

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20040570-CA
v.)	
)	F I L E D
Carl Stanley Fleming,)	(September 15, 2005)
)	
Defendant and Appellant.)	2005 UT App 394

Third District, Salt Lake Department, 041900437
The Honorable Denise P. Lindberg

Attorneys: Elizabeth Hunt, Salt Lake City, for Appellant
Mark L. Shurtleff and Laura B. Dupaix, Salt Lake
City, for Appellee

Before Judges Billings, McHugh, and Orme.

PER CURIAM:

Carl Stanley Fleming appeals his convictions on charges of aggravated robbery and aggravated kidnaping. He asserts on appeal that he received ineffective assistance of counsel based on trial counsel's failure to object to jury instructions, failure to move to merge the charges, and mishandling of the trial itself.

To establish ineffective assistance of counsel, "a defendant must first demonstrate that counsel's performance was deficient, in that it fell below an objective standard of reasonable professional judgment." State v. Litherland, 2000 UT 76, ¶19, 12 P.3d 92 (citing Strickland v. Washington, 466 U.S. 668, 687-88 (1984)). "Second, the defendant must show that counsel's deficient performance was prejudicial--i.e., that it affected the outcome of the case." Id. Furthermore, to establish the first prong of the test, a defendant is required to "rebut the strong presumption that under the circumstances, the challenged action might be considered sound trial strategy." Id. (quotations and citation omitted).

Fleming argues that the jury instructions allowed the jury to reach a nonunanimous verdict, and thus counsel's failure to object to the instructions was ineffective assistance. However, the premise of Fleming's argument, that the jury instructions provided the jury with an opportunity to convict on theories not charged, is incorrect. The instruction giving the statutory definition of aggravated kidnaping included three possible intents, including the one charged. However, the elements instruction clearly stated the single intent the jury was required to find in order to convict Fleming of aggravated kidnaping.

The elements instruction provided that the jury must find four elements beyond a reasonable doubt in order to convict Fleming. The intent element provided that the jury must find "[t]hat such seizure, confinement, detention, or transportation was committed with the intent to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony." This is the sole option upon which the jury could convict Fleming. As noted by Fleming, juries are presumed to follow jury instructions. See State v. Harmon, 956 P.2d 262, 272 (Utah 1998). The jury is presumed to have followed the elements instruction, without importing two other statutory intents from another instruction that do not meet the clearly stated required finding. Because the elements instruction clearly stated only one option for the jury to find Fleming guilty, there was no error by trial counsel in failing to object to the instructions.

Fleming also asserts that the charge of aggravated kidnaping should have merged with aggravated robbery, and thus, counsel was ineffective in failing to move to merge the charges. Because robbery necessarily requires a detention at some level, to sustain a kidnaping conviction in addition to robbery, the acts constituting the kidnaping must be separate and independent from the robbery, and not merely incidental to it. See State v. Finlayson, 2000 UT 10, ¶19, 994 P.2d 1243. "[To] convict a robber of aggravated kidnaping as well as aggravated robbery, . . . the prosecutor must first show that the detention was beyond 'the minimum inherent in [aggravated robbery].'" State v. Mecham, 2000 UT App 247, ¶30, 9 P.3d 777 (quoting State v. Couch, 635 P.2d 89, 93 (Utah 1981)). Additionally, "the detention element must be 'significantly independent' of the detention inherent in the host crime." Finlayson, 2000 UT 10 at ¶23.

Utah appellate courts have applied a three-part test in assessing whether a detention during a host crime may be sufficient to support a kidnaping charge. See id. If a detention or confinement

is alleged to have been done to facilitate the commission of another crime, to be kidnaping the resulting movement or confinement: (a) must not be slight, inconsequential and merely incidental to the other crime; (b) must not be of the kind inherent in the nature of the other crime; and (c) must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

Id. (quotations and citation omitted).

Fleming detained his victim, Porter, for a substantial period of time, driving to two friends' locations and to several ATM locations before finally letting him go near the Fairpark, miles from where the incident began. The detention was not slight or inconsequential. Nor was it merely incidental to the crime of aggravated robbery because the initial robbery had been completed in a matter of minutes. Additionally, the detention was not of the kind inherent in a robbery. Typically, a robbery is of short duration, the detention only long enough to complete the taking of items. Finally, to the extent the detention facilitated continued acts of larceny by going to cash machines, the detention had independent significance because it made these crimes "substantially easier" by providing transport to the machines and assuring that Porter gave the correct PIN to enable the withdrawals. It also significantly reduced the risk of detection because Porter could not report the incident to the police while detained. Thus, the detention was substantially independent of the host crime, and therefore supported a separate charge of aggravated kidnaping. Because the charges would not merge, there was no ineffective assistance of counsel in failing to move for merger.

Finally, Fleming asserts trial counsel mishandled the trial by failing to effectively cross-examine witnesses and by introducing evidence that favored the prosecution. In essence, each of the issues raised regard trial strategy. The record demonstrates that the choices made by trial counsel in his tactics, even introducing evidence now second-guessed, were reasonable choices. As a result, Fleming fails to show ineffective assistance of counsel.

Fleming argues that trial counsel was ineffective for failing to impeach Sharon Thompson, a key witness and participant in the cash machine transactions, with her immunity deal from the

prosecution. However, Thompson's testimony was favorable to Fleming as well as to the State. She testified that Porter gave her his PIN and permission to use the card, that she never saw a weapon or heard Fleming threaten Porter, and that Porter got in and out of the car several times. Given that her testimony was critical to the defense, it was a reasonable strategic choice not to impeach her with her immunity deal. It appears such impeachment would have been counterproductive.

Likewise, the introduction of the "tool" found on Fleming when he was arrested and the receipts from the cash machine transactions were based on sound trial strategy. The tool was introduced in an effort to impeach Porter's credibility by inferring he later tailored his story based upon the tool the police found. The receipts were introduced to show the lack of receipts from the gas station, where Porter testified he purchased gas, supporting Fleming's story that Porter was there to buy drugs. In short, there was a reasonable trial strategy behind these choices, and thus, there was no ineffective assistance of counsel.

Fleming asserts that trial counsel also erred in failing to argue particular points to the jury. Some of these assertions are factually incorrect and all are without merit. In sum, Fleming has failed to "rebut the strong presumption that under the circumstances, the challenged action might be considered sound trial strategy." State v. Litherland, 2000 UT 76, ¶19. As a result, he has not demonstrated that he received ineffective assistance of counsel.

Accordingly, Fleming's convictions are affirmed.

Judith M. Billings,
Presiding Judge

Carolyn B. McHugh, Judge

Gregory K. Orme, Judge