

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS SULLIVAN,

Defendant-Appellant.

UNPUBLISHED

June 13, 2000

No. 211367

Wayne Circuit Court

LC No. 97-004381

Before: Murphy, P.J., and Collins and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions for kidnapping a child under the age of fourteen, MCL 750.350; MSA 28.582, and felonious assault, MCL 750.82; MSA 28.277. Defendant was sentenced to serve concurrent prison terms of ten to twenty-five years for the child kidnapping conviction, and one to four years for the felonious assault conviction. We affirm.

Defendant's first issue is that the prosecution failed to present sufficient evidence to support his child kidnapping conviction. We disagree. In reviewing a claim that there was insufficient evidence to support a conviction, we view the evidence presented in a light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The child kidnapping statute provides that:

(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. [MCL 750.350; MSA 28.582.]

Viewing the evidence in a light most favorable to the prosecution, we conclude that the prosecution presented sufficient evidence to support defendant's conviction. On May 30, 1997, defendant walked uninvited onto complainants' property in Detroit, "grabbed" their four-year-old daughter from the front porch of the house, and carried her to his parked car. Complainants discovered the abduction and ran after defendant, who refused to stop. Also, defendant admitted that he intended to sexually assault complainants' daughter. Thus, based on these facts, the prosecution offered sufficient evidence to show that defendant forcibly took and carried away a child under the age of fourteen with the intent to detain or conceal her from her parents. *People v Rollins*, 207 Mich App 465, 469; 525 NW2d 484 (1994).

Defendant nevertheless claims that he could not have formed the requisite intent to detain complainants' daughter because he was laboring under a diminished capacity. In *People v Denton*, 138 Mich App 568, 571; 360 NW2d 245 (1984), this Court stated that the defendant has the burden of showing that "he lacked the mental capacity to entertain the specific intent necessary for conviction of a particular crime." Once the defendant offers some evidence of diminished capacity, the prosecution has the burden of presenting proof of "undiminished capacity." *Id.* at 571-572.

Although defendant claimed that he was under the influence of drugs and alcohol at the time the offense was committed, the prosecution presented sufficient evidence to show that defendant's mental capacity was not diminished. At the time of his arrest, defendant admitted that he was not under the influence of alcohol or drugs. The arresting police officer testified that defendant "seemed fine," and gave no indication of intoxication. Furthermore, the prosecution presented testimony from an expert in forensic psychology who opined that defendant was not suffering from a diminished capacity at the time of the offense. The jury's verdict indicates that the jury was convinced by the prosecutor's evidence concerning defendant's mental capacity; "the existence of specific intent is a matter to be decided by the trier of fact." *Id.* at 573. Thus, the prosecution met its burden of showing that defendant's mental capacity was not diminished at the time he committed this offense.

Defendant's second issue on appeal is that the prosecution failed to present sufficient evidence to support his conviction for felonious assault. We again disagree. The crime of felonious assault requires the prosecutor to prove beyond a reasonable doubt that the defendant assaulted another person with a dangerous weapon, and did so with the intent to injure or place the other person in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). This Court has recognized that an automobile can constitute a "dangerous weapon" if it was used in "furtherance of accomplishing the assault and the automobile was capable of inflicting serious injury." *People v Sheets*, 138 Mich App 794, 799; 360 NW2d 301 (1984), citing *People v Goolsby*, 284 Mich 375, 378; 279 NW 867 (1938).

Complainant father testified that he jumped onto the hood of defendant's car while it was parked. While complainant pounded on the windshield, defendant began driving his car at an increasing rate of speed. Defendant did not stop or slow down, indicating both that he used his car as a dangerous weapon, and that he had the intent to cause complainant apprehension of receiving an immediate battery. Additionally, complainant testified that he jumped off the car to avoid being killed, further demonstrating his apprehension. Viewing the evidence in a light most favorable to the prosecution,

Wolfe, supra, we conclude that the prosecution presented sufficient evidence to support defendant's conviction for felonious assault.

Defendant's final issue on appeal is that his ten to twenty-five year sentence for child kidnapping violates the principle of proportionality. A trial court must fashion a sentence that is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

The trial court correctly noted that there are no sentencing guidelines for child kidnapping. As such, the sentencing guidelines may not be considered on appeal in determining whether the sentence imposed was disproportionate and this Court reviews the sentence imposed solely for an abuse of the trial court's sentencing discretion. *People v Compagnari*, 233 Mich App 233, 235-236; 590 NW2d 302 (1998). In the context of sentencing, an abuse of discretion occurs when the sentence is not proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn, supra* at 636.

The child kidnapping statute provides for a sentence range of any term of years up to life imprisonment. MCL 750.350; MSA 28.582. Thus, the trial court had broad discretion in tailoring an appropriate sentence. Contrary to defendant's claim, the trial judge considered his individual circumstances. She noted his history, including the numerous letters she received on his behalf, and his lack of prior offenses as indicated by the presentence investigation report. However, the trial judge also noted the circumstances of the offense. Defendant abducted a vulnerable child, and but for the courageous actions of the child's parents, he could have carried out his intention to sexually assault her. Furthermore, the trial judge attempted to quantitatively justify the sentence imposed by reviewing the general kidnapping guidelines to tailor an appropriate sentence.

Given that the trial court had the discretion to sentence defendant to a life term, his ten to twenty-five year prison term is proportionate to both defendant and the offense. See *Milbourn, supra* at 635-636. Accordingly, the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ William B. Murphy

/s/ Jeffrey G. Collins

/s/ Donald S. Owens