

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 17, 2013

v

SEAN MICHAEL PHILLIPS,

Defendant-Appellant.

No. 311110
Mason Circuit Court
LC No. 11-002427-FC

Before: MURPHY, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction of unlawful imprisonment, MCL 750.349b. Defendant was sentenced to 10 to 15 years' imprisonment with credit for 341 days served. For the reasons set forth in this opinion, we affirm.

I. FACTS

Defendant's conviction arises out of the high-profile disappearance of his four-month old daughter Katherine ("Kate") Phillips who disappeared in Ludington, Michigan on June 29, 2011, after she was last seen with defendant in his vehicle.

Kate was born to defendant and Ariel Courtland who had been involved in a tumultuous "on-again-off-again" relationship since 2006. Courtland testified that defendant encouraged her to obtain an abortion when she was pregnant and encouraged her to give Kate up for adoption after Kate's birth. Instead, Courtland initiated a paternity action shortly after Kate's birth, naming defendant the father. DNA tests for defendant, Courtland and Kate were scheduled for June 29, 2011, the day of Kate's disappearance.

On the morning of June 29, 2011, defendant went to Memorial Medical Center in Ludington for his scheduled DNA test and then proceeded to Courtland's apartment a few blocks away. When defendant arrived, Courtland was feeding Kate. Defendant began talking about giving Kate up for adoption and the discussion became "heated." Courtland finished feeding Kate and dressed her in a white tank top with pink flowers and pink "bloomers."

Defendant agreed to drive Courtland and Kate to the hospital for Kate's 1:00 p.m. DNA test. However, instead of driving to the hospital, defendant drove to a DHS office nearby. Courtland asked defendant what he was doing and defendant stated that he "thought we were

dropping Kate off.” Courtland responded “no” and told defendant that she was going to Kate’s DNA test. Defendant responded that he would not drive Courtland to the DNA test because it would “ruin his life.” Defendant eventually exited the DHS parking lot, drove past the hospital, and informed Courtland that if she wanted to “ruin his life” and go through with the DNA test, then she could do it herself. Defendant drove back to the apartment complex and pulled into the parking lot. Defendant stated that he was not getting out of the car because he had things to do. Courtland asked defendant if he would take Kate with him to run errands but he refused. Courtland unbuckled Kate but told defendant she had to get her stroller from her storage unit and would be right back. Courtland testified that when she came back with the stroller, defendant and Kate were gone. Courtland immediately called defendant, who did not answer, and then dialed 911. Police were dispatched to the apartment complex at 1:14 p.m.

Defendant’s whereabouts from the time he drove away with Kate until sometime after 3:00 p.m. are unknown. One witness testified that he saw defendant driving west past the witness’ house on Merriman Road in Mason County at approximately 2:30 p.m. About 45 minutes to an hour later, the witness saw defendant drive back east on the same road. Another witness testified that defendant stopped by a fireworks stand on US-31 sometime between 2:30 and 3:00 p.m. At 3:00 or 3:15, defendant returned to his house where his mother confronted him at the door. Defendant did not have Kate and his mother instructed him to call police.

Officers Tony Kuster and Jody Hartley responded to defendant’s residence. When the officers arrived, defendant was pacing outside his home near the garage. Officer Kuster told defendant that he was trying to locate Kate and defendant responded by stating that “it” was with Courtland. However, as Kuster continued to question defendant, defendant agreed that he was not telling the “whole truth” and he agreed to go to the police department for an interview. Hartley performed a pat down search of defendant and discovered a baby’s white tank-top and pink bottoms “balled up” in defendant’s pocket.

Defendant did not reveal Kate’s whereabouts and the ensuing police investigation did not lead to the infant’s discovery. Police searched defendant’s vehicle, residence and personal computer. In the trunk of defendant’s vehicle, police found an infant’s car seat and diaper bag. The diaper bag contained Courtland’s wallet, baby clothes and diapers, and a bottle in the side-pocket that appeared to have been recently used. Police found a soiled diaper under the front passenger seat of the vehicle.

Police searched defendant’s home and seized a pair of black “Seedless” brand shoes from his bedroom. The shoes had dirt and debris on them. A surveillance video recording at Memorial Medical Center showed that defendant was wearing the Seedless shoes with white socks when he arrived for his DNA test at about noon on June 29, 2011. However, when police met defendant at his residence at about 4:00 p.m. that day, defendant was wearing black socks and a different pair of shoes. One expert from Michigan State University testified that the debris he analyzed from defendant’s Seedless shoes would likely be found in a fairly wet and moist area close to water and another expert testified that dirt on the shoes was likely wind-blown material.

