

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LINWOOD CHARLES GOLDSTONE,

Defendant-Appellant.

UNPUBLISHED

December 5, 1997

No. 193442

Recorder's Court

LC No. 93-004832

Before: Hoekstra, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of kidnapping, MCL 750.349; MSA 28.581, and was sentenced to five to ten years' imprisonment. Defendant now appeals as of right, and we affirm.

Defendant first argues on appeal that the trial court gave an erroneous instruction to the jury regarding the specific intent required to support a conviction for kidnapping. Specifically, defendant argues that the instructions were erroneous because they did not instruct the jury that defendant had to possess a specific intent to both forcibly confine the complainant and also to move her for the purpose of kidnapping her, not for the purpose of some other coequal or lesser crime. We disagree. This Court reviews jury instructions as a whole to determine if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995).

Here, when read as a whole, the instructions given in this case properly presented all of the essential elements of the crime and sufficiently protected defendant's rights. Contrary to defendant's claims, the instructions given did instruct the jury that defendant had to intend to confine the complainant. Forcible-confinement kidnapping also requires proof of asportation. *People v Jaffray*, 445 Mich 287, 298; 519 NW2d 108 (1994). When kidnapping is charged along with an underlying offense, the jury must be instructed that the movement necessary to satisfy the asportation element must not be merely incidental to the coequal or lesser underlying offense. Apparently, this is the additional instruction defendant is seeking. However, where there is no evidence of an underlying lesser or coequal offense,

an instruction on movement merely incidental to some unspecified underlying offense could only lead to confusion and should not be given. *People v Rollins*, 207 Mich App 465, 466-467; 525 NW2d 484 (1994). In this case, defendant was not charged with any underlying offense, nor was there any evidence introduced of an underlying offense; therefore, an instruction on movement merely incidental to some unspecified underlying charge would have been improper. Further, we have reviewed and find without merit defendant's claim that the instructions failed to adequately inform the jury of the specific intent required to complete the crime of kidnapping. The jury instruction stated the specific intent for kidnapping, correctly presented the elements of the crime, and sufficiently protected defendant's rights.

Defendant next argues that the prosecutor deprived him of a fair trial by expressing her personal opinion concerning the credibility of defendant and complainant and improperly referring to facts not in the record in her closing argument. We disagree. Because defendant did not object to the remarks he now claims were improper, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect of the remarks or failure to review the issue will result in a miscarriage of justice. *People v Bass*, ___ Mich App ___; ___ NW2d ___ (Docket No. 178342, issued 07/25/97). Here, because the prosecutor's remarks were not improper, no miscarriage of justice will result from our failure to provide further review.

Defendant also argues that the prosecutor introduced evidence on rebuttal which properly belonged in her case in chief. We disagree. Because defendant failed to preserve this issue for appeal by objecting to the rebuttal testimony at trial, this Court will review only for manifest injustice. *People v King*, 210 Mich App 425, 433; 534 NW2d 534 (1995). Here, we find no manifest injustice because the rebuttal testimony at issue was properly admitted in response to defendant's testimony on direct examination. See *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996).

Defendant's final issue on appeal is that his trial attorney failed to provide him with effective assistance of counsel. We disagree. Because defendant failed to preserve this issue for our review by moving for a new trial or evidentiary hearing in the trial court, our review is limited to errors apparent in the record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). Here, defendant has failed to overcome the presumption that he received effective assistance of counsel at trial. Defendant's three claims of ineffective assistance of counsel are based on his counsel's failure to object to matters raised in his first three issues on appeal, which have been shown to be unsupported claims of error. Thus, defendant has failed to demonstrate that his counsel's assistance was deficient. *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Myron H. Wahls
/s/ Roman S. Gribbs