STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH IRWIN BANKS,

Defendant-Appellant.

UNPUBLISHED
November 5, 1999

No. 197816
Wayne Circuit Court
Criminal Division
LC No. 95-010930

Before: Smolenski, P.J., and White and Markman, JJ.

PER CURIAM.

Defendant and a codefendant, Patrick Dennis, were jointly charged in a multi-count information with kidnapping a child under the age of fourteen (child enticement), MCL 750.350; MSA 28.582, and extortion, MCL 750.213; MSA 28.410.[1] The matter was tried to separate juries, which convicted defendant of kidnapping and acquitted him of extortion. Defendant was sentenced to six to twenty years' imprisonment. Defendant appeals as of right. We affirm, but remand for resentencing.

I

The victim testified at trial in the spring of 1996 that he was ten years old. After being found competent to testify, the victim testified that in July of 1995 he lived with his mother, Florence McDonald (hereafter referred to as "Florence"), and his sister, Rhonda McDonald (hereafter referred to as "Rhonda"), on Tyler Street in Highland Park. The victim testified that at that time he knew a person named Dee Dee (a nickname for Will or Willie Webb), who was his sister's friend, and that his mother also knew Dee Dee. The victim testified that he did not know defendant back then, but knew him now, and that defendant was the person who drove the white truck involved in the incident in question.

The victim testified that on July 11, 1995, he was in front of his house playing by himself when defendant came over in a white truck looking for Dee Dee, who was at the victim's house. Defendant and Dee Dee talked, defendant then left, and Dee Dee climbed over the back fence of the victim's backyard. Defendant came back and asked the victim where Dee Dee was. The victim responded that

he did not know, but offered to show defendant where Dee Dee lived, and told defendant that Dee Dee lived around the corner from the victim's house. The victim got into defendant's truck on his own and showed defendant where Dee Dee lived.[2] When Dee Dee was not found there, the victim told defendant that Dee Dee sometimes went to the victim's aunt's house, and offered to show defendant where his aunt lived. They headed downtown. When they were about halfway downtown, defendant turned around and called the victim's house and spoke to the victim's sister. They then picked up defendant's girlfriend and her son and went to a McDonald's restaurant drive-through. After they got food at McDonald's, the victim spoke to his mother over the phone and told her everything was all right.

Defendant later played dice with a number of men on the front porch of a house while the victim sat in the truck. During that time, the victim called his mother from defendant's cellular phone and gave her the house number where they were, although he did not know the street name. The victim testified that the house was not near anybody's house that he knew, and that he wanted to go home. After defendant gambled, they went to the house of a female friend of defendant, a short drive away. The victim testified that he played there for about half an hour with several children, and then the police came. The victim testified that he looked out the front window and saw a man, whom he identified as codefendant Dennis, sitting in front of the house, and that he saw his mother and several policemen in a car in front of the house. Defendant's female friend told the victim to go to the back of the house and when he went out the back door, the police grabbed him.

The victim testified that when he got in the white truck the sun was out and that he was with defendant until it was dark out. He testified that he heard defendant make about fifteen phone calls to the victim's mother and sister and that he asked defendant to take him home about fifteen times and defendant did not answer. On re-direct examination, the victim testified that he heard defendant tell his mother that defendant would take the victim to Kalamazoo if she got the police involved, and that he wanted Dee Dee.

Florence McDonald testified that in July 1995 she and her family had known Dee Dee about seven or eight years and that she and Dee Dee's mother were friends. She testified that she did not know defendant or codefendant Dennis then and that she did not give anyone permission to take the victim from her property on July 11, 1995. Her daughter, Rhonda, and boyfriend, Carey, were home with the victim. When she learned what had happened she dialed 911 and went to the police station, where she met Detective Berry. Eventually she went home to wait for a phone call, and received between twenty and twenty-five calls from a young man who identified himself as Ken Banks, who said he was Dee Dee's friend.

Florence testified that during the first phone call the caller identified himself as Kenneth, told her he had the victim, that she was not going to see the victim, and that she should not get the police involved. He said that Dee Dee owed him $3,000. She testified that when she asked defendant to bring the victim home, defendant told her that he would do so if she got Dee Dee.

They eventually found Dee Dee in the evening. Dee Dee was at the airport and she told Dee Dee to go to her house, which he did. Dee Dee and defendant spoke on the phone at that point and it

was arranged that the victim would be picked up at a McDonald's restaurant, but defendant did not show up. At some point, the victim called and gave his sister a house address.

Around 5:30 or 6:00 p.m., Florence and Dee Dee went in an unmarked police car with Detective Potts to an address on Warwick that Dee Dee pointed out, at which a number of men were sitting on the porch. Florence walked toward the house and a man said to her that she must be the lady he had been speaking to all day. She testified that that man was not present in the courtroom. When she approached the house, the men scattered. The man she spoke to said her son was around the corner playing. A car drove by and someone in the vehicle yelled to the man she was talking to that it was a setup and that "the hook is around the corner." She got back in the unmarked police car and they drove around the corner. As they drove by, she saw the victim and another child through the front window of a house. A man and woman were sitting on the front porch and the man had a gun in his hand. Florence testified that the man waved the gun in the air as he told them to get out of there because they were not getting anything. Florence heard the man on the porch say something to the woman on the porch, who told someone in the house to take the victim to the back. She saw the victim walk toward the back of the house. Officers then brought the victim out.