Police also seized defendant’s computer. A forensic analysis of the computer showed evidence of internet searches on a range of topics including how to change a name, adoption, adoptive families, “fake adoption papers,” and termination of parental rights.

The prosecution introduced testimony of Dan Ruba, an acquaintance of Courtland's family. Ruba testified that he went with a police officer to search Courtland's apartment. He noticed that Courtland's stroller was in the entryway of the apartment complex. Ruba testified that Courtland and defendant had a "rocky" relationship. Ruba testified that on one occasion after defendant completed National Guard training he and defendant were drinking beer in a garage when defendant randomly stated that he could hide a body and nobody would find it.

Defendant was convicted and sentenced as set forth above and this appeal ensued.

II. ANALYSIS

Defendant contends that there was insufficient evidence to prove the "restrain" element of unlawful imprisonment.

We review a challenge to the sufficiency of the evidence *de novo* to determine whether, when the evidence is viewed in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Russell*, 297 Mich App 707, 721; 825 NW2d 623 (2012). Resolution of this issue requires interpretation and application of the unlawful imprisonment statute, MCL 750.349b. Issues of statutory interpretation involve questions of law that we review *de novo*. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

Before 2006, unlawful imprisonment was incorporated into Michigan's kidnapping statute, MCL 750.349, which encompassed six forms of conduct "each of which constitute[ed] the crime of kidnapping." *People v Jaffray*, 445 Mich 287, 296-297; 519 NW2d 108 (1994). In 2006, the Legislature "substantially revised" the kidnapping statute and split it into two parts, "the first concerning 'kidnapping,' [MCL 750.349] and the second 'unlawful imprisonment' [MCL 750.349b]." Gillespie, *Michigan Criminal Law & Procedure* (2d ed.), § 98.1, pp. 90-91; see 2006 PA 159. MCL 750.349b now proscribes unlawful imprisonment and it provides in relevant part as follows:

(1) A person commits the crime of unlawful imprisonment if he or she *knowingly restrains another person* under any of the following circumstances:

* * *

(b) *The restrained person was secretly confined.* [Emphasis added.]

In this case, defendant was charged and convicted under subsection (1)(b). To prove unlawful imprisonment under subsection (1)(b), a prosecutor must prove beyond a reasonable doubt that the defendant: (1) knowingly restrained a person, and (2) the restrained person was "secretly confined." *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010). The trial court instructed the jury in accord with these elements.

In his first issue presented, defendant contends that the prosecution failed to prove that he restrained Kate. The statute defines "restrain" as follows:

(a) “Restrain” means to *forcibly restrict* a person’s movements *or* to *forcibly confine* the person so as to interfere with that person’s liberty without that person’s consent or without lawful authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts.^[1] [MCL 750.349b(3)(a) (emphasis added).]

Therefore, to prove restraint, the facts must show beyond a reasonable doubt that the accused either: (1) forcibly restricted a person’s movements or (2) forcibly confined a person so as to interfere with that person’s liberty. See *People v Nicholson*, 297 Mich App 191, 199; 822 NW2d 284 (2012) (“The word ‘or’ is disjunctive and, accordingly, it indicates a choice between alternatives”). In addition, the restraint must be done “without the person’s consent or without lawful authority.”

Having concluded that there are two methods to accomplish the act of restraint, and that the restraint must be done without the victim’s consent or without lawful authority, we note that both methods of restraint require proof of some quantum of force—i.e. *forcibly* restrict or *forcibly* confine. MCL 750.349b does not define the word “force,” however, in another context, this Court has defined the term to mean “strength or power exerted upon an object.” *People v Premo*, 213 Mich App 406, 409; 540 NW2d 715 (1995) (internal quotations and citation omitted). Thus, for purposes of unlawful imprisonment, sufficient “force” can constitute any use of strength or power exerted upon a person in order to restrict that person’s movements or to confine that person in a manner that interferes with the person’s liberty.

In this case, there was sufficient evidence to allow a rational jury to conclude beyond a reasonable doubt that defendant either forcibly restricted Kate’s movements or forcibly confined Kate in a manner that interfered with her liberty. Here, defendant exerted his strength upon Kate. Defendant drove away with Kate and was gone for over two hours. At the time he left, Kate was clothed and sitting in her car seat. When he returned, Kate’s car seat was empty, her clothes were in his pocket, there was a soiled diaper in defendant’s car, and the child was missing. Defendant did not disclose where he left Kate. The evidence presented could lead a rational juror to conclude beyond a reasonable doubt that Defendant exerted strength upon Kate when he removed her from her car seat, undressed her, and placed her in an undisclosed location. Additionally, the evidence presented could lead a rational juror to conclude beyond a reasonable doubt that defendant restricted Kate’s movements and he forcibly confined her in a manner that interfered with her liberty. Specifically, Kate was confined to an undisclosed location. At four months of age, although Kate could not move on her own, she could facilitate her own movement by communicating with others. The evidence introduced at trial revealed that defendant ensured that Kate was unable to facilitate her own movement by separating Kate from her mother and by leaving her in a location where she could not communicate with anyone. In doing so, defendant restricted Kate’s movements and confined her to an undisclosed location in a manner that interfered with her liberty.

