defense in a fight or in combat” or “anything used against an opponent, adversary or victim.”⁷⁶ The *Lange* Court concluded that a glass mug could be a weapon for the purposes of scoring MCL 777.31(1)(c).⁷⁷ In this case, Lint plugged in an iron, pressed it against Maja Lint’s skin to see if it was getting hot, and then suspended it inches from her face. We conclude that this evidence was sufficient to sustain the trial court’s scoring decision.⁷⁸

C. OV 2

OV 2⁷⁹ assesses the lethal potential of weapons possessed by the offender. Five, ten, or fifteen points are scored for the possession of biological or chemical substances or devices, radioactive material or devices, incendiary devices, explosive devices, fully automatic weapons, short-barreled shotguns, short-barreled rifles, pistols, rifles, shotguns, knives, or cutting or stabbing weapons. One point is scored if the offender possessed “any other potentially lethal weapon.”⁸⁰ In this case, Lint possessed a hot iron, which he suspended above Maja Lint’s face. Additionally, he tied Maja Lint to a large television in such a manner that, if she moved, the television would have fallen on her head. We find that both the television and the hot iron were potentially lethal weapons to support the score of one point for OV 2. Thus, we conclude that there was no scoring error.

⁷² *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

⁷³ *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

⁷⁴ MCL 777.31.

⁷⁵ *People v Lange*, 251 Mich App 247, 256-257; 650 NW2d 691 (2002).

⁷⁶ *Id.* at 257.

⁷⁷ *Id.*

⁷⁸ *Hornsby*, *supra* at 468.

⁷⁹ MCL 777.32.

⁸⁰ MCL 777.32(1)(e).

D. OV 3

Under OV 3,⁸¹ five points are scored if the victim suffers bodily injury, which does not require medical treatment.⁸² There was ample evidence in this case that Maja Lint suffered bodily injuries that did not require treatment. An officer observed that her neck was red when she was sitting in the back of an ambulance after escaping from Lint. Also, Maja Lint testified that she had lumps on her head from where Lint hit her. Therefore, the trial court properly scored OV 3 at five points.

E. OV 4

Lint argues that OV 4⁸³ was improperly scored at ten points. Ten points are scored for OV 4 if “[s]erious psychological injury requiring professional treatment occurred to the victim.”⁸⁴ Ten points should be scored if the “serious psychological injury may require professional treatment,” and the fact that treatment is not sought is not conclusive when scoring the variable.⁸⁵ Here, Maja Lint testified that she was in counseling for domestic violence and sexual abuse, attending two times a week since the incident. She testified that she suffers from incident-related nightmares wherein she pictures herself suffocating or burning. Further, she suffers from anger issues. The Presentence Investigation Report also contains information that Maja Lint was in counseling to deal with psychological injuries resulting from the offense. We conclude that the evidence supported the scoring decision.⁸⁶

F. OV 7

Additionally, we reject Lint’s claim that OV 7⁸⁷ was improperly scored at fifty points. Fifty points may be scored if a victim is treated with terrorism, sadism, torture, or excessive brutality.⁸⁸ “Terrorism” is defined as “conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.”⁸⁹ In this case, there was evidence that Lint engaged in terrorism. He hung a hot iron inches from Maja Lint’s face and tethered her to a television, which would have fallen on her head had she moved. This conduct was designed to substantially increase her fear and anxiety. The record, therefore, supported the score.

⁸¹ MCL 777.33.

⁸² MCL 777.33(1)(e).

⁸³ MCL 777.34.

⁸⁴ MCL 777.34(1)(a).

⁸⁵ MCL 777.34(2).

⁸⁶ *Hornsby*, *supra* at 468.

⁸⁷ MCL 777.37.

⁸⁸ MCL 777.37(1)(a).

⁸⁹ MCL 777.37(2)(a); *Hornsby*, *supra* at 468.

G. OV 10

Lint argues that the trial court improperly scored OV 10⁹⁰ at five points. Five points are scored if the “offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep or unconscious.”⁹¹ The word “exploit” means “to manipulate a victim for selfish or unethical purposes.”⁹² The word “vulnerability” means “the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.”⁹³ While the existence of one or more of the factors described in subsection (1) of the statute does not automatically equate with victim vulnerability,⁹⁴ we conclude that Maja Lint was vulnerable and exploited. She wanted to leave Lint, but he began terrorizing her. He took the contents of her purse and burned her green card and passport. Lint was a large man, six feet, three inches in height. At the time of sentencing, seven months after the incident, he weighed 180 pounds. Maja Lint was five feet, eleven inches tall, and she weighed only 115 pounds. There was evidence presented at trial that, on November 10, 2003, Lint tackled her to the ground. He was able to overpower her with his strength, causing her to choke and have difficulty breathing. He bound her with restraints, giving him a further advantage over her. Under the plain language of MCL 777.40, the trial court did not err in scoring five points based on the evidence.

H. OV 12

Lint argues that the trial court erred in scoring OV 12.⁹⁵ Not only is this argument abandoned by his cursory treatment and failure to explain or rationalize his position,⁹⁶ it is also frivolous. At sentencing, the probation department argued that OV 12 should be scored at one point. Lint argued that it should not be scored at all but, if it was going to be scored, a score of one point was the most appropriate score. The trial court did not rule on the issue. On June 30, 2004, the trial court signed the corrected sentencing information report. It specifically scored zero points for OV 12. Thus, no error has been shown.

IX. Enhancement Of Sentence

Lint argues that the trial court substantially enhanced his sentence beyond the applicable statutory guidelines range because it scored factors that were not submitted to and proved beyond a reasonable doubt for the jury. Relying on *Blakely v Washington*,⁹⁷ he argues that the trial

⁹⁰ MCL 777.40.

⁹¹ MCL 777.40(1)(c).

⁹² MCL 777.40(3)(b).

⁹³ MCL 777.40(3)(c).

⁹⁴ MCL 777.40(2); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

⁹⁵ MCL 777.42.

⁹⁶ *Kelly*, *supra* at 640-641.

⁹⁷ *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

court's act of fact-finding when scoring the offense variables was unconstitutional. In *People v Claypool*,⁹⁸ the Court indicated that *Blakely* is inapplicable to Michigan's indeterminate sentencing scheme. We are bound by that decision.⁹⁹

X. Cumulative Effect

Lint argues that the cumulative effect of multiple errors deprived him of a fair trial. This argument fails because we have found no errors of consequence that combined to collectively deny Lint a fair trial.¹⁰⁰

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Peter D. O'Connell

⁹⁸ *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

⁹⁹ *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004). We note that the Michigan Supreme Court has granted leave to appeal this Court's decision in *Drohan*. *People v Drohan*, 472 Mich 881; 693 NW2d 823 (2005). However, "a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals." MCR 7.215(C)(2); *Straman v Lewis*, 220 Mich App 448, 451; 559 NW2d 405 (1996).

¹⁰⁰ *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999); *People v Miller (After Remand)*, 211 Mich App 30, 43-44; 535 NW2d 518 (1995).