Florence testified that at one point she offered to give defendant $1,200 to bring the victim back, and defendant accepted. Defendant offered to pay her cab fare to pick up the victim. At one point they arranged to meet at a McDonald's restaurant, but defendant later changed his mind. She testified that she also told defendant not to come to her house with the victim because the police were there, and that she just wanted the victim "because the way he had mentioned he was going to spray the house," which she understood to mean shoot the house up. Florence testified that one minute defendant was sweet and the next he was "the devil."

Florence also testified that initially she did not cooperate with the prosecution or show up in court because she was afraid. She testified that she did not stay at home that night because she was afraid defendant would spray her house. That evening she spoke to her daughter Kenya, who had defendant on the phone in a three-way call, and she joined the conversation. Defendant's mother was also on the line. Florence testified that defendant said that he would not have done anything to the victim and just wanted his money back from Dee Dee.

Lenee Collins testified that she was nineteen years old and lived on Piedmont Street, one block over from Warwick Street. On July 11, 1995, at around 5:00 or 6:00 p.m., defendant arrived at her home with a little boy and asked if he could park in her driveway. She agreed to watch the boy, the victim, while defendant went around the corner, and did so for about twenty to thirty minutes. She testified that the victim did not appear distressed and played with the other children at her house.

Around that time, she saw four men jump over the side fence, including codefendant Dennis. While she was watching the victim, Dennis came up on her front porch and the other men ran. She asked him what was going on and, for the children's safety, told them to go in the house. When reminded of the statement she gave to the Highland Park police, she testified that she had told the police that Dennis had a gun in his hand while on her porch and told some people to go on, and also that Dennis had said "here comes hook." She testified that while she was on the porch with Dennis, a

woman and two men pulled up in a car and Dennis told them to "get the F off," and that she was saying the same thing, and then went in the house. Eventually the police came and she and Dennis were arrested.

Highland Park Detective Douglas Potts testified that he went to the McDonald home and listened to about five phone calls, his ear next to the receiver. He, Florence, and Dee Dee went to a McDonald's where they were supposed to get the victim, but the person did not show up. They then went to the address on Warwick in an undercover police car, arriving around 6:00 or 7:00 p.m. There was a group of men in front of a house, and Florence spoke to one of them. A car pulled up next to them, the occupants spoke to Dee Dee and, after driving off, the occupants said something to the men gathered, and they scattered. One of them, whom he later learned was codefendant Dennis, fled toward Piedmont Street. Potts drove to Piedmont and saw Dennis standing on the front porch of a house. Potts testified that Florence said that she saw the victim, and Potts hollered to Dennis to let the boy come out of the house. Dennis pulled out a semi-automatic gun and said "you better get out of here before I fuck you up." Potts then radioed for backup and the victim was retrieved safely.

Defendant testified that he was twenty-six years old, and employed at Select Nursing Care doing maintenance for the last five years. He testified he was buying a home in Detroit and had lived there for about two years, with his girlfriend and his two children, aged nine and two. Defendant testified that he had known Dee Dee for about fourteen or fifteen years, and that they had practically grown up together. He testified that Dee Dee owed him about $400, and had paid one hundred of it about three weeks before the July 11, 1995 incident.

Defendant testified that around 11:00 a.m. on July 11, 1995, Dee Dee called him and asked him to come to a house in Highland Park to pick up the rest of the money. The phone conversation was friendly. Defendant went to the house around 1:00 p.m. and saw Dee Dee and the victim outside. Defendant testified that he had seen the victim about three or four times before that day. Dee Dee got in defendant's Blazer, said he had left the money in the house, and then got out of the Blazer. After a few minutes, defendant asked the victim if he had seen Dee Dee, and the victim responded that he had just seen Dee Dee jump over the gate. The victim approached the Blazer, said that Dee Dee's grandmother lived right around the block on Buena Vista, and offered to show defendant the house. Defendant testified that he did not ask the victim to show him where Dee Dee's grandmother lived or force the victim into the truck, that the victim offered to show him, and that the victim opened the truck door and got in on his own. Defendant testified that at no point in time did he have a gun in the car.

Defendant further testified that he asked the victim for his phone number, and called the victim's house from his cellular phone. Defendant asked the female who answered if Dee Dee was there, and she said he was not. Defendant told the female that the victim offered to show him where Dee Dee's grandmother lived, and the female said "okay." He and the victim then drove to Dee Dee's grandmother's house, but no one came to the door. Defendant saw a group of people about three houses down and asked if anyone had seen Dee Dee, but none of them had.

Defendant testified that the victim then led him to Tyler Street, where Dee Dee's child's mother lived, but nobody responded when he honked the horn. After that he called the victim's house again,

the same person answered, and he asked her if there was an adult in the house. Defendant then talked to Carey, told Carey his name, and got permission from Carey to take the victim to find Dee Dee. Defendant told Carey that he was going to take the victim to McDonald's and to try to find Dee Dee at an address near Joy Road and Braile, where an aunt of the victim's who was Dee Dee's girlfriend lived. They drove there but the victim was unable to pinpoint the house. Defendant then was paged by Ms. Farakan, who lived near the victim's aunt's house, so defendant just went over there, rather than calling her back. Defendant, Farakan, her son, and the victim went to McDonald's, and defendant was paged by the victim's mother. He returned her call and she asked whether the victim was with him. Defendant said yes and said that he would bring the victim home after he dropped some people off. Defendant testified that there was no discussion of money and that he explained to Florence that Dee Dee had called him over there but had not paid him.