¹ The trial court provided this definition to the jury.

In addition, there was sufficient evidence to allow a rational juror to conclude beyond a reasonable doubt that defendant acted without consent or without lawful authority. Here, Kate did not have capacity to consent, and Courtland did not consent to defendant taking and restraining Kate. Courtland testified that she initially asked defendant to take Kate with him while he ran errands. Defendant refused, and Courtland made arrangements to take Kate herself. Once defendant failed to accept Courtland's limited permission to take Kate to run errands, he no longer had authority to leave the parking lot with her. Evidence that Courtland immediately began making numerous phone calls including a 911 call after defendant drove away with Kate showed that defendant did not have permission to take Kate. Furthermore, even assuming that Courtland gave defendant permission to take Kate, her permission was limited to running errands. Courtland did not give defendant permission to take Kate to an undisclosed location and secretly confine her there.

Moreover, on June 29, 2011, defendant was not the legal father of Kate because she was born out of wedlock and defendant did not take the necessary steps to acknowledge paternity. Under Michigan law, "If a child is born out of wedlock, a man is considered to be the natural father of that child if the man joins with the mother of the child and acknowledges that child as his child by completing a form that is an acknowledgment of parentage." MCL 722.1003(1) (emphasis added). Here, as of June 29, 2011, there was no evidence that defendant completed a form acknowledging parentage and there was no evidence of any other legal document establishing his legal rights as a parent. Therefore, defendant had no legal right to take Kate into his custody against the will of her mother. See e.g. *In re ALZ*, 247 Mich App 264, 274; 636 NW2d 284 (2001) (a nonparent does not have legal rights to communication or visitation with a child); *People v Wambar*, 300 Mich App 121, 124-126; 831 NW2d 891 (2013) (an individual whose parental rights to his biological child have been terminated can be convicted under the parental-kidnapping statute, MCL 750.350a). Accordingly, there was sufficient evidence to allow a jury to conclude beyond a reasonable doubt that defendant acted without lawful authority when he took Kate and secretly confined her.

In sum, there was sufficient evidence to prove the "restrain" element of unlawful imprisonment where a jury could have concluded beyond a reasonable doubt that defendant either forcibly restricted Kate's movements without consent or without lawful authority or forcibly confined Kate so as to interfere with her liberty without consent or without lawful authority. MCL 750.349b.

Next, defendant contends that the trial court erred and violated his due process rights when it instructed the jury that "secret confinement" could be from the state of Michigan "and/or" Courtland.

We review claims of instructional error de novo and examine the instructions as a whole to determine whether "the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues being tried." *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006) (quotation and citation omitted). Whether an instructional error violated a defendant's due process rights involves a question of constitutional law that we review de novo. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010).

The trial court instructed the jury that the prosecution was required to prove beyond a reasonable doubt that defendant restrained another person, and that “the restrained person was secretly confined, which means to keep the confinement of the restrained person a secret or location of the restrained person a secret.” During deliberations, the jury sent a note to the trial court that read as follows: “Is secret confinement from the People of the State of Michigan or from Ariel Courtland or anyone else?” Over the objection of defense counsel, the trial court responded by instructing the jury: “It would be from the State of Michigan and/or [Courtland].”

MCL 750.349b(3)(b) defines “secret confinement” to mean either keeping the confinement of a restrained person a secret or keeping the location of the restrained person a secret. However, the statute does not indicate “from whom” the confinement or location must be kept secret. As noted above, unlawful imprisonment previously was incorporated into the former kidnapping statute, *Jaffray*, 445 Mich at 296-297, and there is case law defining the meaning of the term “secret confinement” in the context of that statute. Specifically, our Supreme Court defined the term as follows:

[T]he essence of “secret confinement” . . . 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. [*Id.* at 309-310 (emphasis added).]

Therefore, “secret confinement” does not require proof that the confinement or location of the confinement was kept secret from a specific individual. Instead, evidence of secret confinement is sufficient where a review of the totality of the circumstances shows that “the confinement itself or the location of confinement was secret, thereby depriving the victim of the assistance of others.” *Id.* Here, the trial court essentially instructed the jury that the secret confinement could be from anyone, i.e. the state of Michigan, “and/or” Courtland. Because the statute does not require proof that the confinement or location was kept secret from a specific individual, the trial court did not err in instructing the jury and defendant was not denied due process. *Martin*, 271 Mich App at 337-338.

