STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD ALAN BRADLEY,

Defendant-Appellant.

UNPUBLISHED
October 2, 1998

No. 201755
Oakland Circuit Court
LC No. 96-147716 FC

Before: Murphy, P.J., and Gribbs and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of kidnapping, MCL 750.349; MSA 28.581, and kidnapping a child under fourteen, MCL 750.350; MSA 28.582. Defendant was sentenced to twenty to forty years' imprisonment on both convictions. The court then vacated those sentences and sentenced defendant as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to twenty to forty years' imprisonment. Defendant now appeals as of right. We affirm.

On Saturday, June 8, 1996, the six-year-old victim was swinging on the swing set in her backyard with her eight-year-old brother. Defendant walked through the woods that abutted their backyard into the backyard, lifted the victim off her swing, held her hands behind her back and began forcing her toward the woods. She escaped and ran screaming toward her mother, who was sitting on the patio in the backyard approximately fifty feet from the swing set. Defendant asked her brother what was wrong with his sister, and the child replied that his sister did not like strangers. The brother then left his swing and joined his mother and sister on the patio.

On appeal, defendant argues that his motion to quash the information should have been granted. We disagree. A decision to bind over a defendant based on the factual sufficiency of the evidence is reviewed for an abuse of discretion. *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997).

The purpose of a preliminary examination is to first determine whether a crime has been committed, and second to determine whether the defendant committed it. *People v Hamblin*, 224 Mich App 87, 92; 568 NW2d 339 (1997). If the magistrate finds probable cause to find that a crime

was committed and the defendant committed it, then the defendant must be bound over for trial in the circuit court. *Id.;* MCL 766.13; MSA 28.931; MCR 6.110(E). Evidence must be presented from which each element of the crime can be inferred. *Id.*. However, the prosecutor need not prove each element beyond a reasonable doubt. *Id.* If a reasonable doubt exists, then it is for the jury to decide and the defendant should be bound over. *Id.*

In this case, defendant was charged with kidnapping by forcible or secret confinement. Defendant argues on appeal that the prosecution did not show asportation, a required element for kidnapping by forcible confinement. *People v Vaughn*, 447 Mich 217, 224-225; 524 NW2d 217 (1994). Defendant argues that the testimony at the preliminary examination failed to establish that he "forcibly or secretly confine[d] or imprison[ed]" the victim, mostly because "defendant moved her approximately twelve to fifteen inches before she broke free." Defendant also argues the movement "should have been considered merely incidental to another underlying offense less than kidnapping, for example, attempted kidnapping."

Our Supreme Court has specifically rejected the requirement that to constitute kidnapping, the victim must be removed from the environment where he was found. *People v Adams*, 389 Mich 222, 235-236; 205 NW2d 415 (1973). In addition, asportation can be found even if the movement does not add either a greater danger or threat to the victim so long as the "movement was incidental to a kidnapping and not a lesser crime." *Id.* at 238. Whether a particular movement is sufficient for statutory asportation is a question for the jury and neither the trial court nor this Court can interfere. *Id.*

In this case, both the victim and her brother testified at the preliminary examination that a man, whom their mother identified as defendant, put the victim's hands behind her back and led her toward the woods. Defendant's truck, which contained blankets and children's toys, was parked about half a mile away, on the other side of the woods. The victim testified that the man moved her twelve inches. Her brother identified the distance defendant moved his sister through use of a photograph, indicating with "x" marks that defendant moved the victim to a sandbox area at the edge of the woods. The mother testified at the preliminary examination that she understood from the children that her daughter was moved to the edge of the woods. The woods were approximately ten to fifteen feet from the swing set. Both children testified that the victim was screaming and had to free herself from defendant's grasp.

Defendant argues that movement of twelve inches was insufficient to show asportation. We find the testimony that defendant began leading the victim toward the woods and may have moved her anywhere from twelve inches to fifteen feet was sufficient for the magistrate to infer the element of asportation. *Adams*, *supra*. The magistrate did not abuse its discretion in binding defendant over on the charge of kidnapping.

Defendant also argues that he should not have been bound over for the charge of kidnapping a child under fourteen. MCL 750.350; MSA 28.582, in relevant part, states:

> (1) A person shall not maliciously, forcibly, or fraudulently lead, take, carry away, decoy, or entice away, any child under the age of 14 years, with the intent to detain or conceal the child from the child's parent or legal guardian, or from the person or

> persons who have adopted the child, or from any other person having the lawful charge of the child. A person who violates this section is guilty of a felony, punishable by imprisonment for life or any term of years.

Defendant argues that the prosecution did not produce evidence to show that defendant detained or concealed the victim from her parents. However, the prosecution only had to show that defendant intended to detain or conceal her from her parents. As a result of the difficulty in proving state of mind, circumstantial evidence is sufficient and satisfactory in sustaining the conclusion that the defendant possessed the requisite intent. *People v Perez-DeLeon*, 224 Mich App 43, 59; 568 NW2d 324 (1997). We find the testimony that defendant was leading the victim toward the woods, which if reached, would have concealed her from her parents, was sufficient to establish probable cause that defendant intended to detain or conceal her from her parents. Accordingly, we find that the magistrate did not abuse its discretion in binding defendant over on kidnapping a child under fourteen.