Defendant testified that Florence told him (apparently during a subsequent conversation) to hold off bringing the victim home because she had gotten in touch with Dee Dee, Dee Dee was supposed to arrive at her house in a few minutes, and she would have Dee Dee page defendant when he arrived. Defendant took Farakan and her son home and was paged by Florence's phone number. He returned the call and spoke to Dee Dee, who was "snappy", and the two argued. Defendant told Dee Dee that he would take the victim to defendant's mother's house and the victim could be picked up there. Dee Dee did not agree and hung up on defendant. Defendant immediately called back and spoke to Florence. Defendant told her to get a cab and come to his mother's house to get the victim and that he would pay for the cab. He testified that Florence had his full name at that time and had his mother's address on Warwick Street. Florence told defendant that she would arrive in a cab at his mother's house in twenty or twenty-five minutes.

Defendant testified that Florence spoke to the victim several times from his cellular phone. He denied telling anyone that he would take the victim to Kalamazoo and denied having made an agreement with Florence to have her pick the victim up at a McDonald's.

Defendant testified that when he got to his mother's house, Florence paged him again and said she would be arriving to pick up the victim in a silver Oldsmobile. Defendant testified that he waited for about two hours, and during that time played dice while the victim sat in the truck. Defendant tried to reach Florence but got an answering service that gave him a beeper number. He called the beeper number and spoke to Kenya, one of Florence's daughters.

Defendant testified that he learned from Florence that the reason it was taking her so long to pick the victim up was that the police were involved. He testified that he told her there was no need to get the police involved, that he was not trying to do anything to the victim and liked the victim. Defendant told her that he had been on his way to take the victim home but she stopped him.

After playing dice on Warwick Street, defendant and a friend dropped the victim off at Lenee Collins' house, around the block from where he had played dice. At Collins' house, the victim played with other children. Defendant testified that he dropped the victim off at Collins' house because he was afraid of Dee Dee and because Florence was coming to get the victim. Defendant testified that although

he had told Florence to pick up the victim at his mother's, he had left word with a friend, Tyrone Bell, to tell Florence where Collins' house was around the block.

Defendant testified that he and a friend, Rodney White, went to get something to eat in White's car. He tried unsuccessfully to reach Florence to tell her the victim was at Collins' house. He also called Collins' house to check on the victim, but there was no answer. Defendant testified that he was not around when Florence arrived to pick up the victim and did not see Dee Dee either. He testified that when he left for the restaurant, he thought the situation was resolved.

After eating, defendant went back to Collins' house, and saw that the truck he had been driving was not there. He learned that the police had been there, and immediately called the police to try to straighten out the matter. Defendant testified that he was not thinking when he took the victim from Highland Park to Detroit, that he used poor judgment, and made a big mistake. He denied ever telling Dennis to watch anybody or to get involved in the situation.

On further cross-examination, defendant testified that Florence asked him to return the victim only once, and that the victim asked to be taken home several times after his mother was supposed to have been on her way to pick him up. Defendant testified that the victim was not scared while he was with him because he was around kids playing, and was happy. Defendant conceded that the victim was with him for five or six hours, but testified that during part of that time Florence was supposed to have been on her way to pick up the victim.

II

Defendant first argues that he was deprived of his due process right to a properly instructed jury for two reasons: first, the trial court gave an instruction defining the elements of kidnapping that omitted essential elements of the charged offense and included elements of another form of kidnapping prohibited by a separate and distinct statute; and second, that the specific intent instruction read by the trial court incorporated by reference the erroneous kidnapping instruction.

Because defense counsel did not object to the kidnapping instruction below, our review of this issue is limited to whether relief is necessary to avoid manifest injustice, which occurs when an erroneous or omitted instruction pertains to a basic and controlling issue in the case. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Instructional error regarding an essential element of an offense does not require reversal unless the error resulted in prejudice to the defendant to the extent that a miscarriage of justice occurred. See *People v Woods*, 416 Mich 581, 600-601; 331 NW2d 707 (1982). Failure to give a proper specific intent instruction can constitute error requiring reversal. *People v Beaudin*, 417 Mich 570, 574; 339 NW2d 461 (1983).

Defendant was charged with kidnapping a child under the age of fourteen, in violation of MCL 750.350; MSA 28.582, which provides in part:

> 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.

Michigan's general kidnapping statute, MCL 750.349; MSA 28.581, provides:

> 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.

The "child enticement" and kidnapping statutes have distinct social purposes and the Legislature intended separate punishments for the two crimes. *People v Rollins*, 207 Mich App 465, 469-470; 525 NW2d 484 (1994). The child enticement statute specifically addresses the social evil of luring children away from their homes and families by force or fraud, while the kidnapping statute protects people of all ages from being secretly confined or forcibly moved against their will. *Id.*

There is no standard jury instruction pertaining to MCL 750.350; MSA 28.582, the child enticement statute. Except for the fourth and sixth item, the trial court's instruction on kidnapping, to which the parties agreed, was taken from CJI2d 19.2, which pertains to the general kidnapping statute, MCL 750.349; MSA 28.581:

> Each Defendant is charged with the crime of kidnapping. To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that the Defendant forcibly confined or imprisoned [the victim] against [the victim's] will.
>
> Second, that the Defendant did not have any legal authority to confine [the victim].
>
> Third, that while he was confining the victim . . . , the Defendant forcibly moved or caused [the victim] to be moved from one place to another.
>
> Fourth, that the Defendant intended to detain or conceal the child from the child's parent.[3]
>
> Fifth, that the Defendant acted willfully and maliciously. This means the Defendant knew it was wrong to confine [the victim] and knew he did not have legal authority to do so.

