STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS PAUL HULL,

Defendant-Appellant.

UNPUBLISHED
September 17, 1996

No. 176392
LC No. 93-449-FC

Before: McDonald, P.J., and Markman and C. W. Johnson, * JJ.

PER CURIAM.

Defendant appeals by right his 1994 jury trial convictions for child kidnapping, MCL 750.350; MSA 28.582, four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) and assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. We affirm.

Defendant abducted complainant, a ten-year-old girl, in the early evening of October 16, 1993. He drove her to a wooded area, forced her to remove her clothes and perform various sexual acts, repeatedly raped and assaulted her and released her the following morning. Complainant was immediately taken to a physician and later gave the police a detailed account of the incident and descriptions of defendant, his vehicle and various items in the vehicle.

On appeal, defendant first claims that the trial court abused its discretion in failing to grant his motion for suppression of statements made to the police. He contends that the trial court erroneously concluded that these statements were made in a noncustodial setting in which *Miranda*[1] warnings were not required. This Court reviews trial court rulings on suppression motions under the clearly erroneous standard. *People v Bordeau*, 206 Mich App 89, 92; 570 NW2d 374 (1994). However, "[a]pplication of constitutional standards by the trial court is not entitled to the same deference as factual findings." *Id*.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Miranda warnings are required to be given, prior to questioning, when an accused is "in custody or otherwise deprived of his freedom of action in any significant way." *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987). Whether an accused is "in custody" depends on the totality of the circumstances; the key issue is whether he could reasonably believe that he was not free to leave. *People v Mayes (After Remand)*, 202 Mich App 181, 190; 508 NW2d 161 (1993). Here, the police initially spoke with defendant at his home. In response to a telephone request, defendant voluntarily went to the police station. The officer testified that he thanked defendant for coming in voluntarily and specifically informed him that he was not under arrest or in police custody. Defendant admitted that the officer may have told him this and informed him that the door to the room was closed for privacy purposes only. He also admitted that he never expressed a desire to leave the station nor refused questioning (until he requested an attorney, at which point the questioning ceased.) On the basis of this evidence, the trial court did not clearly err in finding that defendant was not in custody at this time.

Defendant next contends that the trial court erroneously denied his motion to suppress articles removed from his vehicle. The trial court denied defendant's motion to suppress this evidence on the basis of his consent to the search and the automobile exception to the warrant requirement of the Fourth Amendment.

In *People v Toohey*, 438 Mich 265, 270; 475 NW2d 16, (1991), the Michigan Supreme Court held that the Fourth Amendment and Const 1963, art 1, § 11 require that searches and seizures be conducted reasonably and that "in most cases that requires issuance of a warrant supported by probable cause." When a suspect voluntarily consents to a search, neither a warrant nor probable cause are required. *People v Catania*, 427 Mich 447, 453-454; 398 NW2d 343 (1986). The automobile exception allows searches of automobiles when there is probable cause to believe that evidence of a crime will be found in a lawfully stopped vehicle. *People v Carter*, 194 Mich App 58, 61; 486 NW2d 93 (1992). Where probable cause exists, it justifies the search of every part of the vehicle and any contents thereof that might conceal the objects sought. *Id*.

Here, defendant consented to the search of his car both orally and in writing. He acted in accordance with that consent by opening the trunk and starting the ignition when instructed by an officer. On the basis of this evidence, the trial court did not clearly err in finding that defendant initially consented to the search. Defendant only expressed any objection to the search when an officer seized a brown paper bag from it. Even if we assume that defendant withdrew his consent at this point, sufficient probable cause existed for police to continue their search under the automobile exception. Immediately observable characteristics of the vehicle and articles contained therein matched those described by complainant. Further, defendant admitted that there had been an orange sweatshirt in the vehicle and that he had cleaned the car out and removed it.[2] Complainant had described the orange sweatshirt as being used to wipe her vomit after one of the instances of criminal sexual conduct.