Next, defendant argues that the trial court abused its discretion by admitting hearsay testimony into evidence. We do not agree. This Court reviews the trial court's admission of hearsay testimony under the excited utterance exception under the abuse of discretion standard. *People v Kowalak (On Remand)*, 215 Mich App 554, 558; 546 NW2d 681 (1996).

The parties do not dispute that the mother's testimony regarding her daughter's statement, which was made ten minutes after the incident, was hearsay. Rather, the trial court found that under MRE 803(2), the testimony fell within the "excited utterance" hearsay exception. This exception encompasses any "statement relating to a startling event or condition made while the declarant is under the stress of excitement caused by the event or condition."

The mother testified that, approximately ten minutes after the incident took place, her daughter told her that defendant pushed her on the swing, took her off the swing, put her hands behind her back and started to lead her toward the woods. Before a statement can be admitted into evidence as an excited utterance, the statement must arise out of a startling event; it must be made before there has been time for contrivance or misrepresentation by the declarant; and it must relate to the circumstances of the startling event. *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988). It is not necessary for the utterance to immediately follow the startling event. *Kowalak*, *supra* at 558.

Having a strange man accost her and attempt to force her into the woods, is a terrifying event for a six-year-old child. Within ten minutes of the incident, the victim had calmed down just enough to tell her mother what had taken place. Prior to this time, the mother testified that her daughter was whimpering and clinging to her, was having trouble breathing, and could not respond to her questions. After the child told her mother what happened she again became upset and started to cry. Particularly when the victim's age is taken into account, we do not believe that an interval of ten minutes was sufficiently long to undermine the trustworthiness of the victim's statement to her mother. In addition, the requirement that the utterance must be made before there has been time to contrive and misrepresent is merely another way of requiring that it be made while the declarant is still under the influence of an overwhelming emotional condition. *Id.* As shown by her inability to respond to her mother's questions and her reaction once she told her mother of the incident, the victim was still under

the influence of the incident. Lapses of time far greater than ten minutes have been previously held not to preclude a statement from falling within the excited utterance exception to the hearsay rule. See, e.g., *Kowalak*, *supra* at 554 (thirty to forty-five minutes); *People v Soles*, 143 Mich App 433, 438; 372 NW2d 588 (1985) (five days).

Moreover, even if the mother's testimony did contain inadmissible hearsay statements, the error was harmless in light of the evidence against defendant. The victim's and her brother's testimony, although inconsistent in minor details, was consistent in the basic actions of defendant. Therefore, any erroneous admission of the statement would be harmless. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

Next, defendant argues that the prosecution engaged in misconduct so egregious as to deny his due process rights guaranteed by the United States Constitution. This issue was not properly preserved because it was not raised before and addressed by the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). However, review may be granted if failure to consider the issue would result in manifest injustice. *Id*. at 547. We find no manifest injustice here. In any event, this Court finds no evidence to support defendant's argument that the children testified falsely or that the prosecutor encouraged them to testify falsely.

Defendant also argues that the trial court abused its discretion in scoring offense variable 13 at five points. There is no merit to this issue. Moreover, because the sentencing guidelines do not apply to habitual offender sentences, appellate review of such sentences is limited to whether the trial court abused its discretion in imposing the sentence. *People v Elliott*, 215 Mich App 259, 261; 544 NW2d 748 (1996). We find defendant's sentence in this case proportionate to the offender and the offense. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Finally, defendant argues that insufficient evidence was produced at trial to convict him of kidnapping and kidnapping a child under fourteen and that his motion for directed verdict should have been granted. We disagree. In reviewing a trial court's decision regarding a motion for directed verdict, this Court views the evidence presented up to the time the motion was made in the light most favorable to the prosecution to determine if a reasonable trier of fact could find guilt beyond a reasonable doubt. *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998). This Court should not interfere with the jury's role of resolving questions of credibility. *People v Hughes*, 217 Mich App 242, 248; 550 NW2d 871 (1996).

Defendant argues that the prosecution did not produce sufficient evidence to show the judicially required element of asportation. To prove asportation, the prosecution must show "some movement" of the victim taken in furtherance of kidnapping. *People v Green*, 228 Mich App 684, 696-697; ___ NW2d ___ (1998) (Docket #194995, issued 3-20-98), slip op at 6. The existence of asportation here was a question of fact which was properly submitted to the jury upon a proper instruction. *People v Curry*, 58 Mich App 212, 216; 227 NW2d 254 (1975). Defendant also argues that although the prosecution may have shown that he had some criminal intention in his actions, it did not show that the criminal intention was kidnapping. Again, it is the role of the jury to resolve questions of intent. The evidence that defendant forced the victim to move toward the woods was sufficient to allow a rational

trier of fact to find asportation in the furtherance of kidnapping and the trial court properly left the resolution of the question of defendant's criminal intent to the jurors.

Defendant also contends that the prosecution did not produce sufficient evidence to convict defendant of kidnapping a child under fourteen because the prosecution failed to show that defendant had the "the intent to detain or conceal" the victim from her parents. There was evidence that defendant forced the victim to move toward the woods. The victim was already about fifty feet away from the patio where her mother sat reading. Once in the woods, she would have been concealed from the sight of her mother. When viewed in a light most favorable to the prosecution, this testimony was sufficient to prove beyond a reasonable doubt that defendant intended to conceal the victim from her mother. The trial court properly left the question of defendant's intent to the factfinder.

Affirmed.

/s/ William B. Murphy
/s/ Roman S. Gribbs
/s/ Hilda R. Gage