Sixth, at the time of the confinement that the child was under the age of 14 years.

Defendant also argues that the erroneous kidnapping instruction carried over to the instruction the trial court gave on specific intent:

> The crime of kidnapping and extortion and assault with a dangerous weapon, require – each requires proof of a specific intent.
>
> This means that the Prosecution must prove not only that the Defendant did certain acts, but that he did the acts with the intent to cause a particular result.
>
> For the crime of kidnapping, this means the Prosecution must prove that the Defendant intended to kidnap the child.
>
> * * *
>
> The Defendant's intent may be proved by what he said, what he did, how he did it, or by any other facts and circumstances in evidence. -

A

Defendant correctly argues that the child enticement statute, MCL 750.350(1); MSA 28.582(1), contains a specific intent requirement: the intent to detain or conceal the child. *People v Kuchar*, 225 Mich App 74, 76-77; 569 NW2d 920 (1997).[4] Specific intent crimes involve a particular intent beyond the act done, while general intent crimes involve merely the intent to do the physical act. *Beaudin*, *supra* at 573-574.

Defendant argues that the jury should have been instructed as follows:

> First, that the Defendant led, took, carried away, decoyed, or enticed [the victim] from his parent.
>
> Second, that the Defendant intended to detain or conceal the child from the child's parent.
>
> Third, that the Defendant acted maliciously, forcibly, or fraudulently. This means that the Defendant acted with an unlawful motive, or that the Defendant either used physical force or did something to make [the victim] reasonably afraid of present or future danger, or that the Defendant made a false representation which he knew to be false, in order to lead, take, carry away, decoy, or entice [the victim] from his parent.

The prosecution does not disagree that the jury should have been instructed in the manner defendant asserts, but argues that the trial court's instruction on the elements of kidnapping did not prejudice defendant because it made the prosecution's job harder, not easier, by limiting it to showing

either a forcible confinement or imprisonment, where a mere showing of a carrying away would have sufficed under the child enticement statute.

Defendant responds that he was severely prejudiced by the erroneous jury instruction as to the elements of the offense, noting that while in some cases the reading of the erroneous instruction given in this case might be to a defendant's advantage, in this case the erroneous instruction was very prejudicial because the prosecution's case was weakest with respect to the evidence of defendant's intent and state of mind at the time he originally drove the victim away from the victim's home.

B

A comparison of the instructions that defendant contends should have been given for the offense of "child enticement," MCL 750.350; MSA 28.582, with a comparison of the supplemental instructions drafted by the parties that were actually given in this case, reveal that the instructions that were actually given, although imperfect, fairly presented to the jury the issues to be tried and sufficiently protected defendant's rights. *People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998). Specifically, the first element (forcibly confined or imprisoned) and third element (forcibly moved or caused to be moved from one place to another) of the supplemental charge actually given sufficiently convey the first element of the instruction that defendant contends should have been given (child led, taken, carried away, decoyed or enticed from parent). The first element (forcibly confined), third element (forcibly moved), and fifth element (willful and malicious act) of the charge actually given likewise sufficiently convey the third element of the instruction that defendant contends should have been given (malicious, forcible, or fraudulent act). Finally, the fourth element (intent to detain or conceal from parent) and the sixth element (child under age fourteen at time of confinement) of the charge actually given mirror the second and fourth elements of the instruction that defendant contends should have been given.

We also disagree with defendant's contention that the trial court's reference to specific intent in the jury instructions mandates a new trial for defendant. While it is true that the trial court stated in the instructions that the prosecution must prove that defendant specifically intended to kidnap the child, the supplemental instruction drafted by the parties that was actually given included the element that defendant "intended to detain or conceal the child from the child's parent." Moreover, the supplemental instruction was given to the jury on three separate occasions. Thus, at most, we can only conclude that the jury found beyond a reasonable doubt that defendant both intended to kidnap the victim and intended to detain or conceal the victim from his parent. Under these facts, we find no manifest injustice on the ground of erroneous jury instructions. *People v Kelly*, 231 Mich App 627, 646; 588 NW2d 480 (1998).

III

Next, defendant contends that he was deprived of a fair trial because the trial court failed to respond to the jury's questions regarding the issues of consent and intent. We disagree. During deliberations, the jury requested a dictionary to clarify the definitions of "kidnapping" and "extortion,"[5] and later asked for clarification regarding the "malicious act" referred to in the kidnapping or extortion

instructions.[6] The trial court's response to both of these questions was to re-read the kidnapping instruction it had read originally. When the jury sent out its second note, it also asked: "Is a child allowed to go with a person without permission from a guardian for any reason without govern [sic] law as long as the child was willing?" The trial court responded:

> Ladies and gentlemen, it's not a question that I can answer directly. Much of the question is subsumed into the material of this trial. You're to rely on your own common sense. You're to rely on your understanding of the evidence in this case. You're to rely on your finding of the facts and the law as I gave it to you, and in that way to reach a verdict.
>
> If you have any – candidly, I couldn't totally understand your second question. So, if you want to clarify, you're certainly free to ask it again. But for now return to the jury room and continue your deliberations.

