IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah, Plaintiff and Appellee, v. Todd Wayne Mulder, Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20070511-CA F I L E D (November 5, 2009) 2009 UT App 318

Fifth District, St. George Department, 051501050
The Honorable G. Rand Beacham

Attorneys: Margaret P. Lindsay, Spanish Fork, for Appellant
Mark L. Shurtleff and Marian Decker, Salt Lake City, for Appellee

---

Before Judges Greenwood, Davis, and McHugh.

GREENWOOD, Presiding Judge:

Following a jury conviction as an accomplice to murder, aggravated robbery, and aggravated kidnaping, Defendant raises two claims of ineffective assistance of counsel: (1) that counsel failed to argue that the aggravated kidnaping charge merged into the crime of aggravated robbery and (2) that counsel failed to move to dismiss the aggravated kidnaping charge on grounds of insufficient evidence.

To prevail on a claim of ineffective assistance of counsel, defendant must show both "that counsel's performance was deficient, in that it fell below an objective standard of reasonable professional judgment" and "that counsel's deficient performance was prejudicial--i.e., that it affected the outcome of the case." State v. Litherland, 2000 UT 76, ¶ 19, 12 P.3d 92 (citing Strickland v. Washington, 466 U.S. 668, 687-88 (1984)). We affirm.

I. Aggravated Kidnaping Charge

Defendant first argues that defense counsel failed to argue that the aggravated kidnaping charge should have merged into the aggravated robbery charge. Defendant asserts that "the

confinement or detainer alleged here is 'of the kind inherent in the nature of' aggravated robbery."[1]

This court previously addressed merger of aggravated kidnaping and aggravated robbery in State v. Mecham, 2000 UT App 247, 9 P.3d 777. There, the defendant was charged with aggravated kidnaping, aggravated robbery, and aggravated assault after robbing a movie theater, taping the employees' hands behind their backs, and locking them in the manager's office. See id. ¶¶ 6-7, 17. No one was hurt. See id. ¶ 7. We instructed that "to convict a robber of aggravated kidnaping as well as aggravated robbery . . . the prosecutor must first show that the detention was beyond the minimum inherent in [aggravated robbery]. Moreover, the detention element must be significantly independent of the detention inherent in the host crime." Id. ¶ 30 (alteration in original) (citations and internal quotation marks omitted). We recognized that "almost every aggravated robbery as a factual matter contains the elements needed to prove aggravated kidnaping," id. ¶ 31, but "the question is whether there exists a sufficiently independent basis for the separate charge of aggravated kidnaping," id. We then relied on a three-part test described by the Utah Supreme Court in State v. Finlayson, 2000 UT 10, 994 P.2d 1243, that is useful "for determining . . . whether a detention . . . of a victim is sufficiently independent to justify a separate conviction for aggravated kidnaping." Mecham, 2000 UT App 247, ¶ 32 (citing Finlayson, 2000 UT 10, ¶ 23). That three-part test states:

> [I]f a . . . confinement is alleged to have been done to facilitate the commission of another crime, to be kidnaping the resulting . . . confinement:
>
> (a) Must not be slight, inconsequential and merely incidental to the other crime;
>
> (b) Must not be of the kind inherent in the nature of the other crime; and

---

[1]The aggravated kidnaping statute states: "An actor commits aggravated kidnapping if the actor, in the course of committing unlawful detention or kidnapping: (a) possesses, uses, or threatens to use a dangerous weapon . . . ; or (b) acts with intent: . . . (ii) to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony." Utah Code Ann. § 76-5-302 (2008).

The aggravated robbery statute states: "A person commits aggravated robbery if in the course of committing robbery, he: (a) uses or threatens to use a dangerous weapon . . . [or] (b) causes serious bodily injury upon another." Id. § 76-6-302.

> (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

Id. (alteration in original) (quoting Finlayson, 2000 UT 10, ¶ 23).

