STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH ANTHONY CINTRON,

Defendant-Appellant.

UNPUBLISHED
December 4, 2007

No. 271995
Van Buren Circuit Court
LC No. 06-015017-FC

Before: Donofrio, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84, and kidnapping, MCL 750.349. He was subsequently sentenced to serve concurrent terms of 3 to 10 years' imprisonment for the assault conviction and 12 to 25 years' imprisonment for the kidnapping conviction. Defendant appeals his sentences and kidnapping conviction as of right. Because we conclude that the trial court properly declined to instruct the jury that a specific intent to secretly confine is an element of kidnapping under the facts of this case and that its scoring of the sentencing guidelines offense variable (OV) 9 is supported by the record, we affirm.

Defendant first argues that the trial court erred in refusing to instruct the jury that, to convict him of kidnapping, it must find that he specifically intended to secretly confine the victim. We review a claim of instructional error de novo, examining the trial court's instructions to the jury in their entirety. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003). "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

In challenging the trial court's instructional ruling, defendant acknowledges that the kidnapping statute under which he was charged, MCL 750.349, recognizes only two alternative forms of kidnapping relevant to this matter: (1) secret confinement, and (2) forcible confinement with the intent to secretly confine. See *People v Wesley*, 421 Mich 375, 383-384; 365 NW2d 692 (1984).[1] The difference between these two alternatives is that a secret confinement

[1] Although MCL 750.349 was substantively amended by 2006 PA 159, effective August 24, (continued…)

kidnapping conviction "may be premised on a showing of confinement that in fact is secret," while the alternative depends "upon a showing of forcible seizure or confinement with intent to secretly confine, whether or not the confinement remains a secret." *People v Jaffray*, 445 Mich 287, 300-301; 519 NW2d 108 (1994), citing *Wesley*, *supra*. Thus, a showing of specific intent to secretly confine the victim is not required in every case in which kidnapping by secret confinement is alleged. *Jaffray*, *supra*.

In the present case, the information charged that defendant "wilfully, and maliciously, and without legal authority forcibly or secretly confined Greg Putnik in the state against his will." While this language has been broadly construed by our Supreme Court as sufficient to encompass both of the alternative theories applicable in this case, see *id*. at 302 n 27, defendant does not challenge the trial court's conclusion that the information at issue here in fact charged only secret confinement kidnapping. Rather, defendant challenges the substance of the kidnapping instruction given by the trial court in accordance with this finding. Specifically, defendant argues that the trial court erred in not instructing that secret confinement kidnapping requires a specific intent to secretly confine the victim. Defendant is mistaken. As already discussed, no intent to secretly confine is necessary to establish this form of kidnapping. Rather, a conviction of secret confinement kidnapping is premised on a showing of confinement that is in fact secret. *Id*. at 300-301. Thus, no instructional error warranting reversal occurred because the instruction given comports with the form of kidnapping found by the trial court to have been charged in this case, i.e., secret confinement kidnapping.

Defendant also argues that the trial court erred in scoring ten points for OV 9, MCL 777.39, because he did not place Greg's mother, Susan Putnik, in danger of physical injury. We review a trial court's scoring decisions for an abuse of discretion. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). We will uphold a scoring decision "for which there is any evidence in support." *Id*. at 454 (internal quotation marks omitted).

Ten points may be scored for OV 9 if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death . . . ." MCL 777.39(1)(c). The sentencing court is to "[c]ount each person who was placed in danger of physical injury or loss of life as a victim." MCL 777.39(2)(a). Only persons involved in the criminal transaction may be counted as victims. *People v Chesebro*, 206 Mich App 468, 471; 522 NW2d 677 (1994). However, bystanders and persons who intervene may be considered victims if placed in danger of injury. See, e.g., *People v Morson*, 471 Mich 248, 261-262; 685 NW2d 203 (2004).

The evidence produced at the trial of this matter supports that Susan, who intervened by calling 911 from the office building in which Greg had been confined by defendant in a bathroom, was placed in danger of physical injury. The evidence showed that after defendant and Greg heard Susan speaking to the 911 operator, defendant removed a gun from his pocket and began moving toward the bathroom door. He only stopped when Greg grabbed him. Then, when defendant finally emerged from the bathroom he was carrying not only the gun but also a bow, and Greg instructed Susan to run. These circumstances support the trial court's finding that

(…continued)

2006, the amendment does not apply to defendant's crime, which was committed on January 3, 2006.

Susan was placed in danger of physical injury. Accordingly, the trial court did not abuse its discretion in scoring ten points for OV 9. *Cox*, *supra* at 453.

Affirmed.

/s/ Pat M. Donofrio
/s/ Joel P. Hoekstra
/s/ Jane E. Markey