At a later point in the deliberations, the jury asked another question:

> THE COURT: Ladies and gentlemen, once again you have sent a question. I'll read it. "If the intent was never there to commit a crime, does this constitute reasonable doubt?"
>
> I cannot answer such a question without invading the province of the jury. So I'd ask you to return to the jury room and continue your deliberation.

We conclude that the trial court appropriately responded to the jury's questions in this case. In particular, where the court had already instructed the jury with respect to the prosecution's burden and had further instructed the jury three times with respect to the elements of child enticement, we cannot fault the court in refusing to again give these instructions when the jury asked whether reasonable doubt existed if there was no intent to commit a crime. In summary, we find no manifest injustice on the ground of erroneous jury instructions. *Kelly, supra* at 646.

IV

Defendant next argues that he was deprived of a fair trial by the trial court's failure to sua sponte instruct the jury regarding his defense of consent. It is undisputed that trial counsel did not request such an instruction. A trial court is not required to present an instruction of the defendant's theory unless the defendant makes such a request. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909, modified on other grounds 450 Mich 1212 (1995).

V

Defendant also argues that two other instructional errors were made, neither of which were objected to below. Defendant argues that the trial court erred in granting the prosecution's request to give CJI2d 5.9,[7] the standard jury instruction on child witnesses, because the instruction refers to witnesses under age ten, and the victim was aged ten at the time of trial. The prosecution concedes that

this was plain error, but argues that defendant has not shown that the error affected the trial's outcome. We agree. The instruction merely stated that the child's promise to tell the truth took the place of an oath to tell the truth.

Defendant also argues, and the prosecution does not dispute, that the trial court improperly omitted from CJI2d 2.6 and 3.6, standard jury instructions on credibility, the following language: "However, in deciding whether you believe a witness's testimony, you must set aside any bias or prejudice you have based on the race, gender, or national origin of the witness." Defendant argues that he is African-American and there was a danger that racial bias would enter into the jury's perceptions. We disagree. While the credibility of a witness is an issue of the utmost importance in every case, *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990), defendant failed to establish that he was prejudiced from the omissions in the instructions.[8]

VI

Defendant next argues that several of the trial court's evidentiary rulings resulted in the exclusion of admissible exculpatory evidence and the admission of improper and prejudicial inculpatory evidence, thus depriving him of a fair trial. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Stanaway*, 446 Mich 643, 696; 521 NW2d 557 (1994). To the extent that defendant asserts violation of his due process right to a fair trial, our review is de novo. See *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995).

A

Defendant contends that he should have been permitted to impeach Florence with a prior inconsistent statement. Florence testified that during the phone conversations she had with defendant, defendant at times said he was going to bring the victim home and at times said he was not. Defendant notes that Florence did, however, admit that defendant told her his complete name and identified himself as Dee Dee's friend, and that after the incident she had a phone conversation with defendant's mother. Defendant argues that the trial court erred in sustaining the prosecutor's objection to a question posed to Florence during the following colloquy:

> Q The conversations that you had after everything was all over, did some woman get on the line and identify herself as Kenneth Banks' mother?
>
> A Yes.
>
> Q As part of that conversation, did you ever indicate that you knew that Kenneth Banks had not kidnapped your child and that it was the police that was [sic] pressing this?
>
> MS. WEINGARDEN: Objection. Relevance. Whether or not the child was actually kidnapped is a legal issue, and that's why the jury is here.

Defendant contends that the trial court erred because he was denied his constitutional right to confront a key witness against him. The right of cross-examination is a primary interest secured by the Confrontation Clause.[9] *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993), citing *Delaware v Van Arsdall*, 475 US 673, 678; 106 S Ct 1431; 89 L Ed 2d 674 (1986). However, the right of cross-examination is not limitless; neither the Confrontation Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject. *Adamski, supra* at 138. Trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, interrogation that is only marginally relevant. *Id.*

We agree with defendant that he should have been permitted to impeach Florence with the prior inconsistent statement. However, we conclude that the error was harmless because Florence was extensively cross-examined regarding what defendant had indicated to her, and her testimony was corroborated to a great extent by the victim and Rhonda's testimony. *Id.* at 140.

B

Next, defendant contends that he should have been allowed to testify about the conversation during which Carey gave him consent to take the victim to Detroit's west side. Defendant argues that the trial court substantially infringed on his ability to establish his defense of consent by sustaining the prosecution's objection to this conversation as hearsay. We conclude that the trial court erred in its ruling, but further conclude the error was harmless because the record establishes that what defense counsel was trying to elicit, that the victim told defendant that Dee Dee might be at an aunt's house, was cumulative to other evidence presented to the jury before the prosecutor objected. See *People v Haney*, 86 Mich App 311, 317; 272 NW2d 640 (1978).

C

Defendant also contends that Florence was improperly allowed to vouch for her own credibility when the prosecutor had her read an excerpt of her prior testimony and then asked her if that testimony was consistent with her trial testimony. We reject defendant's argument. This is not a case where a witness improperly commented on the credibility of another witness. See, e.g., *People v Patricia Williams*, 153 Mich App 582, 590; 396 NW2d 805 (1986). Rather, based upon our review of the record, Florence's testimony was in response to defense counsel's cross-examination which suggested that she had not told anyone before the trial that it was her daughter, rather than her, who spoke to the victim when he called on defendant's car phone.

VII

Defendant next argues that the holding of a competency hearing regarding the victim in the jury's presence was prejudicial error because ten-year-olds are presumed competent, the victim was ten at the time he testified, and that the effect of this procedure was to place the court's approval on the victim's testimony and improperly bolster his credibility in the jury's eyes. We disagree. It is not error to hold a competency hearing in front of the jury. *People v Wright*, 149 Mich App 73; 385 NW2d

731 (1986), cited with approval in *People v Houghteling*, 183 Mich App 805, 809; 455 NW23d 440 (1990). Furthermore, our review of the trial court's brief interrogation of the victim convinces us that defendant was not prejudiced. See *Houghteling*, *supra* at 809.

VIII

Defendant next contends that he was denied effective assistance of counsel and due process of law because his attorney failed to make meritorious objections, failed to object to the admission of improper evidence, and failed to object to improper jury instructions and request proper instructions. To establish ineffective assistance of counsel, a defendant must show 1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, 2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and 3) that the result of the proceeding was fundamentally unfair or unreliable. *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *Stanaway*, *supra* at 687-688. While defendant sets forth general allegations that his attorney was ineffective for failing to make meritorious motions, objections or arguments, his brief fails to address the elements necessary to establish ineffective assistance of counsel. Accordingly, we conclude that defendant abandoned this issue on appeal as insufficiently briefed. See *Dresden v Detroit Macomb Hospital Corp*, 218 Mich App 292, 300; 553 NW2d 387 (1996). Because defendant has failed to adequately brief this issue, we reject his request for a remand to conduct a *Ginther*[10] hearing.

IX

Defendant next argues that there was insufficient evidence to support his conviction of child enticement because the prosecution failed to provide sufficient evidence that defendant's taking of the child was done maliciously, forcibly, or fraudulently. We disagree.[11]

When determining whether sufficient evidence has been presented to sustain a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified 441 Mich 1201 (1992).

Rhonda testified that on the day in question Dee Dee spoke with a man and then hopped the McDonalds' back fence. She testified that about five minutes later, while the victim was outside playing alone, she received a phone call from a man, later determined to be defendant, who told her that Dee Dee owed him money and that she had better go and see if she could find Dee Dee. She testified that the man called back and said that Dee Dee owed him something, that he wanted it back, and that he was taking the victim to Kalamazoo. This testimony, together with the testimony set forth above, was sufficient for a rational trier of fact to infer that defendant maliciously carried the victim away, intending to use him as leverage to secure the debt Dee Dee owed him, and that he intended to detain or conceal the victim from his parent.

X

Defendant asserts that a number of the prosecutor's arguments, comments, and questions were improper and that he was thus deprived of a fair trial. Defendant preserved for review only one of the errors he asserts on appeal. In reviewing prosecutorial misconduct cases, this Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). Our review of unpreserved challenges is precluded absent a miscarriage of justice. *People v Rivera*, 216 Mich App 648, 651; 550 NW2d 593 (1996). However, a miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely curative instruction. *Id.*

A

We will address defendant's sole preserved issue first. Defendant contends that the prosecutor engaged in an improper cross-examination to obtain a prejudicial impact when the prosecutor asked him whether "most mothers" would be hysterical and frightened at the kidnapping of a child. We disagree. After reviewing the prosecutor's questioning and defendant's response, we conclude that defendant was not denied a fair and impartial trial due to this limited line of questioning.

B

We will now address defendant's unpreserved issues. First, defendant contends that the prosecutor's remark in opening statement that Dee Dee was "basically a no-good-neck [sic], rumor had it he was into drugs," was made knowing there was no evidence to support this assertion. Defendant failed to object to this remark. We find no evidence of bad faith on the prosecutor's part in making this statement and conclude this remark did not deprive defendant of a fair trial. See *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991).

Defendant next argues that the prosecutor intentionally distorted the victim's testimony that he offered to show defendant where Dee Dee might be by asking the victim improper leading questions which changed his testimony. The record does not support defendant's argument, as defense counsel established during cross-examination that the victim offered to show defendant where Dee Dee lived.

Defendant next argues that the prosecutor falsely stated that the victim had testified at trial the previous day regarding defendant having threatened to take him to Kalamazoo. On the second day of trial, defense counsel attempted to establish that the victim had been coached the previous night by his mother, and asked the victim if he had forgotten to testify the day before that defendant threatened to take him to Kalamazoo, to which the victim responded "yes." The prosecutor then indicated that she had asked the question and the victim had answered that defendant had threatened to take him to Kalamazoo. Then, on redirect examination the prosecutor established that the victim had testified at the preliminary examination that defendant said he was going to take him to Kalamazoo. Under these facts, we conclude there was no miscarriage of justice.

Defendant next argues that, in closing argument, the prosecutor improperly bolstered Officer Berry's testimony by stating that he was a "decent guy and a decent cop" and that those were the

reasons that Berry stated favorable things about defendant, and not that Berry believed defendant was not guilty. The prosecutor's remarks were in response to defense counsel's argument that Officer Berry had said favorable things about defendant at the arraignment proceeding because he had doubts about defendant's guilt. We find no miscarriage of justice.

Defendant next argues that the prosecutor intended to bolster Florence's testimony when she argued in closing argument that she had not seen the victim or his mother since the preliminary examination and that they had not communicated. The prosecutor's argument was in response to defense counsel's questioning to the effect that the prosecution had coached the victim to get him to testify that defendant threatened to take him to Kalamazoo. We find no miscarriage of justice.

Defendant next argues that the prosecutor improperly cross-examined defendant by asking him whether the first time his pager "came up" was in his own testimony. We disagree. The prosecutor had questioned the defense's first witness, Kinidia Farakan, regarding defendant's having paged her. The prosecutor later asked defendant whether it was fair to say that the first time the word "pager" was introduced at trial was when defense witnesses testified, to which defendant responded "yes." The prosecutor also asked defendant whether he had heard Florence testify that she could not reach defendant and had to wait for defendant to contact her. Defendant responded that he had heard that testimony but that it was untrue. In sum, the prosecutor did not claim that defendant was the first to mention the pager. We find no miscarriage of justice.

Defendant next argues that the prosecutor improperly denigrated defendant by stating in opening statement that defendant was the type of person who "sometimes, just like that, he would turn and become a mean person who was uncaring of human life." Defendant argues that this statement went well beyond the anticipated and actual testimony of Florence. We disagree. Florence testified at trial that defendant had threatened to "spray" her house, that "he was sweet one minute and the devil the next," and that defendant mentioned to her on the phone that "he didn't give a mother dew drop about nobody. He wanted his money." Because there was subsequent evidentiary support for the prosecutor's statement, we find no miscarriage of justice.

Defendant next argues that the prosecutor improperly expressed her personal opinion when she remarked in closing argument "I believe that the pager is a big lie." The use of the phrase "I believe" rather than "the evidence shows" does not, standing alone, warrant reversal. See *People v Cowell,* 44 Mich App 623, 628; 205 NW2d 600 (1973). Read in context, the prosecutor was referring to the lack of evidence presented to support that defendant had a pager. The prosecutor may properly ask the jury to view the defendant's testimony as untruthful. See *People v Coddington,* 188 Mich App 584, 603; 470 NW2d 478 (1991). We find no miscarriage of justice.

Defendant next argues that the prosecutor improperly referred to defendant as stupid and uneducated in closing argument. Viewed in context, the prosecutor was responding to defense counsel's argument to the effect that no "real" kidnapper would give his name and mother's address to the mother of the abducted child. We find no miscarriage of justice.

Defendant next argues that the prosecutor improperly commented on defendant's right to remain silent when she cross-examined defendant as follows:

> Q Now, you say that you tried very hard to sit down with Officer Berry to talk about your version of how it all happened; is that right?
>
> A Yes. Several times. But Officer Berry then told me that he can't talk to me, I have to have my attorney present with me before he go [sic] over anything.

Defendant argues that he never referred on direct examination to his willingness or unwillingness to talk to the police. We disagree. On direct examination, defendant testified that after he discovered that the police had been at Lenee Collins' house, where he had left the victim, he "immediately went and called police, the Sixth Precinct [Detroit], you know, trying to straighten out this matter." Defendant testified that the Sixth Precinct told him they were not handling the case and that he had to contact the Highland Park police, which he did. Defendant testified that he spoke to the night chief at Highland Park, that the night chief told him that Sergeant Berry was in charge of the case, and asked him to come in and discuss the case, but defendant declined because he figured he would be arrested, since Collins and Dennis had been arrested. Defendant testified that he could not reach Berry that night, but talked with him "[f]irst thing the next day," and made arrangements to turn himself in. At that point, defendant had an attorney. Defendant testified that three weeks went by before he was asked to turn himself in, and that in that interim period, he called Berry twice a day. He testified that he went in immediately when he was asked to turn himself in.

In light of this testimony, we cannot agree with defendant that he did not testify regarding his willingness to speak to the police. The prosecutor's question was in response to defendant's testimony on direct examination. We thus reject defendant's claim that the prosecutor improperly implicated defendant's assertion to remain silent.

Next, defendant contends that the prosecutor abused the missing witness rule as expressed in *People v Fields*, 450 Mich 94, 105; 538 NW2d 356 (1995) when the prosecutor questioned him regarding his and his attorney's efforts to locate and subpoena Carey for trial to corroborate defendant's testimony that Carey gave him permission to drive The victim McDonald to Detroit's west side to look for Dee-Dee.[12] Defendant further contends that the rule does not apply because Carey was closely associated with the adverse party and that the prosecution's argument improperly shifted the burden of proof to him. We disagree. While the prosecutor may not use defendant's failure to present Carey's testimony as substantive evidence of guilt, the prosecutor is entitled to contest the evidence of consent presented by defendant. See *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). Furthermore, we conclude that the prosecutor's actions did not deprive defendant of a fair trial because any prejudice could have been cured by a timely curative instruction.

Defendant's last unpreserved challenge is that the prosecutor began and ended the trial with solicitations to the jury to render a verdict based on sympathy. Defendant points to the prosecution's remark in opening statement that "But for the police ending this whole thing, who knows where the victim McDonald would be today." Defendant argues that there was no evidence that defendant in any

way mistreated, neglected or abused the victim at any time. We disagree. Rhonda, the victim's sister, testified that defendant told her that Dee Dee owed him something, that he wanted it back and that he was taking the victim to Kalamazoo. She also testified that defendant said that if the police got involved, she would never see The victim again. Thus, the prosecution's statement was supported by subsequent testimony and not improper.

Defendant also points to the prosecution's statement in rebuttal, "Tell the defendant with your verdict that you're as offended by what he did as the rest of us are." Defendant argues that this statement requested that the jury take the side of the prosecutor and the police and convict defendant based on sympathy for the victim and Florence. The prosecutor's argument was likely in response to defense counsel's line of questioning which suggested that the victim and Florence were not worried or offended by defendant's actions with the victim, and that Berry had doubts about defendant's guilt. We conclude that the prosecutor's remarks were not tantamount to asking the jury to convict on the basis of the prestige of her office, see *People v Fuqua*, 146 Mich App 250, 254-255; 379 NW2d 442 (1985), and when viewed in context, were not an improper appeal to the jury to sympathize with the victim and Florence. See *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).

XI

Defendant next contends that even if no single assignment of error is sufficient for reversal, the totality of the errors denied defendant a fair trial. "Although a single error in a case may not necessarily provide the basis for reversal, it is possible for a number of minor errors to require reversal." *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987). The test to determine whether reversal is required is not whether some irregularities occurred during the course of the trial, but whether defendant had a fair trial. *Id.* However, in assessing the cumulative effect of minor errors which occurred during the course of the trial, we must be mindful that defendant is entitled only to a fair trial, not a perfect trial. See *Kelly, supra* at 646. Based upon our review of the record in the present case, we conclude that defendant received a fair trial.

XII

Finally, defendant contends that he should be resentenced because he was convicted of the offense of child enticement in violation of MCL 750.350; MSA 28.582, an offense which is not covered by the sentencing guidelines; nonetheless, at defendant's sentencing hearing, the prosecutor, defendant's attorney and the trial court referred to the sentencing guidelines for the general kidnapping statute, MCL 750.349; MSA 28.581, and the trial court determined his sentence by referring to those guidelines. Defendant correctly asserts that the sentencing guidelines cannot be extended or analogized to sentencing for a crime not addressed by the guidelines. *People v Pena*, 224 Mich App 650, 662-663; 569 NW2d 871 (1997), modified and remanded on other grounds 457 Mich 883; 586 NW2d 925 (1998); *People v Laube*, 155 Mich App 415, 417; 399 NW2d 545 (1986). The kidnapping and child enticement statutes have distinct social purposes and our Legislature intended separate punishments for the two crimes. *Rollins, supra* at 470. As a result, we conclude that the trial court erred when it failed to recognize that the kidnapping guidelines' recommendation was only a consideration in fashioning an appropriate sentence. Therefore, we remand to the trial court for resentencing.

Affirmed, but remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Stephen J. Markman

[1] Codefendant Dennis was additionally charged with two counts of felonious assault, MCL 750.82; MSA 277, and one count of felony-firearm, MCL 750.227b; MSA 28.424(2). He was found not guilty of the kidnapping and extortion charges, and guilty of the felonious assault and felony-firearm charges.

[2] The prosecution's statement of facts inaccurately states that the first place defendant and the victim went was defendant's girlfriend's house, when the trial testimony was that they went to Dee Dee's house first. The prosecution also states that the victim "got into Defendant's truck. He saw a car phone and gun in Defendant's truck." This statement is misleading because the victim testified that he did not see the gun when he first got in the truck, rather he saw the gun when defendant showed it to a boy. The victim answered "yes" when asked if he saw it "much later." From the evidence, the only fair conclusion regarding the chronology of when the victim saw the gun is that it was definitely after he showed defendant where Dee Dee lived and after they headed downtown.

[3] CJI2d 19.2 provides in pertinent part: "Fourth, that the defendant intended to kidnap or confine [*name complainant*]."

[4] In *Kuchar*, this Court held that the trial court did not err in refusing an instruction on asportation because there was no need to read a judicial requirement of asportation into the statute where the accused is charged with a form of kidnapping that requires specific intent, such as child enticement.

[5] The trial court read the note: "Dictionary needed. Need to clarify kidnapping and extortion by law."

[6] The trial court read the question: "Malicious act was referred to under kidnapping or extortion?"

[7] CJI2d 5.9 provides: "For a witness under the age of 10, the promise to tell the truth takes the place of the oath to tell the truth."

[8] We note that defendant did not establish that he was the only African-American witness in this case or that there were no African-American jurors.

[9] US Const, Am VI; Const 1963, art 1, § 20.

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

[11] While defendant appeals from the trial court's denial of his motion for a directed verdict, defendant raises the issue as one of insufficient evidence. Therefore, we will review the issue as one involving sufficiency of the evidence rather than one involving a denial of a motion for directed verdict.

[12] Our Supreme Court's opinion in *Fields, supra,* 450 Mich 105 quoted the following dictum from *Graves v United States*, 150 US 118, 121; 14 S Ct 40; 37 L Ed 1021 (1893):

> [I]f a party has it peculiarly within his power to produce [evidence or] witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the [evidence or] testimony, if produced, would be unfavorable.

However, we note that the Court did not express an opinion as to whether this dictum stated Michigan's version of the rule. *Fields, supra*, 450 Mich 105 n 15.