Next, defendant contends that the trial court erred when it departed from the recommended minimum sentencing range under the sentencing guidelines and sentenced him to 10 to 15 years’ imprisonment. Defendant’s recommended minimum sentencing range was 19-38 months and the trial court departed from the guidelines and sentenced defendant to 10 to 15 years’ imprisonment.

A trial court may depart from the sentencing guidelines if it articulates one or more substantial and compelling reasons to justify the departure. MCL 769.34(3); *People v Lucey*, 287 Mich App 267, 270; 787 NW2d 133 (2010). A “substantial and compelling reason” is “an objective and verifiable reason that keenly or irresistibly grabs [the court’s] attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases.” *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003) (internal quotations and citation omitted). However, a trial court “shall not base a departure on an offense characteristic or

offender characteristic already taken into account in determining the appropriate sentence range unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b). In addition, “the statutory guidelines require more than an articulation of reasons for a departure; they require justification for the *particular* departure made.” *People v Smith*, 482 Mich 292, 303; 754 NW2d 284 (2008) (emphasis in original).

On appeal, courts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes. [*Id.* at 300 (footnotes omitted).]

In departing from the guidelines, the trial court discussed reasons for the departure and concluded that scoring of Offense Variables (OVs) 8 and 10² did not account for the unique facts and circumstances involved in this case. With respect to OV 8, the court reasoned that the variable did not take into account circumstances where a victim was taken to a location and held there for an indefinite amount of time. The court also reasoned that this case involved a four-month old infant, a circumstance that was not properly accounted for in OV 10. The court stated as follows:

[O]ur situation . . . is substantially a unique situation that the [unlawful imprisonment] Statute itself maybe is somewhat the closest thing we have to deal with this kind of a charge. But it doesn’t mean that the guidelines themselves are tailored so that they apply to the Statute as the guidelines are drafted.

[I]t does strongly catch the Court’s attention that we have something here that’s a departure from what the guidelines are trying to measure.

* * *

[W]hat we have here is still a worst case scenario in the sense that we don’t know where Katherine is.

And so with this amount of time, and with her being as young as she was, and the inability to survive on her own, in that sense it’s a worst case scenario because there’s no other evidence that has been developed other than that something happened while she was with [defendant].

Having reviewed the record, we conclude that the trial court articulated substantial and compelling reasons to justify departure from the guidelines. Specifically, as the trial court noted,

² Defendant was assessed 15 points for OV 8, asportation of a victim to a place of greater danger, 10 points for OV 10, exploitation of a vulnerable victim, and 10 points for OV 19, interference with the administration of justice, for a total OV score of 35 and an OV Level IV.

OV 8 takes into account situations where a victim was held captive longer than necessary to complete the offense, MCL 777.38(1)(a), but it does not necessarily account for situations where a victim is held indefinitely. Here, defendant held the infant victim captive far longer than necessary to commit the offense of unlawful imprisonment as that crime can occur in situations where the victim is held even for a moment. See MCL 750.349b(3)(b). Thus, it was reasonable for the court to conclude that OV 8 did not afford adequate weight to the unique circumstances in this case and the court did not abuse its discretion in departing from the guidelines on this basis.

The trial court also discussed how OV 10 did not adequately account for the facts and circumstances of the case. While OV 10 takes into consideration the victim's "youth," as the trial court noted, this case involved a unique circumstance where a four-month old infant was left alone in an undisclosed location. The infant was wholly dependent on others and unable to survive on her own. Defendant not only exploited the victim's youth, but also exploited her incapacity as an infant when he separated her from her mother, left her in a location where she would not be found, and ensured that she could not communicate her predicament to others. The trial court found this to be an exceptional circumstance and it did not abuse its discretion in concluding that it constituted a substantial and compelling reason to depart from the guidelines.

In sum, the trial court properly articulated substantial and compelling reasons to support an upward departure from the sentencing guidelines. In addition, the trial court did not abuse its discretion with respect to the extent of the departure. *Smith*, 482 Mich at 303. The court articulated reasons to support the departure. Specifically, after discussing the unique circumstances of the case, the court explained that it was limited to two-thirds the statutory maximum sentence of 15 years and it determined that defendant should serve two-thirds of the maximum. The trial court properly articulated reasons to support the sentence it imposed after it provided a thoughtful review of the unique facts and circumstances of the case. Accordingly, we conclude that the trial court did not abuse its discretion in sentencing defendant to 10 to 15 years' imprisonment. *Id.*

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello