

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW SCOTT TACKEBURY,

Defendant-Appellant.

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UNPUBLISHED

April 21, 2000

No. 213985

Saginaw Circuit Court

LC No. 97-014075-FC

Before: Bandstra, C.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), kidnapping, MCL 750.349; MSA 28.581, two counts of felonious assault, MCL 750.82; MSA 28.277, carrying a dangerous weapon with unlawful intent, MCL 750.226; MSA 28.423, assault with intent to murder, MCL 750.83; MSA 28.278, and killing or torture of animals, MCL 750.50b; MSA 28.245(b). Defendant was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to concurrent terms of thirteen to twenty years for the home invasion conviction, twenty-five to fifty years for the kidnapping conviction, two to four years for the felonious assault convictions, three to five years for the carrying a dangerous weapon with an unlawful intent conviction, twenty-five to fifty years for the assault with intent to murder conviction, and two to four years for the killing an animal conviction. Defendant appeals by right. We affirm.

Defendant first argues his conviction for kidnapping should be vacated because plaintiff presented insufficient evidence of secret confinement, an essential element of the kidnapping charge. We disagree. When considering a claim of insufficient evidence, this Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Michigan's kidnapping statute, MCL 750.349; MSA 28.581, makes it unlawful to secretly confine a person against his will. *People v Jaffray*, 445 Mich 287, 296-297; 519 NW2d 108 (1994). "[A] kidnapping conviction may be premised on a showing of confinement that in fact is secret *or* upon a showing of forcible seizure or confinement with intent to secretly confine, whether or not the confinement remains a secret." *Id.* at 300-301. The term "secret

confinement” is not defined by statute. However, the Supreme Court defined “secret confinement” in *Jaffray, supra* at 309:

[T]he essence of “secret confinement” as contemplated by the statute is deprivation of the assistance of others by virtue of the victim’s inability to communicate his predicament. “Secret confinement” is not predicated solely on the existence or nonexistence of a single factor. Rather, consideration of the totality of the circumstances is required when determining whether the confinement itself or the location of confinement was secret, thereby depriving the victim of the assistance of others. That others may be suspicious or aware of the confinement is relevant to the determination, but is not always dispositive.

When looking at the totality of the circumstances in this case, we find sufficient evidence of secret confinement to sustain defendant’s conviction for kidnapping. Ann Sells testified that she was in her bedroom at night when defendant confronted her with a knife. Defendant ordered her out of her bed and stated that he was going to kill her daughter, Jennifer Sells, who had recently broke-off a relationship with defendant. Defendant told Ann that she was going to watch as he killed Jennifer and that he would then kill her. Defendant forced Ann downstairs and cut the telephone lines throughout the house. When Ann asked to use the bathroom, defendant insisted that she leave the door open and stood in the doorway, so she would not escape. Defendant held the knife at all times during the incident, sometimes becoming agitated and kicking and stabbing furniture. Although Ann wanted to leave, she felt frightened and believed it was not safe to try to escape. Defendant eventually ordered Ann to the sun porch at the rear of the house, where he ordered her to close the window blinds. Defendant told her he was going to kill Jennifer’s pet rabbit. As he knelt to remove the rabbit from its cage, Ann ran to a neighbor’s house and contacted the police.

That evidence was sufficient to allow a rational jury to conclude that defendant forcibly confined Ann Sells with an intent to keep her secretly confined. *Jaffray, supra* at 300-301. Despite the fact that Ann Sells was in her own home and there was testimony that her daughter had spoken with her earlier and believed that she was home, there is no evidence anyone was suspicious or aware of Ann’s confinement. *Id.* at 309. No one knew of her confinement until she escaped. Viewing this evidence in a light most favorable to the prosecution, there was sufficient evidence of secret confinement to find the elements of kidnapping were proven beyond a reasonable doubt. Cf. *People v McNeal*, 152 Mich App 404, 412; 393 NW2d 907 (1986); See *People v Warren*, 228 Mich App 336, 343-345; 578 NW2d 692 (1998); *People v Hoffman*, 225 Mich App 103, 112; 570 NW2d 146 (1997).

Defendant also argues that there was insufficient evidence to sustain his conviction of first-degree home invasion because he had permission to enter the house uninvited and unannounced. We disagree. The elements of a home invasion are: (1) the entering without permission; (2) of an occupied dwelling; (3) with felonious intent. *Warren, supra* at 348; see *People v Brownfield, (After Remand)* 216 Mich App 429, 431; 548 NW2d 248 (1996). Viewing the evidence in the light most favorable to the prosecution, particularly the testimony of Ann Sells, we find that there was sufficient evidence presented for the jury to determine that defendant did not have permission to enter the house on the night in question. While defendant may have been allowed to enter the house on prior occasions while

he was dating Jennifer, the couple had broken up. Defendant did not have permission to enter the house without knocking once he was no longer dating Jennifer, and he never had permission to enter with a weapon. Given the threats defendant made to Ann and Jennifer, his extreme assaultive behavior and his conduct of gutting the pet rabbit, there is sufficient evidence defendant entered the home with a felonious intent. *Id.*

Defendant next contends his conviction for assault with intent to murder must also be reversed due to insufficient evidence. Again, we disagree. The elements of assault with intent to commit murder are (1) assault; (2) with actual intent to murder; (3) which, if successful, would make the killing murder. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). Here, defendant contends that the second element, intent to murder, was not proven beyond a reasonable doubt.

Intent may be proven by facts and circumstances that surround the case. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987); *People v Daniels*, 163 Mich App 703, 706; 415 NW2d 282 (1987). Because a defendant's state of mind is difficult to prove, minimal circumstantial evidence is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). An intent to kill may be inferred from the evidence. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993).

We find the evidence of defendant's intent to kill sufficient to sustain his conviction. Once Jennifer Sells returned home, defendant held a knife to her throat and threatened to kill her. The use of a lethal weapon is the kind of evidence that will support an inference of an intent to kill. *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974). Defendant also told the police repeatedly that he wanted to kill Jennifer. We therefore find defendant's argument without merit.

Finally, defendant argues his sentences for assault with intent to murder and kidnapping were disproportionately long. This Court reviews a trial court's sentence imposed on an habitual offender for abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). A given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). If it is shown that a defendant has an inability to conform his conduct to the laws of society, sentencing the defendant as an habitual offender is not an abuse of discretion by the trial court. *Hansford, supra* at 326. Here, the crimes were of a violent nature and defendant displayed a propensity to terrorize his victims. Defendant kept Ann Sells confined at knife point. He told her he wanted her to watch him kill her daughter and that he would then kill her. Defendant gutted a pet rabbit. He then waited for Jennifer Sells to return home, grabbed her by the hair and shirt and held the knife to her neck. When Jennifer's friend, Sam Restifo, attempted to intervene, defendant swung the knife and threatened to kill him and Jennifer. Defendant had a criminal history and was a potential threat to Jennifer and Ann Sells. Such circumstances demonstrated that defendant was unable to control his anger or conform his conduct to the laws of society. We therefore find no abuse of discretion arising from the sentence imposed upon defendant.

Affirmed.

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

/s/ Brian K. Zahra