We applied this three-part test in Mecham and upheld the separate conviction of aggravated kidnaping:

> [T]he evidence shows that the detention was not slight or inconsequential. All seven employees were bound, and the trial court noted that it was unclear how long they would remain so before they were discovered or able to free themselves. This was not a typical robbery where the victims' detention consists of them simply standing still for a few brief moments, with their hands up. Second, binding victims and confining them to a room is not inherent in an aggravated robbery. It is an additional act, completely independent of the act of taking property by force or threat of force. Lastly, the detention did make the crime substantially easier to commit, and was done expressly for the purpose of avoiding premature detection. Under these facts, we conclude that the trial court was correct in recognizing that herding the victims at gunpoint to the manager's office and binding their hands behind their backs had sufficient independence to support a charge of aggravated kidnaping.

Id. ¶ 33.

Applying the same three-part test to this case, we likewise conclude that the detention was not slight or inconsequential. First, the victim was shot and abandoned; Defendant and his cohort did not know how badly the victim was injured. Second, shooting and handcuffing a victim is not an inherent part of an aggravated robbery. Third, the victim was clearly detained and abandoned to facilitate escape and avoid detection. Thus, defense counsel did not render ineffective assistance because counsel's failure to argue merger was not error and therefore would not have changed the outcome of the case.

II. Dismissal

Next, Defendant argues that the evidence was insufficient to support the aggravated kidnaping charge against him as an

accomplice and thus, trial counsel was ineffective in failing to move for its dismissal. In considering the underlying sufficiency argument,

> we review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We will reverse a jury conviction for insufficient evidence only when the evidence is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.

State v. Shumway, 2002 UT 124, ¶ 15, 63 P.3d 94. The supreme court elaborated:

> "The fabric of evidence against the defendant must cover the gap between the presumption of innocence and the proof of guilt. In fulfillment of its duty to review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict, the reviewing court will stretch the evidentiary fabric as far as it will go. But this does not mean that the court can take a speculative leap across a remaining gap in order to sustain a verdict."

Id. (quoting State v. Petree, 659 P.2d 443, 444-45 (Utah 1983)).

To establish accomplice liability for the kidnaping, the State must show that Defendant "solicit[ed], request[ed], command[ed], encourage[d,] or intentionally aid[ed]" Campbell, Defendant's co-bandit, in the kidnaping. See Utah Code Ann. § 76-2-202 (2008). Kidnaping requires that "the actor . . . against the will of the victim . . . detains or restrains the victim for any substantial period of time; [or] detains or restrains the victim in circumstances exposing the victim to risk of bodily injury." Id. § 76-5-301. Aggravated kidnaping, as noted above, adds the use of a dangerous weapon. Id. § 76-5-302.

Defendant argues that the evidence only supports the conclusion that Defendant aided Campbell in planning the robbery, but does not show that he aided or encouraged Campbell in planning or committing an aggravated kidnaping. Defendant explains that "[o]ne, [he] was not present when Campbell shot and handcuffed [the victim], and left him lying on the floor still handcuffed. Two, [Defendant] did not act as a lookout while Campbell committed the crimes. . . . He was well away from the

scene." Campbell testified that it was his plan alone to use the stun gun, handcuff the victim, and then to zap him again. Campbell did not testify that Defendant gave him the handcuffs, though he did indicate that Defendant gave him the revolver. Defendant argues that improper speculation is necessary to determine that Defendant had anything to do with the kidnaping.

However, the evidence indicates that Defendant tutored Campbell in the crime, including providing him with a revolver and explaining that merely zapping the victim with a stun gun was likely to be insufficient. Furthermore, the evidence shows that Defendant likely knew that Campbell had the handcuffs, Defendant drove Campbell to Walmart where Campbell stole duct tape, and Defendant told Campbell he needed "to be a lion. If you show any weakness at all this man is going to take your gun from you. . . . You've got to go in and be forceful, take control of the situation immediately." Finally, Defendant declined Campbell's suggestion to call the police after the victim had been shot, saying "we don't need to call 911. The place is open for business. Someone is going to show up . . . . We're getting on the freeway." Based on this evidence and reasonable inferences drawn therefrom, the jury had sufficient evidence to find that Defendant acted as an accomplice and was thus criminally liable for the kidnaping. Accordingly, we conclude that defense counsel was not ineffective in not challenging the sufficiency of the evidence as it relates to the kidnaping charge because Defendant has not shown that the outcome would have been different.

Affirmed.

_____
Pamela T. Greenwood,
Presiding Judge

WE CONCUR:

_____
James Z. Davis, Judge

_____
Carolyn B. McHugh, Judge