Defendant next claims that the trial court erroneously admitted complainant's testimony identifying defendant as the perpetrator. He contends that the photographic lineup was impermissibly suggestive and that his counsel was not present during its construction or presentment. He claims that complainant had seen defendant on television before she identified him in the corporeal lineup. He also

argues that there was no independent basis for her in-court identification of defendant. The trial court denied his motion to suppress the identification testimony because there was no evidence that the photo spread was impermissibly suggestive and because there was an independent basis for complainant's identification of defendant at the corporeal lineup – her ample opportunity to observe the perpetrator during the incident and her accurate description of defendant and his vehicle. This Court reviews trial court rulings regarding admission of evidence for an abuse of discretion. *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996).[3]

Here, defendant fails to specify how the photographic lineup was suggestive. An independent attorney evaluated the photo spread before it was shown to complainant. Counsel are not generally necessary at precustodial investigatory photographic lineups. *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994).

Complainant was exposed to television coverage of defendant's arraignment before the corporeal lineup. Where there is evidence of a tainted identification, appropriate factors for determining if an identification is supported by an independent basis include: the witness' opportunity to observe the offense, the length of time between the incident and the identification, discrepancies between the pre-taint description and the defendant's actual appearance, and previous proper identification of the defendant. *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977). Here, the twelve to fourteen hour incident provided complainant with an extended opportunity to observe the perpetrator. The corporeal lineup occurred within two months of the incident. Complainant's description of defendant was consistent with his appearance and resulted in a composite sketch from which members of the community recognized defendant. Complainant identified defendant as the perpetrator in the photographic lineup. On the basis of this evidence, the trial court did not clearly err in finding that complainant's identification of defendant was supported by an independent basis, despite the possible taint of television coverage of defendant's arraignment. Accordingly, the trial court did not abuse its discretion in admitting the identification evidence.

Defendant next claims that there was insufficient evidence to prove the asportation element of the kidnapping count. To review claims of insufficiency of the evidence to sustain a verdict, this Court views the evidence in the light most favorable to the prosecution to determine if a rational factfinder could find the essential elements of the crime proven beyond a reasonable doubt. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1992).

To meet the asportation requirement of kidnapping, movement must be more than merely incidental to a coequal or lesser underlying offense. *People v Wesley*, 421 Mich 375, 386-388; 365 NW2d 692 (1984). Charges of kidnapping and first-degree criminal sexual conduct are coequal offenses for which there is an independent asportation requirement. *People v Barker*, 411 Mich 291; 307 NW2d 61 (1981). Defendant contends that the movement of complainant was merely a necessary means for accomplishing the criminal sexual conduct offenses. The evidence established that defendant drove complainant to a wooded area and detained her there throughout the night. He confined her there for twelve to fourteen hours, including a significant period of time after completion of the criminal sexual conduct offenses and did not release her until approximately 10:00 a.m. the next day. Defendant thus

detained complainant for a longer period of time than was reasonably necessary to commit the sexual offenses. Movement and detention of a victim for a time period beyond that reasonably necessary to commit an underlying offense, whether prior or subsequent to commission of such offense, indicate that the asportation was not simply a necessary means by which to commit the underlying offense. On the basis of this evidence, a rational factfinder could find beyond a reasonable doubt that the movement and detention of complainant were incident to commission of an independent kidnapping offense and not merely incidental to the criminal sexual conduct offenses.

Finally, defendant claims that there was insufficient evidence to support the anal penetration criminal sexual conduct conviction. "Sexual penetration" includes "intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." MCL 750.520a(l); MSA28.788(1)(l). Here, complainant testified that defendant penetrated her rectum with both his penis and his finger. A laboratory specialist testified that sperm was detected in complainant's rectal smear. On the basis of this evidence, a rational factfinder could find anal penetration beyond a reasonable doubt.

For these reasons, we affirm defendant's judgment of sentence.

Affirmed.

/s/ Gary R. McDonald
/s/ Stephen J. Markman
/s/ Charles W. Johnson

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] In the context of evidence that defendant cleaned the car and removed evidence from it, the exigent circumstances exception may also apply. See *In Re Forfeiture of $176,598*, 443 Mich 261, 271; 505 NW2d 201 (1993).

[3] The *McElhany* Court also stated at 286, "A trial court's decision to admit identification evidence will not be reversed on appeal unless it was clearly erroneous." The authority on which this statement is based ultimately traces its history to *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983), which clearly involved a factual finding. Accordingly, it is only the factual findings involved in a ruling whether to admit identification, e.g., whether there was an independent basis for the identification, that we review under the clearly erroneous standard.